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COMPRISING ALL THE DECISIONS OF THE  
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WASHINGTON, COLORADO, MONTANA, ARIZONA  
NEVADA, IDAHO, WYOMING, UTAH  
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WITH KEY-NUMBER ANNOTATIONS

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SEPTEMBER 6 — OCTOBER 11, 1920

ST. PAUL  
WEST PUBLISHING CO.  
1920

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135

P27

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# THE PACIFIC REPORTER VOLUME 191

(183 Cal. 229)

## CITY OF SAN LEANDRO v. RAILROAD COMMISSION, and four other cases. (S. F. 9306-9309, 9314.)

(Supreme Court of California. June 22, 1920.  
Rehearing Denied July 22, 1920.)

1. Waters and water courses ⇨203(6)—Commission can fix charges of water company on municipalities, if property devoted to public.

The jurisdiction of the Railroad Commission to impose charges on municipalities for the service of a water company is dependent on whether, as regards the services for which the charges are sought to be imposed, the company has actually devoted its property to a public use.

2. Waters and water courses ⇨203(6)—Water service furnished municipalities a public use.

Water service dedicated by water company impartially to all municipalities requiring such service *held* a public use, so that the Railroad Commission had jurisdiction to fix charges on such municipalities.

3. Waters and water courses ⇨203(1)—Water company must be compensated by cities for cost of operation and maintenance.

A water company, supplying municipalities, must be compensated for the cost of operating and maintaining the portions of its system devoted to their requirements; the services in return for which charges are imposed being those involved in supplying water and maintaining the system.

4. Waters and water courses ⇨203(6)—Fixing of water company's charges to cities within power of Railroad Commission; "interference with municipal affair."

Fixing of charges for service on municipalities in favor of water company *held* within rate-fixing power of the Railroad Commission, and not an interference with municipal money or property by the imposition of a tax, in violation of Const. art. 11, § 18; fixing of rates for service not being interference with municipal affair, within sections 6, 8.

5. Waters and water courses ⇨203(12)—Failure to object in applications for rehearing by commission precludes review.

Under Public Utilities Act, § 66, municipalities which, in their applications to the Rail-

road Commission for rehearing of the matter of fixing rates to be charged them by a water company for its service, fail specifically to set forth the alleged failure of the commission to fix a rate base for its award, cannot urge the objection to the award in the Supreme Court on certiorari.

6. Waters and water courses ⇨203(6)—Requiring cities to pay for water service not in excess of jurisdiction of Railroad Commission or confiscatory.

Requirement of Railroad Commission that certain municipalities pay a water company for its service of fire protection, etc., a sum amounting to less than 10 per cent. of the total revenue allowed the water company, *held* not to have exceeded the jurisdiction of the commission, or to have amounted to confiscation of the property of the cities.

7. Waters and water courses ⇨203(12)—Supreme Court will not disturb discretionary findings of commission.

The Supreme Court will not disturb the discretionary finding of the Railroad Commission on the question whether a water storage project would be available to meet the needs of water consumers during the year for which rates to be allowed a water company were imposed on municipalities.

8. Waters and water courses ⇨203(12)—Inability of cities to meet charges in favor of water company cannot be considered by Supreme Court.

The inability of municipalities to meet certain rates for water service imposed on them in favor of the water company by the Railroad Commission, though a matter of expediency to be weighed by the commission, cannot be considered by the Supreme Court in a proceeding attacking the legality of the charges or rates.

In Bank.

Certiorari by the City of San Leandro, by the City of Richmond, by the City of Oakland, by the City of Berkeley, and by the city of Alameda, respectively, to review an order of the Railroad Commission of the state of California fixing rates. Decision of the commission affirmed.

H. L. Hagan, City Atty., and Leon E. Gray, Deputy City Atty., both of Oakland, Frank V. Cornish, City Atty., of San Francisco, Wm. J.

Locke, City Atty., of Alameda, D. J. Hall, City Atty., of Richmond, and Harris P. Jones, City Atty., of San Leandro (G. Clark, of San Francisco, of counsel), for petitioners.

Hugh Gordon, of Los Angeles (Douglas Brookman, of San Francisco, of counsel), for respondent Railroad Commission.

Creed, Jones & Dall, of San Francisco, and Fitzgerald, Abbott & Beardsley, of Oakland, for East Bay Water Co.

LENNON, J. Certiorari upon the petition of each of the above-named petitioners, seeking a review by this court of an order of the Railroad Commission of the state of California which fixed the rates to be charged by the East Bay Water Company for water supplied. In the order directing the issuance of a writ of review, the above-entitled proceedings were consolidated. The petition in each one of the separate proceedings attacks the same portion of the decision of the commission upon practically the same grounds. The rates fixed in said decision make no distinction between the residents of each community, and, while it is true that the basic charge allocated to each community varies, the underlying principle is the same in all cases. Therefore it is obvious that, if any one of the cities prevails, there must be a readjustment of the rates as to all the communities, or, in other words, an entire new allocation of rates.

On July 1, 1918, the Railroad Commission, by decision No. 5534, fixed the total revenues to which the water company was entitled at \$2,000,000. In allocating or apportioning this total sum among the various classes of consumers, the commission determined that approximately \$192,000 should be charged against the East Bay cities. Portions of this \$192,000 charge were imposed upon the respective petitioners as follows:

Oakland .....	\$106,500.00
Berkeley .....	43,000.00
Alameda .....	22,000.00
Richmond .....	11,000.00
San Leandro .....	3,500.00

The cities were, in addition, required to pay rates upon all pipe lines and hydrants installed subsequent to January 1, 1917, and a surcharge of 10 per cent. on the above amounts. Upon the cities making a showing to the commission that their tax budgets had already been made up, and that it would be impossible to provide money to meet this new charge, the commission, by a supplemental order on August 13, 1918, temporarily suspended the above rates as to the municipalities. On August 8, 1919, the East Bay Water Company filed an application, alleging the necessity of increased revenue and requesting the reimposition of the rates upon the municipalities. After a hearing, the commission by its decision No. 6755, determined that the water company was entitled

to a gross income of \$2,350,000, approved rates which it was estimated would yield that income, and reimposed upon the East Bay cities the charges fixed in its prior decision. Applications of the petitioners for a rehearing were denied by the commission in November, 1919.

[1] Petitioners urge the objection, in various forms, that the commission is without jurisdiction to impose these charges, for the reason, it is claimed, that as to the services in return for which the charges are imposed the water company is not a public utility. The jurisdiction of the commission to fix the charges is, of course, dependent upon whether, as regards the services for which the charges are sought to be imposed, the company has actually devoted its property to a public use. *Allen v. Railroad Commission*, 179 Cal. 68, 89, 175 Pac. 466. Upon this phase of the case, the decision of the commission declares that the basic charges in controversy are imposed upon the several municipalities mentioned—

"for water used by them for fire fighting, street sprinkling, and other purposes. \* \* \* Admittedly it is difficult to equitably distribute the expense of maintaining and operating a system such as this among the various consumers in proportion to the benefits derived by each. An exact allocation of the cost to the company of rendering a service such as is rendered to the cities is impossible. The amount of water used is not a proper measure, because the demand for fire purposes is wholly unexpected, and the company must stand ready to deliver a large quantity of water within a short period at any point where the fire may occur. This has been designated a 'readiness to serve' or 'stand-by' service. The utility is rendering a valuable service to the municipality and its taxpayers, which requires an investment and operating expense largely in excess of what would be required, if domestic and industrial consumers only were served."

It has been decided in this state that the law does not impose any duty upon a water company, as a public utility, to furnish a municipality, or its inhabitants, with water for a particular purpose. *Ukiah v. Ukiah Water & Improvement Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; *Niehau Bros. Co. v. Contra Costa, etc., Co.*, 159 Cal. 305, 113 Pac. 375, 36 L. R. A. (N. S.) 1045. The cases cited further hold that liability for loss resulting from fire is not an incident of the ordinary relation of water distributor and consumer, but such liability on the part of a water company can only be created by an express private contract whereby the water company agrees to furnish water as a protection against fire. Accordingly, throughout the hearing in the case now before the court, the water company steadfastly denied that it had assumed, or could as a public utility be compelled to

assume, any liability to furnish water to the municipalities or their inhabitants for the particular purpose of fire protection, claiming that it is a public utility to the extent, and only to the extent, that it furnishes water as a commodity, and irrespective of the purpose for which the water is used by the consumer. It is upon this stand taken by the water company that petitioners rest their argument that the commission is attempting to impose upon them charges for a service which they are not receiving, and which rests upon private contract, and cannot be regulated as a public utility service.

[2] The argument in this behalf, however, fails to distinguish between the furnishing of water for a particular purpose, such as for fire protection, and supplying it as a commodity merely, in the quantity and manner desired, but without reference or regard to the use to which it is put by the consumer. While the company is not furnishing water to the municipalities for any particular purpose, and is not liable for fire protection, it is furnishing water as a commodity, which is ready for use and may be received and used by the municipalities for certain purposes, the most important of which is that of fire protection. That the water company is thus rendering a material municipal service, and that such service cannot be dispensed with by the cities at present, is beyond question. It is equally indisputable that this service has been dedicated impartially to all consumers within the class that requires such services. Having been devoted to all municipalities within the field of the company's operations, and the use being one of importance to the public generally, the dedication is of such a character that every member of the class has a legal right to the use, and it falls, therefore, within the accepted definition of a public use. *Allen v. Railroad Commission*, supra.

The cases of *Lewis v. People's Water Co.*, 3 Cal. Railroad Com. Rep. 416, and *City of Alameda v. People's Water Co.*, P. U. R. 1916D, 865, hold that, in the absence of a public duty to furnish fire protection, a water company cannot be compelled to extend its mains solely for the purpose of rendering such protection adequate. Petitioners rely upon these cases as establishing the principle that the commission is without jurisdiction to control the services for which it has imposed the charges. It will be noted that these cases do not go to the extent of holding that the company cannot be compelled to extend its service, so as to furnish the municipalities with water in an adequate manner, provided that the municipalities compensate the company for such extension and that the water is supplied as a commodity and without liability for loss by fire in case it is used by the municipalities for fire protection. Section 549 of the Civil Code provides:

"All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge."

Aside from the fact that water need no longer be furnished "free of charge," this section remains in force. The phrase "to the extent of their means," as used in that section, may signify merely that the company is not an insurer as regards fire protection, or that the furnishing of water to municipalities is a function secondary in importance, and one which must not be permitted to interfere with the primary function of furnishing water to private individuals. On the other hand, it may mean that water companies cannot be compelled to increase their means in order to supply water to municipalities. That point has never been passed upon by the Railroad Commission, nor by this court, and seems not likely to arise in so far as petitioners are concerned, for the reason that the company has stipulated to such an extension and asserts its refusal in the past to have been due solely to the failure of petitioners to provide for compensation to the company for the additional expenditure. Moreover, it is unnecessary, for the purposes of this decision, to pass upon the question as to whether or not such extension of service can be compelled. While the power to compel an extension of plant is an ordinary element of the right to regulate a public utility, the mere fact that the Legislature deemed it expedient to dispense with this power does not take away the public utility character of the service nor prevent regulation of the service "within the present means."

[3] The fact that the commission stated that the charges are imposed for "services" is not, as is contended by petitioners, inconsistent with the principle that the company is furnishing water to the cities as a commodity, and not as a fire protection service. Admittedly the amount of water furnished the municipalities is not a fair standard of valuation. The water company must be compensated for the cost of operating and maintaining the portions of its system devoted to the requirements of the municipalities, and the "services" in return for which the charges are imposed are those involved in supplying the water and maintaining the system.

[4] The fixing of the charges is within the rate-fixing power of the commission, and is not an interference with municipal money or property or the imposition of a tax in violation of section 13 of article 11 of the Constitution of this state. The services are rendered to the municipalities, and should be paid for by them, and not by the ordinary consumers. Merely because the money to

pay the charges will probably be raised by taxation is no argument for holding the charges themselves to be taxes, and, since the payment of the charges is dependent upon the continuing acceptance by the cities of the services in question, they are essentially rates and not taxes. Nor is the fixing of rates for the services to the cities an interference with a "municipal affair" within the control of the municipalities, within the meaning of sections 6 and 8 of article 11 of the state Constitution. Furthermore, even if it were, the provisions of section 23 of article 12 of the Constitution, and of the Public Utilities Act (Laws Ex. Sess. 1911, p. 18), give the Railroad Commission power to regulate public utility services rendered to municipalities as well as those to individuals.

Section 23 of article 12 of the Constitution of this state, in vesting the commission with jurisdiction in the matter of the regulation of public utilities, saves to the cities the power to make local regulations governing public utilities, "other than the fixing of rates." Therefore, by virtue of this provision, a vote of the respective petitioners is unnecessary to confer upon the commission jurisdiction to regulate the rates in question.

The contention is made that, even if the service is a public utility service, subject to regulation by the commission, the commission did not regularly pursue its authority in fixing the amount of the charges. The method pursued was as follows: There were submitted, on behalf of the company and also on behalf of the cities, various rate bases which purported to comprise the value of the property upon which the company was entitled to a reasonable return. The smallest rate base was submitted by a representative of one of the petitioners, the city of Berkeley. At the same time the company submitted a statement of its financial needs. The commission expressly refrained from passing upon the value of the company's property or a proper interest return; it computed the revenue to which the company would be entitled, if allowed interest at 8 per cent. on the rate bases submitted, and found that, allowing interest at this per cent. the smallest rate base submitted, if corrected by the addition of certain items erroneously omitted, would yield a return at least equal to the amount claimed as necessary to meet the financial needs of the company. Accordingly a sum equal to the amount of the financial needs of the company, plus operating expenses, was fixed by the commission as the amount of revenue to be allowed the company. The commission then estimated from the evidence before it the proportion of this revenue to be borne by the cities. It is now claimed that the commission arbitrarily allowed a return based upon the financial needs of the company, whereas the amount to which the utility is entitled is a fair re-

turn on a reasonable rate base. In its decision of October 11, 1919, the commission states:

"It is very important to provide a sufficient revenue to put the company's credit upon a sound basis so that it may obtain money at reasonable rates, thus preventing a heavier burden being placed upon the consumers. The production of this revenue, however, to care for the financial needs of this company, should not place an unreasonable burden upon its consumers *nor should it be in excess of a reasonable return upon the value of the utility's property.*" (Italics are ours.)

[5] The commission then proceeded to compare the amount of the financial needs with an 8 per cent. return on the lowest rate base submitted, and found it did not exceed that return. Therefore, even though no rate base nor rate of interest was expressly found and adopted by the commission, nevertheless it follows, as a necessary implication from all that was said and done by the commission, that it found that this particular rate of interest and rate based represented at least a reasonable rate of return on the fair value of the company's property, in the sense that neither were, as against the consumer, excessive. Since the amount allowed the company was first compared with this return to ascertain that it did not exceed such return, the allowance was, in effect, nothing more than an allowance of a return on the investments of the company. In view of the fact that it is not claimed that the revenue allowed exceeds a reasonable return on a reasonable rate base, petitioners' objection to the method of procedure is purely academic. But, however that may be, petitioners failed to specifically set forth the alleged failure to fix a rate base in their applications to the commission for a rehearing, and are therefore precluded by the terms of section 66 of the Public Utilities Act from urging the objection in this court.

It is further contended that the commission was without jurisdiction to impose the charges upon the cities, unless it first ascertained the value of the portion of the system of the water company devoted to service to the cities, and also the cost of operating this portion of the system. As previously indicated herein, the commission states:

"Admittedly it is difficult to equitably distribute the expense of maintaining and operating a system such as this among the various consumers in proportion to the benefits derived by each. An exact allocation of the cost to the company of rendering a service such as is rendered to the cities is impossible."

[6] There is no rule which requires the commission to allocate charges for public service among the different classes of consumers by an exact mathematical calculation. In the vast majority of cases this is impossible, for there is no segregation of



plant. If the mere fact that a segregation of plant or cost of operation is impossible rendered invalid the charges here sought to be imposed, for like reason the commission would, be without jurisdiction to fix the rates for water supplied to private individuals. Of course, an allocation based upon estimate presents the possibility of an abuse of the rate-fixing power. For that reason the court will closely scrutinize rates so fixed, lest the exercise of the rate-fixing power merge into a system of confiscation. We take into consideration the facts that the cities are receiving substantially all of their water fire protection from the East Bay Water Company, with the possible exception of San Leandro; that, in conjunction with the domestic and industrial consumers, they are using the entire water supply, pumps, reservoirs, transmission lines, all the mains of 4 inches in diameter, and all the larger mains, aggregating approximately 440 miles in length, and are having the use of special service and higher pressure in the case of sudden demands caused by large fires. Having this in view, it cannot be said that a requirement that these cities pay a sum amounting to less than 10 per cent. of the total revenue allowed exceeds the jurisdiction of the commission or amounts to confiscation.

[7] Certain property of the East Bay Water Company, known as the San Pablo project, is now under construction. There was testimony at the hearing that this lake contained at the time of the hearing about 2,000,000,000 gallons, or 8 months' water storage; that this could be connected with the water company's mains supplying water to East Bay consumers within 30 days in case of an emergency; that the company was at the time drawing from San Leandro Lake 2,000,000 gallons a day in excess of the safe yielding capacity of that lake, and was able to do so because of the San Pablo storage available in case of an emergency. The value of the San Pablo project was excluded from the rate bases with which the statement of financial needs was compared.

It is contended by petitioners, however, that because certain expense items, including taxes and interest on bonds, connected with the San Pablo project, were included in the statement of financial needs approved by the commission, the San Pablo project was treated as property used and useful, upon which the company was allowed a return. Even assuming this view to be tenable, it was within the jurisdiction of the commission, in the exercise of its discretionary powers, to determine from the facts before it whether or not the San Pablo project would be available to the needs of the consumers during the year for which the rates were imposed. This court will not disturb the

finding of the commission upon that question. *Union Hollywood Water Co. v. Los Angeles*, 178 Cal. 206, 172 Pac. 983.

[8] Petitioners urge their inability to meet this additional financial obligation as an objection to the imposition of the charges. This was a matter of expediency to be weighed by the commission, but, of course, cannot be considered by this court in a proceeding attacking the legality of the charges. The decision is affirmed.

We concur: OLNEY, J.; SHAW, J.; WILBUR, J.; LAWLOR, J.

(183 Cal. 239)

BOEHM et al. v. SPRECKELS. (S. F. 7692.)

(Supreme Court of California. June 22, 1920.  
Rehearing Denied July 22, 1920.)

1. Pleading ¶8(3) — Allegation that newspaper route was property right held allegation of opinion.

An allegation that it was the custom and usage of newspapers in a certain city to treat and deal with routes and the business connected therewith as property was but an allegation of an opinion.

2. Sales ¶7—Agreement transferring route to newspaper carrier not sale of property.

An agreement whereby a newspaper transferred and delivered a newspaper route for a consideration held to create an agency and not to declare a sale of property.

3. Principal and agent ¶27—Agent can convey only opportunity to vendee to offer himself as substitute.

In a qualified sense an agent of an agency terminable at will may sell or transfer his right to the agency, but he cannot transfer to the purchaser anything more than the opportunity to offer himself to the principal as a substitute.

4. Principal and agent ¶34—Interest in money collected not "interest in subject of agency."

The interest which an agent authorized to collect a debt may have in the money collected, a part of which he is to take as compensation for his services, is an interest in that which is to be produced by the exercise of his power, and not an interest in "the subject of the agency," within the meaning of Civ. Code, § 2356, as to agency coupled with an interest.

5. Principal and agent ¶36—Sale of subject of agency terminates agency.

The sale of the subject of an agency terminable at will made in good faith by the principal operates as a termination of the agency and is equivalent to a revocation thereof.

6. Evidence ¶65—Every one presumed to know law.

Every one is presumed to know the law.

**7. Principal and agent @41—No damages for termination of indefinite agency.**

An agent cannot recover damages from the principal on account of the termination of an agency for an indefinite period for causes mentioned in Civ. Code, § 2355, except where the agency was procured for a valuable consideration passing from the agent to the principal and the revocation is prior to the expiration of a reasonable time after its creation.

**8. Principal and agent @33—Principal may revoke unless agent's power is coupled with interest.**

Except where an agent's power is coupled with an interest, the power to revoke always exists under Civ. Code, § 2355, but the right to revoke without liability for damages depends upon circumstances.

**9. Principal and agent @41 — Revocation of agency for consideration after 10 years not unreasonable as matter of law.**

In an action by a newspaper carrier who paid \$3,250 for the right to deliver papers in a certain district for an indefinite period, it cannot be said that 10 years was not a reasonable time for the continuance of the agency and that revocation at the end of that period would give the carrier the right to recover the original sum paid for the agency, in the absence of a showing of special hardship or of facts indicating that a longer period was contemplated or expected.

**10. Principal and agent @41 — Benefits to business arising from performance by agent inure to principal.**

The benefits to the business of the principal arising from the performance by the agent of his duties under the contract of agency inure entirely to the principal, and the agent is entitled to nothing except the agreed compensation, unless the contract of agency expressly provides for something more.

Angellotti, C. J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by M. Boehm and others against John D. Spreckels. Judgment for defendant, and plaintiffs appeal. Affirmed.

Wm. M. Abbott, Wm. M. Cannon, Fabius T. Finch, Paul F. Fratessa, and Geo. B. Keane, all of San Francisco, for appellants.  
Samuel M. Shortridge, of San Francisco, for respondent.

SHAW, J. In the court below a demurrer to the complaint was sustained, and judgment was thereupon given for the defendant. The plaintiffs appeal.

The plaintiffs are the assignees of all the rights of one James Shepherd to recover damages under a contract made between Shepherd and Spreckels on September 1, 1903. Spreckels was at that time the owner of the San

Francisco Call, a morning newspaper of general circulation in San Francisco, which had been published and circulated therein for more than 40 years prior to said date. For the more convenient transaction of the business the city of San Francisco had been divided into districts, in each of which the newspapers taken by patrons thereof were delivered to such patrons by carriers who received the papers from the publisher and delivered the same to such patrons. These districts were commonly known as "newspaper routes." The contract between Spreckels and Shepherd related to one of these routes. Spreckels was the party of the first part and Shepherd the party of the second part therein. Substituting their names for these phrases, the material parts of the agreement are as follows:

"That for and in consideration of the sum of \$3,250.00 gold coin of the United States in hand paid to said Spreckels, the receipt whereof is hereby acknowledged, and of the further conditions and covenants named in this agreement, said Spreckels has transferred and delivered and by these presents does transfer and deliver to said Shepherd, that certain route for the delivery of said newspaper the San Francisco Call lying and being in said city, county and state aforesaid, and more particularly described as follows, to wit:

"Route number 4 of the San Francisco Call, embracing the following territory: Commencing at the southeasterly corner of Sixteenth and Howard streets, thence southerly along the easterly line of Howard street to the corner of Twenty-Fourth street, thence easterly along the northerly line of Twenty-Fourth street to Potrero avenue, thence northerly along the westerly line of Potrero avenue to Channel street, thence westerly along the southerly line of Channel street to Harrison street, thence southerly along the easterly line of Harrison street to Sixteenth street, thence westerly along the southerly line of Sixteenth street to point of commencement.

"Spreckels agrees to deliver to Shepherd daily, a sufficient number of issues of said newspaper to supply said newspaper route, and said Shepherd agrees to receive the same and to pay said Spreckels therefor at the rate of 10<sup>11</sup>/<sub>12</sub> cents per paper per week, said payments to be made weekly and upon Saturday of each and every week during the existence of this agreement.

"It is expressly understood and agreed that said Shepherd shall manage, conduct and control said newspaper route above described in such manner and with such efficiency as shall be for the best interests of said the San Francisco Call newspaper, and shall maintain and preserve the extent and value of said newspaper route to the satisfaction of said Spreckels, and said Spreckels hereby reserves the right to make such changes in the rate to be paid for the newspapers delivered Shepherd under this contract, as changed conditions in said route and the service thereof or in the cost of production of said newspaper shall render rea-

sonable and just, and further reserves the right to give his written consent before any legal transfer of this contract shall be made.

"It is distinctly understood and made a part of this agreement that this bill of sale shall not be hypothecated or loans negotiated thereon where loans may be raised on said route without the full knowledge and sanction of said San Francisco Call, John D. Spreckels, proprietor."

Attached thereto as a part thereof was the following:

"It is hereby agreed and understood by and between Spreckels, proprietor, and James Shepherd, owner and holder of that certain newspaper route on the San Francisco Call known as route number 4, as described in the attached bill of sale, of which this agreement is made a part;

"That whereas the subscription price of said newspaper has been increased from 65 cents to 75 cents per month from and after July 1st, 1903.

"Now, therefore, in consideration of the premises, and of said increase of 10 cents per month in said subscription price, it is understood and agreed that of said increase of 10 cents per month in the subscription price said James Shepherd shall receive 2 cents per calendar month and the Call shall receive 8 cents per calendar month, in addition to the amount received by each of them respectively previous to said increase. That the said San Francisco Call may at any time increase its subscription price, or reduce the same back to 65 cents per month, to suit existing conditions as the judgment of said newspaper management shall deem reasonable, and said rate to James Shepherd will be increased or decreased in proportion to the increase indicated herein."

The complaint further alleges that at the time the contract was made, and ever since, it was, and has been, a custom and usage of publishers of newspapers in San Francisco, including the defendant, to treat and deal with newspaper routes, the lists of subscribers thereon, and the exclusive right to sell and deliver newspapers and procure new subscribers upon said routes and the good will of the business thus carried on over such routes, as property, and to make sales and transfers thereof accordingly; that the defendant, during all the period of his ownership of said newspaper, had known and acted upon said custom and usage, and that he and Shepherd executed the aforesaid contract with knowledge of said custom and in pursuance thereof; that Shepherd continued to perform his part of said contract, until September 1, 1913, and by his efforts had secured large numbers of new subscribers to the paper whereby the value of the business was materially increased and at that time was of the value of \$4,000; that it had returned to him a net annual profit of \$227.50, and he would have continued to have received that profit for the period of at least 14 years succeeding said date if the defendant had con-

tinued to perform his part of the said agreement; that on August 15, 1913, defendant, intending to take said newspaper route from said Shepherd and deprive him of the same and all benefits and advantages of the business conducted by him under said agreement and to transfer and sell said newspaper route with the business aforesaid to other parties, gave notice to each of the subscribers of said paper upon said route that they would be served with the San Francisco Chronicle instead of the Call until September 1, 1913, and that thereafter the San Francisco Chronicle would be delivered to them daily instead of the San Francisco Call; that on September 1, 1913, defendant refused, and ever since has refused, to deliver to Shepherd any copies of said San Francisco Call, although delivery thereof was demanded of defendant by said plaintiff, and defendant has repudiated said agreement; and that by reason thereof the business of the defendant in selling and distributing said newspaper upon said route has been destroyed, to the damage of the plaintiff in the sum of \$7,185. In said item of damages is contained the sum of \$3,185, alleged to be the value of the profits which the plaintiff would have received after September 1, 1913, if the defendant had continued to deliver the said newspapers as provided in the contract.

[1] The allegation that it was the custom and usage of the publishers in San Francisco to treat and deal with such routes and the business connected therewith as property adds nothing to the case of the plaintiff. It amounts to nothing more than a statement that it was the opinion of such publishers that rights concerning said newspaper routes constituted property. The question whether the rights relating thereto constitute property which is a subject of sale is a question of law that is to be determined by the principles of law and not by the opinions or customs of persons who deal with such matters.

The plaintiffs contend that the agreement aforesaid operated as a grant to Shepherd of that portion of the business of Spreckels which was transacted within the territory included in said route, consisting of the delivery of the paper to the subscribers along said route and making sales of the paper to others within the territory; that this grant included the good will of the business; and that it gave Shepherd the absolute right to continue the business and compel Spreckels to perform his part thereof during the life of Spreckels. They also contend that, if the agreement created an agency authorizing Shepherd to sell and deliver papers for Spreckels, it was an agency coupled with an interest in the subject-matter thereof and was therefore irrevocable by Spreckels except for cause. Also that, even if the agency was not coupled with an interest, it was created for a valuable consideration and therefore

was irrevocable at the will of Spreckels, and that inasmuch as it did not specify the time for its continuance it could not be revoked for a reasonable time, which reasonable time is a period equal to the life of the newspaper, or the life of Spreckels.

[2] The facts stated in the complaint must be considered in construing the contract. At and before the time it was made, Spreckels was the publisher and proprietor of the newspaper. It circulated generally throughout the city, and there were subscribers thereto and patrons thereof living or doing business along said route, to whom it was then being delivered. The contract shows that the subscription price was 75 cents per month and that Spreckels had the right to raise or lower this price at will and could also make reasonable changes in the rate to be paid by Shepherd. The contract is not entirely complete on the subject, but it is reasonably clear from its contents in connection with the facts alleged that, subject to this power to change the price, Shepherd was to pay to Spreckels for each paper received, the sum of  $10\frac{11}{12}$  cents per week, plus 8 cents per month, and that he was to collect from the subscribers 75 cents per month and keep the difference for his own compensation. Spreckels does not agree to sell the papers to Shepherd. The fact would appear to be that the papers were sold by Spreckels to the subscribers. That was the condition when the contract was made, and there is nothing in the contract to indicate that it was to effect a change in the relations between the publisher and the subscribers. The agreement of Spreckels is that he will "deliver" to Shepherd "a sufficient number of issues of said newspaper to supply said route." In view of the fact that Spreckels had already agreed to sell and deliver the papers to the subscribers, this language cannot reasonably be construed to import a sale of the same copies to Shepherd.

If Spreckels had sold an interest in his business as publisher of the newspaper, the two would have become partners. If a separable part of that business, assuming that a separation was possible, had been sold, they would have been partners in the ownership of that part. In either case the ownership of the respective interests would have continued after a dissolution of the partnership, each would have been entitled to his share of the profits, and would be liable to the other for a share of losses, and would be liable for the debts of the joint enterprise. The contract manifestly had no such effect. The statement that Spreckels does "transfer and deliver" to Shepherd "that certain route for the delivery of said newspaper" therein described cannot reasonably be understood to be a transfer to Shepherd of any interest in the business of publishing the newspaper. The more reasonable conclusion, in view of

all the facts, is that it is only a rather awkward expression of the idea that Shepherd was to have the right and duty, as agent of Spreckels, of delivering the papers, soliciting and taking new subscriptions thereto, and conducting the business incidental thereto within the territory described, including the collection of the price of the subscriptions owing to Spreckels. The statements that Shepherd was to receive the papers, distribute them within the territory, and "manage, conduct and control said newspaper route in such manner and with such efficiency as shall be for the best interests" of said newspaper, "and as shall maintain and preserve the extent and value of said newspaper route to the satisfaction of" Spreckels, are apt expressions to describe the duties and powers of an agent. They strongly imply that an agency only was contemplated. They are meaningless as applied to a sale of the business, or a part thereof, to the carrier. For these reasons we conclude that the contract created an agency and did not declare a sale of property. This is the effect of the decisions of other courts upon similar contracts. *Harlow v. Oregonian Pub. Co.*, 45 Or. 525, 78 Pac. 737; *Harlow v. Oregonian Pub. Co.*, 53 Or. 272, 100 Pac. 7; *Staroske v. Pulitzer Pub. Co.*, 235 Mo. 67, 138 S. W. 36; *Wilcox & Gibbs Co. v. Ewing*, 141 U. S. 636, 12 Sup. Ct. 94, 35 L. Ed. 882. So far as the opinion of the District Court of Appeal in *Otten v. Spreckels*, 24 Cal. App. 262, 141 Pac. 224, contains anything inconsistent with this conclusion, that case is disapproved.

[3] Appellants refer to cases which say that an agent may sell or transfer his right to the agency even where it is terminable at will. In a qualified sense he may do so, but he cannot transfer to the purchaser anything more than the opportunity to offer himself to the principal as a substitute for the transferor. He buys a mere chance that the principal may accept him in place of the other. No interest in the agency, or in the business which the former agent was authorized to transact for the principal, can be thus sold or transferred. These cases are not authority for the proposition that such an agent has a property interest in the business which he carries on and which is the subject of his agency. Expressions may be found in such decisions indicating that the agent may sell his agency, but they cannot be considered as declaring that he has any interest in the business which may be the subject thereof.

[4] Shepherd had an interest in collecting the subscription price, for upon that his compensation as agent was dependent. But the interest which an agent authorized to collect a debt may have in the money collected, a part of which he is to take as compensation for his services, is an interest in that which is to be produced by the exercise

of his power, and not an interest in "the subject of the agency," within the meaning of section 2356. *Hunt v. Rousmanier*, 21 U. S. 204, 5 L. Ed. 589; *Meyer v. Pulitzer Pub. Co.*, 156 Mo. App. 176, 136 S. W. 5; *Flanagan v. Brown*, 70 Cal. 260, 11 Pac. 706; *Hartley and Miner's Appeal*, 53 Pa. 212, 91 Am. Dec. 207. We therefore conclude that the action cannot be maintained on the theory that Shepherd had an interest in the subject of the agency and that, as the first count of the complaint is founded on this theory, it does not state a cause of action.

The second count of the complaint is founded upon the theory that the payment of a valuable consideration by Shepherd implies an agreement that the agency should continue for a reasonable time, and that the revocation by Spreckels occurred before such reasonable time had expired. This count prays only for the recovery of the \$3,250 paid for the route by Shepherd to Spreckels, with interest thereon from the time of revocation. It alleges that 7 per cent. upon said sum was received by Shepherd annually during the 10-year period; that it was only a reasonable return thereon; and that he had never received or had returned to him any part of the principal. It also repeats the other facts hereinbefore stated.

[5, 6] It is contended that the implied agreement for a reasonable time means that the agency should continue for a period which would "enable the carrier to get back his invested capital, together with a fair profit on his investment." The Civil Code provides that an agency is terminated by:

"(1) The expiration of its term; (2) the extinction of its subject; (3) the death of the agent; (4) his renunciation of the agency; or (5) the incapacity of the agent to act as such." Section 2355.

Also, that when not coupled with an interest in the subject of the agency it is terminated by:

"(1) Its revocation by the principal; (2) his death; or (3) his incapacity to contract."

It is also an established rule that a sale of the subject of the agency made in good faith by the principal operates as a termination of the agency and is equivalent to a revocation thereof. 1 *Mechem on Agency*, § 698. Every one is presumed to know the law, and it must therefore be presumed that the parties to the agreement contracted with knowledge of the possibility of a termination of the agency by either of the causes above specified.

[7-9] We know of no rule of law which allows the agent to recover damages from the principal on account of a termination of an agency for an indefinite period for any of the causes above mentioned, except where the agency was procured for a valuable consideration passing from the agent to the

principal and the revocation is prior to the expiration of a reasonable time after its creation. In *Frink v. Roe*, 70 Cal. 309, 11 Pac. 820, it is said that an agency created for a valuable consideration is irrevocable, but as this is directly contrary to the Civil Code, and as the expression was clearly obiter, the case cannot be considered as authority. There is a distinction between the "power" to revoke and the "right" to revoke an agency. Except where the agent's power is coupled with an interest, the power to revoke always exists, but the right to revoke without liability for damages depends upon circumstances. 1 *Mechem on Agency*, vol. 1 (2d Ed.) § 568. If the right does not exist, the principal will be liable for damages upon a revocation. In *Brown v. National Electric Co. Works*, 168 Cal. 337, 143 Pac. 606, the defendant, for a valuable consideration agreed to employ the plaintiff at a monthly salary for an indefinite time. The plaintiff was discharged without cause after three months' service. It was held that there was an implied contract arising from the valuable consideration, to continue the employment for a reasonable time, that the discharge in three months was a breach of the implied contract, and that by reason thereof the plaintiff was entitled to rescind the contract and recover what he had paid thereon. In the present case the paper had been published for more than 40 years before the contract was made in 1903. The payment of \$3,250 for an agency for an indefinite period raises the inference that both parties considered the privilege valuable and that both assumed that it would be continued for a considerable period of time. The plaintiff contends that under such circumstances the implied agreement is that the agency shall continue until the agent has received, as compensation, a sum sufficient to repay the consideration paid by him to the principal, together with a fair profit thereon during the necessary period, in addition to a reasonable compensation for his own time and labor in performing his duties. We cannot agree to this proposition. It would add to the agreement something not contained therein, and instead of being an agency for an indefinite time, terminable at will, it would become an agency, indefinite, it is true, but one which must necessarily continue for a long time after its creation, the length of the period depending upon the capacity and diligence of the agent and on many other future conditions which might arise affecting his success or failure, none of which could be foreseen. No subsequent condition which affected the ability of the plaintiff to recoup his outlay is alleged. The contention is that the obligation to allow him time to recoup arises solely from the payment of a consideration for the agency. The complaint does not disclose the amount which Shepherd received

and applied as compensation for his own time and labor. It must be presumed that the opportunity of obtaining such employment and compensation was one of the main inducements which caused him to enter into the arrangement. No standard can be fixed for the determination of the question what is a reasonable time. Under all the circumstances of the case, and in the absence of any showing of special hardship or of further facts indicating that a longer period was contemplated or expected, we think it cannot be said that 10 years was not a reasonable time for its continuance, and that the revocation at the end of that period would not give a right to Shepherd to recover the original sum paid for the agency.

[10] In support of the proposition that the agency was terminated before a reasonable time had expired, the plaintiff cites the *Brown Case* above mentioned and also *Pierce v. Tenn., etc., Co.*, 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591, *Davidson v. Laughlin*, 138 Cal. 320, 71 Pac. 345, 5 L. R. A. (N. S.) 579, *Brown v. Crown, etc., Co.*, 150 Cal. 385, 89 Pac. 86, *Harlow v. Oregonian Pub. Co.*, 53 Or. 272, 100 Pac. 7, and *Meyer v. Pulitzer Pub. Co.*, 156 Mo. App. 177, 136 S. W. 5. We have already stated the effect of *Brown v. Natl. Elec. Co. Works*, supra. In *Pierce v. Tenn., etc., Co.* the decision was put upon the ground that the contract was that the employment was to continue as long as the employé was able to do the kind of work specified. It has no bearing upon the question of a reasonable time. Neither *Davidson v. Laughlin* nor *Brown v. Crown, etc., Co.*, touch upon the question. In *Meyer v. Pulitzer Pub. Co.* the carrier had paid \$45.46 for his agency and had enjoyed it for more than 11 years. The court said that if it appeared that the agent, induced by his appointment, had in good faith incurred expense, devoted time, and bestowed labor in the matter of the agency without having had a sufficient opportunity to recoup the same from the agency, the principal would be required to compensate him to that extent, but that the law required no more than that—

"In every instance the agent shall be afforded a reasonable opportunity to avail himself of the preliminary expenditure and efforts put forth to the end of executing the authority conferred."

The conclusion was that the plaintiff in that case had had ample time for that purpose and he was denied a recovery. The main reliance of the plaintiff is upon the case of *Harlow v. Oregonian Pub. Co.* This case is somewhat remarkable, both in its facts and in the law declared thereon. The agency in that case was created in the year 1864 for the delivery of the *Daily Oregonian* in a certain part of the city of Portland. The consideration paid by the agent was \$350. It continued for 48 years and was then

terminated by a revocation. In the meantime the population of the city had greatly increased and the value of the privilege was declared to have increased to more than \$5,000. The decision did not go upon the theory that the valuable consideration implied an agreement that the agency should continue for a reasonable time, but upon the meaning of the contract creating the agency. The court construed it to provide that, no matter how long the agency might continue, a just and equitable allowance was to be made to the agent for the value of the privilege at the time of its revocation. A jury had allowed him \$5,000 for his loss caused by the revocation of the agency, and this allowance was upheld, although the contract was construed to create a mere agency not coupled with any interest in the subject thereof. In other words, the decision, aside from what we deem a strained construction of the contract itself, appears to go upon the idea that, where an agent is employed to assist in the business of the principal and receives from time to time the compensation agreed upon between them, he nevertheless becomes entitled to the value which his efforts add to the business of his principal, in case the agency is terminated by the principal without the fault of the agent. It appears to us that the correct rule is that the benefits to the business of the principal, arising from the performance by the agent of his duties under the contract of agency, inure entirely to the principal and that the agent is entitled to nothing except the agreed compensation, unless the contract expressly provides for something more. The contract there involved contained no such covenant, and we think none could be implied from its terms. Neither this nor any of the other cases cited sustain the contention of the plaintiff. The demurrer to the complaint was properly sustained.

The judgment is affirmed.

We concur: OLNEY, J.; WILBUR, J.; LAWLOR, J.

ANGELOTTI, C. J. (dissenting). In all respects except one I concur in the opinion. It is conceded that because of the payment of a valuable consideration there was an implied agreement that the agency should be allowed to continue for what under all the circumstances would be a "reasonable time," and with this view I am in accord. I have no doubt that, if the agency here was allowed to continue through the life of the newspaper, it should be held that it had been allowed to continue for such time as was contemplated, with the result that no recovery could be had by plaintiff. But the complaint does not show that such was the fact, and we are here dealing only with the question of the sufficiency of the complaint. Assuming that

the publication of the newspaper continued, it seems to me that the complaint sufficiently alleges matters showing that the agency was terminated prior to the expiration of the "reasonable time" for which it was given. I dissent from the judgment solely for this reason.

(183 Cal. 252)

**OTTEN v. SPRECKELS. (S. F. 8203.)**

(Supreme Court of California. June 22, 1920.  
Rehearing Denied July 22, 1920.)

**1. Appeal and error ⇨1097(6)—Decision of Court of Appeals law of case on subsequent appeal to Supreme Court.**

A decision of the District Court of Appeals was the law of the case on a subsequent appeal to the Supreme Court.

**2. Appeal and error ⇨1097(8)—Record on former appeal may be examined under doctrine of law of case.**

Where an appeal was had to the District Court of Appeals and a hearing was denied in the Supreme Court, on a subsequent appeal to the Supreme Court, the record used on the former appeal could be examined in order to determine whether the evidence on the former trial was substantially the same as on the second trial, to determine whether the doctrine of the law of the case applied.

**3. Appeal and error ⇨1097(3)—Doctrine of law of case inapplicable where facts are different.**

Where the facts on a second appeal are substantially different from those on a former appeal, the doctrine of the law of the case does not apply.

**4. Principal and agent ⇨33—Mutual stipulations not consideration preventing termination by principal.**

Stipulations of one transferred a route by a newspaper to faithfully perform the duties required of him by his contract was not such a valuable consideration as would take the contract out of the rule of Civ. Code, § 2356, that an agency may be terminated by the principal, or to bring it within the rule that, if an agency is given for a valuable consideration, the principal will be liable in damages if he revokes it before the agent has had a reasonable time to enjoy his agency so as to some extent to reimburse himself, since the law would make him subject to such obligation without any stipulation, under section 2228.

**5. Principal and agent ⇨41 — Benefits of agent's services go to principal and give agent no interest in business.**

The benefits of an agent's services go to the principal and not to the agent, and while a contract of agency which gives the agent a profitable employment is valuable to him, and if he is allowed by his principal to perform his agency in his stead, his agency may have a commercial value, and as between the agent and a substitute it may have all the attributes

of property, such agent has no interest or right which he can assert against his principal as a basis for damages for revocation, where the agency is revocable at will.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by C. H. Otten against John D. Spreckels. Judgment for plaintiff, and defendant appeals. Reversed.

Samuel M. Shortridge, of San Francisco, for appellant.

Mastick & Partridge, of San Francisco, for respondent.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiff.

[1] The cause has been tried twice. Upon the first trial a verdict was returned for the plaintiff and a new trial was thereupon ordered. From this order the plaintiff appealed. The appeal came before the District Court of the Third District for decision and the order was affirmed. 24 Cal. App. 251, 141 Pac. 224. The plaintiff applied to the Supreme Court for a rehearing and it was denied. The respondent contends that the decision of the District Court upon the appeal from the order granting a new trial constitutes the law of the case, binding upon the lower court and upon this court upon the question of the legal effect of the contract set forth in the complaint upon which the judgment is based. The denial of a rehearing by this court is of no significance as an approval of the law stated in the opinion of the District Court of Appeal, for the plaintiff in his petition did not complain of the points there decided in his favor. The plaintiff now invokes, as the law of the case, certain parts of the opinion which are favorable to him and which this court has had no occasion to consider. The decision, nevertheless, constitutes the law of the case to the same extent as if it had been made by this court. It is necessary, therefore, to determine whether or not, upon the second trial, the facts were the same as those upon which the conclusions of the district court as to the law were predicated, since otherwise the doctrine of the law of the case does not apply.

[2] The complaint alleges a contract in writing, which it sets out in full. It then alleges facts which it is claimed constituted a breach thereof and states the amount of the resulting damages. On the first trial this writing was not admitted in evidence. Evidence of oral negotiations leading up to the execution of the writing was given and the trial court treated this as evidence of an oral contract. The complaint was not amended, but the cause was submitted to the jury on the theory that proof of an oral con-

tract was admissible, with the result already stated. The District Court held that the writing was improperly excluded by the court below. Upon the second trial the writing set forth in the complaint was admitted in evidence, and it formed the basis of the verdict and judgment. It is necessary therefore to inquire whether or not the evidence of the oral negotiations upon which the district court based its conclusion as to the effect of the contract was substantially the same as the written contract upon which the present judgment was based. The record used on the former appeal may be examined by us on this appeal in order to determine this question. *McKinlay v. Tuttle*, 42 Cal. 576.

The contract alleged was executed on September 30, 1903, between "The San Francisco Call, and John D. Spreckels, the parties of the first part, and C. H. Otten, the party of the second part." It may be inferred from its language that the San Francisco Call was a newspaper which was then being printed somewhere and circulated in Berkeley, and that Spreckels was either the owner, or was in control, of the business of publishing and circulating it; but these facts are not alleged in the complaint. In describing the contract we use the name "Spreckels" to designate the party of the first part. Its material provisions are as follows:

"In consideration of \$3,000.00 paid to Spreckels by Otten," Spreckels sold, transferred, and delivered to Otten "the agency of and for the San Francisco Call, and of and for that certain newspaper route" of said paper in Berkeley, particularly described.

Spreckels also agreed to deliver to Otten, daily, enough copies of the paper to supply said route. Otten was to pay therefor one cent per copy and 8 cents per month in addition. The subscription price of the paper was 75 cents per month, subject to increase or reduction at the will of Spreckels. It provided that Otten "shall manage, control and conduct the said newspaper route above described in such a manner, and with such efficiency, as shall be for the best interests of the said San Francisco Call newspaper, and shall maintain and preserve the extent and value of said newspaper route to the satisfaction of said Spreckels, and in all respects keep and perform all of his obligations unto the said Spreckels, arising out of the possession and management of said newspaper route during such time as the said Otten shall be in possession thereof." It further provided that Spreckels reserved the right to give his "written consent before any legal transfer of this contract shall be made." This is the contract the effect of which the court is now required to consider and to compare with the oral contract proven in the case and construed by the District Court of Appeal as above stated. It is to

be observed, however, that the recitation in the instrument that the \$3,000 was paid by Otten to Spreckels for its execution was not true. It was admitted upon the last trial that no consideration for the contract passed between the parties, other than their respective stipulations therein.

The record on the first appeal shows that, on the first trial, evidence was given regarding the oral negotiations. The District Court considered this as evidence of the contract between the parties. This evidence was in effect that Otten had been engaged in distributing the San Francisco Call in Berkeley ever since the year 1896, in connection with one Cordes; that on or about September 30, 1903, he made an arrangement with the agents of Spreckels to continue the delivery of the papers in the territory in Berkeley embraced in the territory described in the contract aforesaid and to pay Spreckels one cent the copy for the papers so distributed; that Spreckels was to deliver to him at Oakland the number of papers required to supply the subscribers in the Berkeley territory, and that Otten had them distributed to subscribers within the territory by certain persons whom he employed for that purpose; that he made out the bills to the subscribers and collected them monthly as they became due, deducting his own charges as arranged and returned the balance to Mr. Spreckels. It was further shown that Otten was to be allowed to sell the territory at any time he had a party who would buy it, who would be agreeable to Spreckels; that, if Spreckels was not satisfied with Otten's services, Otten was to be notified and then have an opportunity to sell out the territory to some other person; that Otten paid between \$8,000 and \$9,000 for the route; and that when the agency was terminated on January 1, 1909, the defendant had procured one McCoy to buy out Otten and pay him \$5,000 and offered the opportunity to Otten to sell out his rights or route at that price, which offer Otten refused.

Concerning the rights of Otten under this oral contract the District Court on the former appeal, in discussing the question of the sufficiency of evidence to sustain the verdict for the amount of damages allowed, said (24 Cal. App. 262, 141 Pac. 228):

"Unquestionably, he acquired, by virtue of the agreement, a right of property in said territory—the exclusive right to distribute and deliver the Call therein—of which he cannot be divested without just compensation. \* \* \* The right remained absolute only so long as the plaintiff rendered efficient service."

This declaration, it is now claimed, establishes the law of the case.

The oral contract, according to the testimony above related, was given for a valuable consideration, amounting to at least \$8,000, and it included an agreement by Spreckels



that Otten should have the right at any time to transfer the agency to some other person acceptable to Spreckels, and that even if Spreckels was not satisfied with Otten's manner of performing the service, Otten was to have notice thereof and an opportunity to transfer the agency to some person satisfactory to Spreckels and to obtain for himself whatever sum of money such person would pay for the privilege of becoming such agent.

[3] No such provisions are contained in the written contract, and at the last trial it was admitted that Otten did not pay Spreckels any money for its execution. The facts are therefore substantially different, and the doctrine of the law of the case does not apply. *Allen v. Bryant*, 155 Cal. 259, 100 Pac. 704; *McLeran v. Benton*, 73 Cal. 337, 14 Pac. 879, 2 Am. St. Rep. 814; *Mitchell v. Davis*, 23 Cal. 383; *Smith v. Goethe*, 159 Cal. 631, 115 Pac. 223, Ann. Cas. 1912C, 1205, 4 Cor. Jur. 1095, footnote 78.

We may therefore consider the effect of the contract pleaded free from any embarrassment arising from the law laid down in the former decision.

In the case entitled *Boehm v. Spreckels* (S. F. No. 7692, 191 Pac. 5), submitted simultaneously with the present case, we considered the question of the legal effect of a contract relating to a "newspaper route" which is similar to the contract with the plaintiff, Otten, set forth in the complaint, and certainly more favorable to the theory that it vests a property right in the carrier of the papers. We have there held that such a contract creates an agency only; that it does not vest in the agent any interest in the subject of the agency; that the agency is not coupled with an interest; that it is for an indefinite period, and hence that it is revocable by the principal at any time.

We further held that, unless such agency was given for a valuable consideration, it could be revoked by the principal without liability to the agent for any loss or damage to him that might be caused by loss of the compensation provided, for him by the contract of agency. The agency in the present case was not given for a valuable consideration.

[4] It cannot seriously be contended that the effect of the stipulations of the respective parties, as being a consideration sufficient to support it as a contract, is sufficient to take it out of the rule of section 2356 of the Civil Code that an agency may be terminated by the principal, or to bring it within the rule that if an agency is given for a valuable consideration the principal will be liable in damages if he revokes it before the agent has had a reasonable time to enjoy his agency so as to some extent to reimburse himself for his outlays in getting it or in preparing to perform the duties imposed on him there-

by. All of the cases on that subject involve the payment of some money by the agent to secure the agency, or the incurring of preliminary expenses by him in preparing to execute the powers given him. No reason can be given for the proposition that his agreement to faithfully perform the duties required of him by his contract of employment will, as a valuable consideration, make this rule applicable. The law would make him subject to that obligation without any stipulation. 2 Cor. Jur. p. 692; Civ. Code, § 2228; *Calmon v. Sarraille*, 142 Cal. 641, 78 Pac. 486.

[5] Throughout the trial the counsel for the plaintiff apparently assumed that in an agency of this character the efforts of the agent to increase his compensation by increasing the number of subscribers to the defendant's newspaper within the described territory operated to give him an interest in the principal's business, an interest distinct and separate from that of the principal and of which the principal could not deprive him without his consent, or without adequate compensation in damages equal to the value of that interest. This is a manifest mistake in every case in which the contract of agency does not so provide. The contract in this case required that Otten should control and conduct the route for the best interests of Spreckels and maintain and preserve its extent and value to the satisfaction of Spreckels. His commissions were allowed for the purpose of paying him for this service. If he was required by the contract to endeavor to increase the number of subscribers within the territory he served, the commissions paid for that endeavor also, and his compensation would be automatically increased proportionally thereby. In contemplation of law, in this and all similar cases, the benefits of the agent's services go to the principal and not to himself, and the agent has no interest therein. A contract of agency which gives the agent a profitable employment by reason of the large compensation allowed him is, of course, valuable to him, and if he is allowed by his principal to procure another to perform the service in his stead, his agency may have a commercial value, similar in many respects to a right of property. As between him and the substitute with whom he agrees to abdicate, it may indeed have all the attributes of property and the transfer may command a high price. But where the agency is revocable at will, as in this case, he has no interest or right which he can assert against his principal who revokes it, as the basis of damages for such revocation.

These principles are decisive of the case. The only breach of contract alleged was the revocation of the agency by Spreckels on January 1, 1909. The only damage alleged or proven was that Otten thereby was de-

prived of the agency. The agency being terminable at will by the principal and being for an indefinite term and without a valuable consideration, its revocation was not a breach of the contract. The plaintiff has no cause of action and the judgment should have been for the defendant. This renders it unnecessary to consider other questions presented.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.

(183 Cal. 259)

**SMITH et al. v. BACH et al.**  
(L. A. 5121.)

(Supreme Court of California. June 24, 1920.)

**1. Statutes §205—Entire statute to be considered.**

For the purpose of ascertaining the legislative intent, courts should consider the entire statute.

**2. Contracts §105 — Ipso facto void when made as prohibited by statute.**

A statute prohibiting the making of contracts, except in a certain manner, ipso facto makes them void if made in any other way, notwithstanding that the statute does not expressly pronounce it void, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum.

**3. Vendor and purchaser §39—Contract of sale by reference to unrecorded map void.**

A contract of sale of land made in violation of Act March 15, 1907 (St. 1907, p. 290), making it unlawful to sell or offer for sale land with reference to an unrecorded map, is void.

**4. Contracts §139 — Vendee may recover money paid under unlawful contract of sale.**

Where a contract of sale of land is made in violation of Act March 15, 1907 (St. 1907, p. 290), making it unlawful to sell or offer for sale land by reference to an unrecorded map, the vendee may rescind and recover money paid; the prohibition in the statute being for the vendee's benefit, and he therefore not being in pari delicto.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clara L. Smith and others against George J. Bach and another. Judgment for defendants, and plaintiffs appeal. Reversed.

F. G. Blood and Crouch & Chambers, all of San Diego, for appellants.

Sweet, Stearns & Forward and C. O. Pease, all of San Diego, for respondents.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal for the First Appellate District, while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

This action is one in assumpsit for money had and received. The case grows out of a contract relating to the sale of certain tracts of land in a subdivision situated in San Diego county. Plaintiffs paid defendant a part of the purchase price under the terms of the contract of sale, and they seek by this action to recover the same upon the ground that the contract relating to the sale is void. The claimed invalidity is based upon the admitted fact that the sales were made in violation of the act of March 15, 1907 (Stats. 1907, p. 290), making it unlawful to sell or offer for sale land by reference to an unrecorded map. At the conclusion of plaintiff's case the trial court granted a nonsuit, and from the judgment and the order denying a new trial plaintiffs appeal. The main question here presented is whether or not such a contract is void, so as to prevent any right of action being based thereon.

By the terms of the statute in question not only is the selling or offering for sale of lots of land by reference to an unrecorded map or plat expressly prohibited, but the act makes it a misdemeanor so to do, the penalty for which is fixed at both a fine and imprisonment. This precise question has been presented to the appellate courts of this state in three different cases, in none of which, however, have the rights of a vendee thereunder been passed upon. See *Bentley v. Hurlburt*, 153 Cal. 796, 96 Pac. 890; *Baines v. Shank*, 12 Cal. App. 391, 107 Pac. 631; *King v. Johnson*, 30 Cal. App. 63, 157 Pac. 531; *Shultz v. Redondo Imp. Co.*, 158 Cal. 439, 440, 105 Pac. 118. In the *Bentley* Case this court found it unnecessary to pass upon the validity of the contract, for the reason that the evidence showed that the statute had been substantially complied with. In *Baines v. Shank*, supra, the District Court of Appeal also found it unnecessary to consider the question; the case being disposed of upon a different point. The only case, therefore, where the question has received consideration in this state, is *King v. Johnson*, supra, which is hereinafter referred to.

Many of our sister states have adopted laws of a similar character. These statutes differ in terms; some containing no express prohibitory words, but recognizing that the act may be done subject to a fine for its disregard, while others, analogous to our own, contain an express prohibition and a penalty for violation. The decisions of the courts of these various jurisdictions, construing these statutes to determine the legislative intent, are not harmonious. See 39 Cyc. 1215;

13 Corpus Juris, p. 410 et seq. An extensive review of these numerous cases would answer no useful purpose. Frequently, as here, a statute imposes a penalty on the doing of an act without expressly declaring such act illegal and void.

Applying the doctrine, "Expressio unius est exclusio alterius," some of the courts have held that, the Legislature having fixed the penalty for the execution of the contract, courts cannot impose another, invalidating the agreement. See 39 Cyc. 1215. In cases announcing this doctrine a distinction is usually made between acts *malum in se*, which are generally regarded as void, and those which are *mala prohibita*. On the authority of these cases, respondent in effect contends, in support of the judgment, that the statute imposing specific penalties for its violation, and the act condemned not being *malum in se*, the purpose of the act can be accomplished without declaring contracts made in violation thereof illegal, and that the inference is that it was not the intention of the Legislature to render them illegal, or it would have so declared in unequivocal terms.

The decisions supporting the doctrine invoked are in the main based upon revenue statutes, which simply impose a fine or penalty, the amount of which is definitely fixed, as distinguished from those, as here, which prohibit and declare the violation of the act a misdemeanor punishable by fine and imprisonment.

[1-3] For the purpose of ascertaining the legislative intent courts should consider the entire statute, and if from such consideration it is manifest that the Legislature had no intention of declaring a contract void, they should be sustained and enforced; otherwise, they should be adjudged void. *Dunlop v. Mercer*, 156 Fed. 548, 86 C. C. A. 435. Here it is manifest from a reading of the entire act that the statute in question was passed for the protection of the public, and not as a revenue measure. *King v. Johnson*, 30 Cal. App. 63, 157 Pac. 531. In such a case a contract made in violation of its terms should be held to be void. *Levinson v. Boas*, 150 Cal. 193, 88 Pac. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661; *Pangborn v. Westlake*, 36 Iowa, 548. The general rule controlling in cases of this character is that, where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is *malum in se*, or merely *malum prohibitum*. A statute of this character, prohibiting the making of contracts except in a certain manner, *ipso facto* makes them void if made in any other way. 13 Cyc. 351; 13 Corpus Juris, p. 410. The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a con-

tract founded upon such act is void. This general rule finds support in the decisions of this state. *Berka v. Woodward*, 125 Cal. 127, 57 Pac. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31, and cases cited; *Bentley v. Hurlburt*, supra.

It is true, as stated by Mr. Justice Sloss in *Bentley v. Hurlburt*, that cases may be found holding a contrary doctrine; but an examination of those cases will, as hereinbefore stated, show that the statutes upon which they are based generally do not prohibit, but merely impose a fine as an exclusive punishment. This identical statute was construed in *King v. Johnson*, supra, where the general rule above stated was applied. It is there said that—

"Cases \* \* \* from other jurisdictions are based upon statutes which the court, for different reasons, construed as not prohibiting the sale, while the statute under consideration, in express terms, prohibits the doing of the act."

Concluding, as we do, that the contract in question is void, it only remains to determine the rights of plaintiffs to recover in this action.

[4] There are authorities which, while not denying the general rule that an illegal contract cannot be enforced, whether *malum in se* or *malum prohibitum*, hold that all the consequences which attend a contract contrary to public morals do not attend one which is purely *malum prohibitum*, and that in the latter case courts will take notice of the circumstances, and will give relief, if justice and equity require a restoration of money received by either party thereunder. 13 Corpus Juris, p. 411, § 341. In such a case the complaining party is protected, the prohibition being for his benefit, and, not being in *pari delicto*, he is entitled to relief. *Id.*, p. 501, § 443. By the weight of authority, where money has been paid in consideration of an executory contract which is illegal, the party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money. In such a case it is the duty of the court in furtherance of justice to aid one not in *pari delicto*, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require. *Pomeroy*, Eq. Jur. (3d Ed.) § 942; *Gray v. Roberts*, 2 A. K. Marsh. (Ky.) 208, 12 Am. Dec. 335; *Wassermann v. Sloss*, 117 Cal. 431, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; *City of Los Angeles v. City Bank*, 100 Cal. 18, 34 Pac. 510; *Savings Bank v. Burns*, 104 Cal. 480, 38 Pac. 102; *Manchester R. R. v. Concord R. R.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 589; 13 Corpus Juris, p. 501, § 444.

For the reasons given, the judgment is reversed.

ANGELOTTI, C. J., and SHAW, WILBUR, OLNEY, LAWLOR, and LENNON, JJ., concur.

(183 Cal. 284)

In re STREETON'S ESTATE.

SHOULTS v. WILLIAMS.

(L. A. 6329.)

(Supreme Court of California. July 1, 1920.)

1. Wills §111(2) — Test for determining whether signature not at end of will intended as token of execution.

The test whether a will has been signed by the testator is, under Civ. Code, § 1277, that, if placed at the end of document, and nothing to the contrary appears, he intended to so sign, but, if placed elsewhere, it is for the court to say, from an inspection of the whole will as to language and form and the relative position of its parts, whether there is positive and satisfactory inference that the signature was so placed as a token of execution.

2. Wills §133 — Signature at top of will where no other space left held intended to authenticate will.

Where no space was left at the bottom of an olographic will, and testator's name was signed in the only blank space which had been left, which was in the upper left-hand corner, held, that the document showed testator's intention to thus authenticate the instrument.

3. Wills §386—Finding as to execution not overthrown unless without evidentiary support.

The due execution of a will is a question of fact and its determination by the trial court will not be overthrown unless without support in the evidence.

4. Wills §289—Face of document held to show testator's intention to sign at top to authenticate instrument.

The trial court's finding that testator signed his name at the top of the will with the intention of authenticating the instrument held sustained by positive and satisfactory inference arising from the face of the document.

5. Wills §278—Allegation that instrument is not deceased's will insufficient as plea of revocation.

An allegation "that said written instrument is not the last will and testament of said S., deceased," is a mere conclusion of law, and is insufficient to plead a revocation.

6. Wills §306—Evidence held insufficient to show revocation.

Evidence held insufficient to show that an olographic will admitted to probate had been revoked.

7. Wills §290—Crumpling of instrument insufficient to support presumption of revocation.

While the crumpling of a will might be a sufficient act of destruction if accompanied by clear evidence of other circumstances showing an intent to revoke, yet such act of itself is insufficient to support a presumption of intention to revoke, particularly where it is not shown that the will had been continually under testator's control until his death.

8. Wills §290—Tearing of part of instrument held not to revoke part remaining.

The tearing of a portion of a will as originally drafted from the remaining text raises no presumption of intention to revoke the whole instrument, particularly where so torn as to leave the portion found intact and complete, the torn edge being practically horizontal except the lower left-hand corner where such line is departed from to preserve two syllables of a word divided at the end of the preceding line, so that the mutilation affected only the part destroyed.

9. Wills §290—Presumption of intent to revoke by destruction of signature overcome by restoration.

Although the destruction of a signature of a will may be sufficient to support a presumption of intention to revoke the whole, yet, if the signature destroyed has been later restored or rewritten, courts in general will admit the will to probate; for it then affirmatively appears there was no intention to revoke.

10. Wills §290—Replacing of testator's signature in different place after destruction repels presumption of revocation.

Assuming that a testator tore his signature from the will together with a part thereof, any presumption therefrom of an intent to revoke is repelled by the fact that his signature was again appended to and appeared at the top of his will for the obvious purpose of authentication and execution.

Department 2.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

In the matter of the estate of Harry Streeton, deceased. Petition by Emma Louisa Shoults against Nellie Williams, administratrix. From an order denying petition to revoke the probate of an olographic will, the petitioner appeals. Affirmed.

Robert M. Clarke and Henry L. Knoop, both of Los Angeles, for appellant.

I. R. Rubin, of Los Angeles, and M. G. C. Harris, for respondent.

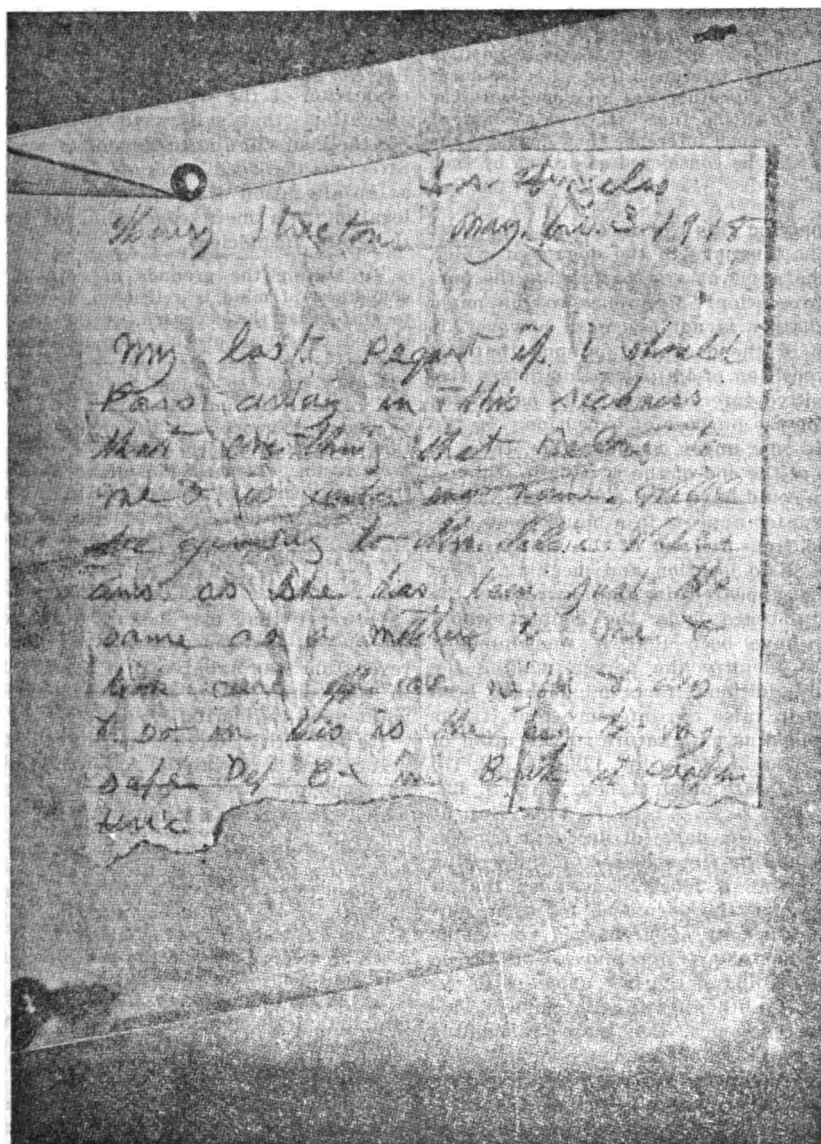
LENNON, J. The superior court of Los Angeles county denied a petition for the revocation of an order which admitted to probate a certain written instrument, olographic in form, as the last will and testament of Harry Streeton, deceased. Petitioner appeals. The respondent herein is the adminis-

atrix with the will annexed. The petitioner, an heir at law of said decedent, sought to have the probate of the will revoked, apparently upon three grounds: (1) That the instrument was not executed as required by law; (2) that the will had been revoked; (3) that the decedent was not of sound mind at the time the instrument was executed. In view of substantial conflict in the evidence, the sufficiency of the evidence to support the findings of the trial court upon the question of mental competence is not challenged, and petitioner, upon this appeal, relies entirely upon the first two grounds.

After the death of Harry Streeton the instrument in question, which consists of a single sheet of paper, was found in an en-

velope. At the time it was found, the lower portion of the page had been torn off in such a way as to disclose, by "pencil marks and dots" appearing along the torn edge of the paper, that there were written words on the part torn off. There were creases in the paper indicating that it had been crumpled. The document is entirely in the handwriting of decedent. The date is written in the upper right-hand corner of the page, and in the upper left-hand corner, on a line with the date and above all the other writing, appears the name of decedent.

The condition of the will is best portrayed by a photographic reproduction thereof, which appears in the record, and is therefore reproduced in this opinion as follows:



[1] The alleged defect in the execution of the will is the claimed insufficiency of the signature as a token of authenticity. The test to be applied in determining whether a will has been "signed by the hand of the testator himself," as required by section 1277 of the Civil Code, was stated in *Estate of Manchester*, 174 Cal. 417, 163 Pac. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227, as follows:

"The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

[2] Applying this test in the present case, we find no language in the document which adopts the name as a signature for the purpose of execution. Reference to the name as a signature is not essential, however, if the form of the document is such that the relative position of its parts alone gives rise to a positive inference that the name was affixed for the purpose of execution. In the document now under consideration, there is no space at the end of the writing in which a signature could have been placed. The name of the testator appears in a blank space, disconnected from the rest of the written matter both as to location and meaning. Had the name appeared in the exordium, the logical inference from the context would probably have been that it was intended merely to identify the person making the will, and additional facts might have been necessary to raise the inference that it was also intended as a signature in execution of the will. *Estate of Hurley*, 178 Cal. 713, 174 Pac. 669; *Estate of McMahon*, 174 Cal. 423, 163 Pac. 669, L. R. A. 1917D, 778. But, as above stated, the name of decedent appears entirely separate from the rest of the writing and by itself. It must be assumed that it was placed on the document for some purpose, and the only apparent and reasonable purpose under the circumstances would seem to be the signing of the instrument with the intention of authenticating the same. This conclusion becomes the more compelling when we consider that the name is written in a blank space at the beginning of the instrument; for such a space is the most natural one in which to place a signature when the usual place at the end of the document is un-

available. The fact that the end of the page was torn off, whatever its importance in a determination of the question of revocation, if of any weight in a consideration of the sufficiency of the signature, tends to support, rather than defeat, the inference that the name was written at the top of the page with the intention of authenticating the instrument.

[3, 4] The due execution of a will is a question of fact, and its determination by the trial court is not to be overthrown unless that determination is without support in the evidence. *Estate of Cullberg*, 169 Cal. 365, 370, 146 Pac. 888. We are satisfied that the finding of the trial court to the effect that the testator signed his name at the top of the will with the intention of authenticating the instrument was sustained by a "positive and satisfactory inference" arising from the face of the document itself.

[5] The petition to revoke the probate of the will contains no direct allegation of the revocation of the will by the testator. The allegation "that said written instrument is not the last will and testament of said Harry Streeton, deceased" was evidently intended as an allegation of revocation. Such an allegation is a mere conclusion of law, and therefore insufficient.

"In stating the grounds of contest, if unsoundness of mind is relied on, it is sufficient to state that the deceased, at the time of the alleged execution of the proposed paper, was not of sound and disposing mind. And the same is true as to undue execution. But when the grounds of contest embrace fraud, duress, or undue influence, a subsequent will, revocation, or the like, such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded, not in the language of the statute, but the facts relied on must be stated." 40 Cyc. 1269; *Estate of Gharky*, 57 Cal. 274, 279; *Estate of Harris*, 3 Cal. Prob. 1; *Barksdale v. Davis*, 114 Ala. 623, 22 South. 17.

However that may be, no demurrer was interposed, and, inasmuch as the question of revocation was apparently a contested issue in the court below, we shall consider the point upon its merits.

[6, 7] With reference to the question of revocation there was the following testimony of respondent concerning the condition in which the will was found:

"Q. It appears from the pencil marks and dots along the tear that there was other writing upon this paper. Can you give us any light on that, or do you know anything about it? A. I don't know anything about it. I got it after he died. I opened the envelope, and that was the condition of the will.

"Q. With reference to the crumpled condition, is that the condition that it was? A. That is the condition; I suppose laying around. I have no other reason; I don't know why."

No other evidence was adduced. Petitioner, however, claims to have thereby borne the burden of proving a revocation. In this be-

(191 P.)

half petitioner relies upon the statement in Estate of Olmsted, 122 Cal. 224, 230, 54 Pac. 745, to the effect that, where it appeared that an instrument during the lifetime of the maker had been in his secure possession, and, when discovered by the two parties in interest, bore marks of cancellation, "from these circumstances alone arise the presumptions: (1) That the cancellations were the act of the testator; and (2) that they were performed with the intent and purpose of revoking the instrument." The facts of that case are, however, distinguishable from the facts now presented. In the case at bar there was, apparently, no proof that the will had been continually under the control of the testator until the time of his death; moreover, the acts from which it is claimed the intent to revoke is presumed are of a different character from the acts proved in the Estate of Olmsted. In that case it was also said:

"What act of destruction will supply the requirement of the statute is a question much discussed. It is apparent that the destruction may be total or partial. The will, for example, may be wholly burned or totally obliterated, or it may be but partially destroyed, and still legible. Generally, it may be said that, *if the intent to revoke clearly appears, a slight act within the statute will be deemed sufficient.*" (Italics are ours.)

In other words, there must be an act coupled with an intent. If the act is a slight one, the evidence of intent must be clear; if, on the other hand, the act is sufficiently definite in character, the intent may be presumed from the very nature of the act and the surrounding circumstances. While the crumpling of the instrument in the instant case might be a sufficient act of destruction if it were accompanied by clear evidence of other circumstances showing, or tending to show, an intent to revoke, the mere act of crumpling in and of itself is insufficient to support a presumption of an intention to revoke.

[8-10] Nor does the fact that a portion of the will as originally drafted was torn from the remaining text raise any presumption of an intention to revoke the whole instrument.

"The slightest act of tearing with intent to revoke the whole will is sufficient for the purpose. But the whole will is not necessarily revoked by the destruction of a part. It is the animus which must govern the extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revo-

cation of the whole instrument, or only of some, and what portion thereof. It is obvious that the mutilation may be of such a part as to afford evidence that the deceased did not intend the document any longer to operate as his will. On the other hand, in the absence of evidence aliunde an intent to revoke the whole will cannot be inferred from a partial mutilation which does not affect the instrument as an entirety, or destroy that part which gives effect to the whole." 40 Cyc. 1191.

The fact that a will is found with the signature destroyed may be sufficient to support a presumption of an intention to revoke the whole will. King v. Ponton, 82 Cal. 420, 22 Pac. 1087. While this act imports prima facie an intent to revoke, it is nevertheless a presumption which may be repelled by accompanying circumstances. Therefore, if a signature has been destroyed, but later restored or rewritten, the courts in general admit the will to probate; for it then appears affirmatively that there was no intent to revoke. Re Wood (Sur.) 11 N. Y. Supp. 157; Sellards v. Kirby, 82 Kan. 291, 108 Pac. 73, 28 L. B. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214; Re Brock, 247 Pa. 365, 93 Atl. 487, L. B. A. 1915D, p. 1140. Even assuming, then, in the present case, that the testator tore his signature from the will, any presumption therefrom of an intent to revoke is repelled by the fact that his signature was again appended to and appeared on the will when it was found after his death, obviously placed there for the purpose of authentication and execution.

The document was carefully torn so as to leave the portion found in the envelope intact and complete in itself. The torn edge is practically horizontal, with the exception of the lower left-hand corner, where the horizontal line is departed from so as to preserve two syllables of a word divided at the end of the preceding line. The mutilation is a partial one "which does not affect the instrument as an entirety, or destroy that part which gives effect to the whole."

After a careful examination of the photographic copy of the document, we are convinced that the marks of crumpling and tearing which it bears are, in the absence of additional evidence, insufficient to support a presumption of an intention on the part of the testator to revoke the whole will.

The order is affirmed.

We concur: WILBUR, J.; SLOANE, J.

(188 Cal. 191)

**McCOY v. ZAHN CORPORATION.**  
(L. A. 6386.)(Supreme Court of California. June 17, 1920.  
Rehearing Denied July 15, 1920.)**1. Brokers §51—Must place client in touch with customer or procure contract.**

An agent to procure a loan must have placed his client in touch with one ready, willing, and able to make the loan, or must have secured from a prospective lender an unqualified agreement to make the loan on the terms proposed to be entitled to commission, it not being sufficient that he first interested the lender in the proposed loan and told the borrower who the lender was.

**2. Brokers §51—Merely mentioning name of lender who subsequently made the loan through another is insufficient.**

The fact that the broker, who knew that others were seeking to procure the same loan under an agreement that the first agent to bring in the money should receive the commission, told the owner that he was dealing with the one who subsequently made the loan, is insufficient to entitle him to a commission, where he did not introduce the lender to the borrower nor secure an agreement from the former.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Lon S. McCoy against the Zahn Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

J. Wiseman Macdonald, of Los Angeles, for appellant.

Paul H. McPherrin, of Los Angeles, for respondent.

**SLOANE, J.** This action was brought to recover \$800 as commissions for services of plaintiff rendered pursuant to employment in assisting the defendant to procure a loan secured by mortgage on real property. The trial court found that the plaintiff had been employed to procure for the defendant a loan of \$40,000 to be secured by mortgage on real property in the city of Los Angeles owned by the defendant corporation and known as the Gordon Apartments, defendant agreeing to pay the plaintiff for his services in "so securing such customer ready and willing to make said loan the sum of 2 per cent. on the amount of said loan, or the sum of eight hundred (\$800) dollars." It was further found by the court.

That "plaintiff in this action fully rendered and performed all the services for which he was employed and procured a customer ready, able, and willing to make the loan of \$40,000 desired by the defendant corporation on the same terms specified in his employment and on the security offered by defendant, viz. a first

mortgage on the Gordon Apartments, and that said plaintiff was the means of bringing the said E. W. Hadley, the customer so secured by him, and the defendant corporation together in pursuance of his employment, according to the terms thereof, and that his efforts in so bringing the said Hadley and defendant corporation together were the proximate and procuring cause resulting in the making of the loan of the said Hadley to defendant corporation."

The judgment was for plaintiff in the amount demanded, and it is from this judgment that the appeal is taken. The grounds stated on the appeal are: First, the insufficiency of the evidence to establish the employment; and, second, the insufficiency of the evidence to support the finding that the plaintiff was the efficient agent in bringing the lender and borrower together, or in procuring the loan. The finding as to the employment is not very seriously controverted, and is one clearly justified by the evidence and it may be dismissed from further consideration.

The finding that the plaintiff brought the parties together and secured the proffer of the loan is the real issue in controversy. The doubt on this point does not arise upon a conflict in the evidence, but from a challenge of the legal conclusions drawn by the court from the uncontroverted facts. One significant fact is that several agents were engaged in trying to place this loan for defendants, and plaintiff was informed during the negotiations that other agents than himself were employed, and that the commission would go to the agent who first brought in the money. The plaintiff himself testified:

"Hector N. Zahn told me at that time there were other agents working on the loan, and the first one who came in with the money would get the commission."

The agents concerned in these negotiations other than the plaintiff, McCoy, and one Allen, who was associated with him, were F. A. Pattee, A. W. Ross, and the firm of Rowan & Co. These agents actually closed the deal by obtaining the lender's final ratification of the loan and by securing an escrow deposit of the money or check for the amount of the loan. It was in response to a notice from some of these parties, and not the plaintiff, that the defendants met Mr. Hadley and made the loan and thus finally closed the deal.

While these facts are not disputed, it is contended in behalf of plaintiff that it was he who first brought this application for a loan to the attention of Hadley, and that prior to any negotiations between Hadley and the other agents Hadley had expressed himself favorably toward this loan, and had, in effect, agreed to take it if on personal inspection he was satisfied with the security.



It appears without dispute that Hadley, who lived in San Francisco, communicated about May 6, 1915, with several real estate firms in Los Angeles, including the various agents mentioned in this deal, by a circular letter in which he inquired about the demand for loans and stated that he was in the market to place a considerable amount of money on Los Angeles property. On May 10th plaintiff wrote to Hadley offering to aid him in placing loans. On September 29th Hadley wrote to plaintiff asking to be advised as to applications for loans that he might have to submit. On October 7th plaintiff for the first time mentioned the Gordon Apartments' application for \$40,000. He had not then any agency from the defendants to act in the matter, but had learned of their desire to secure a loan from his associate, Allen. It is not necessary to follow the details of the negotiations. Plaintiff went to considerable pains to present the Gordon Apartments' loan in a favorable light. On October 14th Hadley sent a letter and telegram informing plaintiff that he thought he could take care of the \$40,000 loan and he would soon be in Los Angeles to investigate. It was after this, on the 20th of October, that the plaintiff first met representatives of the defendant corporation and procured authority to act for them in obtaining the loan. He informed them that he had a prospective customer, but did not then mention the name. On the following day he claims to have read to them a telegram and letter from Hadley, including the signatures, and to have given them other information as to his negotiations, but did not give them the documents to read. It was on this occasion that he was informed that there were other agents working on the loan, and that the first to come in with the money would get the commission. Learning from a son of Hadley that the latter would be in Los Angeles on the 27th of October, plaintiff communicated with defendants, told them his client had not yet shown up, and requested them to wait until he had heard from him and asked if everything was O. K. He was answered in the affirmative, and was told that they were anxious to get the money. On October 29th Hadley called upon the plaintiff at his office and refused the latter's offer to show him the Gordon Apartments property. Hadley further said that he had already been to the Gordon Apartments and had investigated them, but had a little more investigating to do, and that he would let the plaintiff know about it in the afternoon or soon after. It developed later that Hadley had already inspected the property with Pattee, one of the other agents. Plaintiff testified that on the evening of October 29th he telephoned defendants that his client had been at the office that morning, that he had said he had a little more investigating to do, and that after he completed it he would make up his mind in a few minutes and let

him know soon thereafter. Plaintiff further informed them that he would try to get an answer from his client the next day and not later than Monday, the 1st of November. He claims they told him they would let the matter rest in that way. Testimony was given by defendants, which was undisputed, that plaintiff stated in his telephone conversation that his man was in the office that morning and promised to come again in the afternoon, but had not come. This was the last communication that plaintiff had with either Hadley or the defendants until after the deal was closed through other agents on Monday, the 1st of November, about 4:30 p. m. Up to this time the defendants had not met Hadley. If they knew his name, there is no evidence that they knew where to find him, and he had not agreed with plaintiff to make the loan.

In the meantime the undisputed evidence shows that Pattee had learned about the same time plaintiff did of Hadley's desire to place loans in Los Angeles. He later learned of the Gordon Apartments' application through his associate, Ross, who had been authorized by defendants to find them the money. On the 14th of October Hadley telephoned Pattee that he expected to be in Los Angeles very soon. On October 21st Pattee reported to Hadley a number of applications for loans, including the Gordon Apartments' property. On October 27th Pattee and Hadley inspected this property together and saw each other nearly every day thereafter. On November 1st the loan was agreed to and the money placed in escrow. It was Ross, Pattee's associate, who notified the defendants that the money was in escrow and to go down at once and close the deal. The escrow included this loan on the Gordon Apartments and another loan to defendants upon other property. The commissions were divided between Pattee, Ross, and Rowan upon representations made to the defendants by Hadley that Pattee did the work and brought the parties together on the Gordon Apartments' loan.

[1] The law applicable to this sort of agency is well settled. It is clear that the agent, in order to recover a commission, must have placed his client in touch with a customer ready, able, and willing to make the loan, or must have carried on negotiations to such a point as to secure from the prospective lender an unqualified agreement to make the loan upon the terms proposed. Such is practically the rule as quoted in appellant's brief from the authorities cited. In *Cone v. Kell*, 18 Cal. App. 675, 124 Pac. 548, the court said:

"Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and, even though a broker opens negotiations for the sale of prop-

erty, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy, or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms for which the property was originally offered for sale."

In the case of *Massie v. Chatom*, 163 Cal. 772, 127 Pac. 56, this language was quoted with approval:

"The contract of the broker is to negotiate a sale; that is, to procure a valid contract, to purchase, which can be enforced by the vendor if his title is perfect; or if he does not procure such contract to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agreement." \* \* \*

"The readiness and willingness of a person to purchase the property can be shown only by an offer on his part to purchase; and unless he has actually entered into a contract binding him to purchase, or has offered to the vendor, and not merely to the broker, to enter into such contract, he cannot be considered a purchaser."

We do not find that the authorities quoted by respondent distinguish the application of this rule. The opinion in *Justy v. Erro*, 16 Cal. App. 519, 117 Pac. 575, quoting from *Mechem on Agency*, that it is not necessary that the broker should personally have conducted the negotiations between his principal and the purchaser leading to the sale, nor that he should have been present when the bargain was completed, "or even that the principal should, at the time, have known that the purchaser was one found by the broker," refers to a condition where the broker has brought the vendor and vendee together and then they contract for themselves. The rule as quoted from *Ruling Case Law* (4 R. O. L. "Brokers," §§ 46, 57, 58) holds that, where the services of the broker, as well as those of another agent, have contributed generally to the successful termination of the negotiations in question, "if the success of the transaction is directly attributable to the broker originally employed, his right to his commissions cannot be defeated by the mere fact that the negotiations were conducted, or the transaction finally consummated, through the medium of another broker." In this action the very controversy is as to whose agency actually brought about a meeting of the minds upon the proposed loan, and the contention here is that it does not appear that the final decision of the lender to accept the loan was affected through the influence or agency of the plaintiff. However nearly he may have brought him to a favorable decision, if the negotiations were broken off before a decision was reached and a final decision is brought about by another agent, the latter

will be entitled to the commission. It may also be conceded as a correct statement of the law that, "if the broker is to merely find or procure a purchaser, it is not necessary that he should be present at the time the negotiations are entered into with the purchaser, or be an active participater in the consummation of the contract, provided he can show that the same was effected through his agency, and that the parties were brought together and the deal resulted from his acts as its procuring cause." But how can it be said in this case that the lender and borrower were brought together by the previous negotiations through the plaintiff when he failed to bring the parties together or in any way to introduce them to each other, and it is shown that this office was performed by other agents who had been employed under a contract and were negotiating with the same party?

[2] We do not see how, under the evidence here, it can be held that plaintiff met either of the requirements of his employment. It is certain that he at no time obtained an agreement from Hadley to make this loan. On the occasion of his last communication with the defendants, and after he had interviewed Hadley for the last time, Hadley had told him that he wanted to make further investigation, that he would make up his mind and let him know later, and plaintiff telephoned defendants that his customer had not shown up as agreed and asked them to wait on him until Monday. This was on Friday, the 29th of October. They did wait until Monday, as the deal through the other agents was not closed until 4:30 p. m. on Monday, November 1st, and no further word had been received by them from the plaintiff up to that time. Clearly the plaintiff, through his negotiations with Hadley, had not brought him to the "sticking point" of obtaining any final promise or agreement from him. Neither could he be said to have brought the parties together. Conceding that he had disclosed Hadley's name to the defendants as the party with whom he was negotiating, which is denied by defendants' witnesses, it does not appear that he had more than casually mentioned the name in the reading of a telegram and in a conversation relating to the loan, and he had at no time given Hadley's Los Angeles address or told defendants where they could find him or attempted in any way to bring the parties into personal contact. On the contrary, a fair inference from his conduct was that he was intending to carry negotiations through by himself to an acceptance of the loan. There is no justification for reaching a conclusion that the defendants would have met Hadley had they not been brought together by the other agents or that Hadley would have made the loan without their agency in the matter. It was

understood that the agent who first produced the money would receive the commission. It seems to us that this was a controlling feature of the case. The defendants were anxious for the money. They had been in the market for this loan a number of months; they had to meet an outstanding mortgage on their property in the very near future; they had placed the procuring of the loan with various agents; and it was understood with plaintiff that the first agent who came with the money would receive the commission. These other agents produced the customer and the money. We do not think, under the circumstances, that it was incumbent upon defendants to trace back the negotiations of the different agents to ascertain who saw the customer first. The controlling fact was who saw him last and brought him to a favorable decision. Whatever may be said of the conduct of the lender in leading the plaintiff to believe that if he made the loan he would close it through plaintiff, no bad faith is attributable to defendants, and they are not responsible for any bad faith on the part of the customer. They unite in denying that they even knew Hadley was plaintiff's customer; but, accepting plaintiff's contention and the court's finding that the latter had disclosed Hadley's name, the last word they had received from plaintiff three days previous to the closing of the deal was that his customer had not then made up his mind, but had promised to let him know soon, and had not appeared, and up to the time that Pattee and Ross notified them they had the money in escrow no further word was had from plaintiff.

Under this condition of the law and the facts it becomes immaterial that the plaintiff may have notified defendants that he claimed the commission before the money had actually been paid out to the other agents. The decision of the case rests upon the conclusion that the evidence does not show that the plaintiff was the efficient agent in procuring the loan.

Judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SHAW, J.; LAWLOR, J.; OLNEY, J.

(182 Cal. 284)

McPHEE v. LAVIN. (L. A. 5167.)

(Supreme Court of California. June 25, 1920.)

1. Negligence §72—One confronted by emergency not held to strict accountability.

One suddenly confronted with an unexpected danger may use such means for avoiding the danger as would appeal to a person of ordinary prudence in a like situation, without be-

ing held to strict accountability as to whether the course chosen is the most judicious or not.

2. Municipal corporations §705(10)—Plaintiff automobilist not contributorily negligent in swerving to wrong side of street to avoid collision.

Where defendant automobilist unlawfully cut a corner at a street intersection and bore down on plaintiff automobilist from the wrong side of the street, plaintiff was not contributorily negligent in turning his machine to the left in an effort to avoid the threatened collision, in view of the sudden emergency.

3. Municipal corporations §706(7) — Driver of automobile held not guilty of contributory negligence as matter of law under crossing speed regulation.

Motor Vehicle Act, § 22, prohibiting greater speed than 10 miles an hour at street intersections where the view is obstructed, is complied with if speed is so reduced in the territory common to both streets at or within the lines of intersection, and one driving 15 miles an hour at a point 25 or 30 feet from the intersection could not be held guilty as a matter of law of contributory negligence therefor, especially where at 15 miles an hour he could stop completely within 15 to 30 feet.

4. Evidence §222(2)—Defendant's declaration that he carried accident insurance admissible as admission.

In automobile collision case, it was proper to admit in evidence, as part of a conversation had with defendant, defendant's declaration to plaintiff, immediately after the collision, that he carried accident insurance that would provide for plaintiff if he suffered injury; this tending to show an acknowledgment of responsibility by defendant for the accident.

5. Appeal and error §1060(1)—Trial §27 —Elloiting that defendant carried accident insurance held error, but not prejudicial.

In automobile collision case, where upon questioning on behalf of defendant of a physician who had examined plaintiff, plaintiff's counsel asked if he made the examination at the instance of the Fidelity & Casualty Company, such line of examination was improper; but, the trial being before the court without a jury, and the witness' affirmative reply being afterwards stricken out, it could be treated as error without prejudice.

6. Damages §130(3)—\$1,000 for bruises and shock from automobile accident not excessive.

Where plaintiff was pinned beneath an overturned automobile and subjected to severe nervous shock and numerous bruises, \$1,000 for his injuries held not excessive.

In Bank.

Appeal from Superior Court, Grange County; Z. B. West, Judge.

Action by George McPhee against J. D. Lavin. From a judgment for plaintiff, defendant appeals. Affirmed.

R. P. Jennings, of Los Angeles (Frank B. Belcher, of Los Angeles, of counsel), for appellant.

R. Y. Williams, A. W. Rutan, and Williams & Rutan, all of Santa Ana, for respondent.

**SLOANE, J.** This appeal is from a judgment for plaintiff for injuries caused by an automobile collision. The principal point presented is on the contention of appellant that the record discloses contributory negligence on the part of plaintiff.

The parties, each driving an automobile, were approaching the crossing of intersecting streets in the city of Anaheim; the plaintiff going west on the north side of Center street and the defendant going south on the west side of Claudina street. The main facts in the case, as found by the trial court and supported by the undisputed weight of the evidence, show that the defendant, upon reaching the vicinity of the street intersection, instead of keeping to the right until he had passed the center of the intersection, as required by section 20 of the state Motor Vehicle Act, cut across the corner of the intersection to the east of the center of the street; that the plaintiff, who was approaching the intersection from the east, saw defendant's machine coming toward him on the wrong side of the street, and in an attempt to avoid a collision turned to the left and increased his speed. The defendant also, seeing the imminence of a collision, turned his car to the right, and the machines came together near the southern line of the intersection, with resultant injuries to the plaintiff. Under this state of facts thus found there can be no question but that the defendant, by reason of his negligent and unlawful crossing on the wrong side of the street, was responsible for the accident, unless the contention of contributory negligence on the part of plaintiff can be maintained.

Section 22 of the Motor Vehicle Act, then in force, already referred to, prohibits the driving of a motor or other vehicle on a public highway—

"At a greater rate of speed than ten miles an hour where the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways or in approaching or traversing a bridge, \* \* \* causeway or viaduct, or in going around corners or a curve in a street or highway." Stats. 1915, p. 409.

Contributory negligence was pleaded by an allegation of the answer averring that the plaintiff was driving at an excessive rate of speed in violation of the statute and that contributory negligence is imputed as a matter of law. On the issue thus raised the trial court found as follows:

"The court finds: That the defendant negligently, recklessly, carelessly, and unlawfully

caused his said automobile to be driven and propelled, so that the same was unlawfully driven to the east side of the intersection of the prolongation of Claudina street in and upon said Center street, in the city of Anaheim. That by the action of said defendant a collision was imminent between the automobiles of plaintiff and defendant. That plaintiff saw that a collision was imminent between the said automobiles, and on account of the same caused his said automobile to veer in a southwesterly direction towards the left-hand side of Center street. That if defendant had kept upon the proper side of the street there would have been no accident. That the proximate cause of said accident was the failure of defendant to follow the law in keeping on the right-hand side of the street, and by his unlawfully driving his automobile to the east side of the intersection of the prolongation of Claudina street in and upon said Center street, and by causing his said automobile to be driven upon the northeastern portion of said intersection when he was going in a southeasterly direction. That the defendant did, when a collision was imminent, attempt to turn his automobile towards the right for the purpose of avoiding a collision with the plaintiff's automobile, but that plaintiff's automobile was not then and there being driven at a high or dangerous or unlawful rate of speed. That the plaintiff turned his automobile to the left without slackening the speed thereof, and that up to the time of so turning to the left plaintiff was at all times proceeding at a speed of 15 miles per hour, and that upon so turning to the left he increased the speed of his automobile for the purpose of avoiding a collision." "That the rate of speed that plaintiff was driving his automobile prior to and at the time of the accident did not contribute to or cause the said collision and accident, and that plaintiff was not guilty of contributory negligence in the speed, way, or manner in which he was driving his said automobile."

[1, 2] It is appellant's contention that the specific finding of fact that at all the times mentioned the plaintiff was driving at a speed of 15 miles an hour negatives and supersedes the conclusion of the court that plaintiff was not driving at a dangerous or excessive rate of speed and that the rate at which he was driving did not contribute to the accident. If we may go behind the findings of the facts in this matter, it appears from the evidence that the plaintiff's view around the corner in the direction from which the other vehicle was coming was obstructed by buildings; that the plaintiff was driving in the direction of this intersection at a rate of 14 or 15 miles an hour, and was at a point 25 or 30 feet from the intersection when the defendant came into his line of vision, crossing directly toward him on the wrong side of the street. The plaintiff in an effort to avoid the threatened collision speeded up his machine and turned at an angle to the left. That he cannot be held as a matter of law guilty of negligence in doing this is clear from the well-established rule than one suddenly confronted with an un-

expected danger may use such means for avoiding the danger as would appeal to a person of ordinary prudence in a like situation without being held to strict accountability as to whether the course chosen is the most judicious or not. *Schneider v. Market St. Ry.*, 134 Cal. 482, 490, 66 Pac. 734. The defendant, by unlawfully cutting the corner and approaching the plaintiff from the wrong side of the street, is not in a position to complain of the plaintiff's deviation from the rule of the road in an attempt to avoid a collision. If the plaintiff was guilty of negligence at all, it was by virtue of the fact that he was driving at the rate of 15 miles an hour at a point within 25 or 30 feet of an intersection where the view of the intersecting street was obstructed. This situation involves the construction of the law in question as to the precise point on approaching such an intersection at which the driver must have reduced his rate of speed to 10 miles an hour.

[3] The purpose of this limitation of speed at intersections is obviously to avoid danger from the traffic crossing on the transverse street. Under the rules regulating such traffic, no danger arises until the passing vehicles reach the territory common to both streets at or within the lines of intersection. If then the speed has been reduced to 10 miles an hour at the point of intersection, the purpose of the limitation has been met. This is so held in *Blackburn v. Marple*, 184 Pac. 873, and we are in accord with the decision on that point. In this case the plaintiff was driving at the rate of 15 miles an hour as he came toward this intersection, and was within the speed limit prescribed by law on that part of the street. He was still from 25 to 30 feet from the intersection when driven by the emergency that confronted him to change his course and accelerate his speed. Testimony was given in the case that his brakes were in good order and that he could, while moving at 15 miles an hour, bring his car to a complete stop within 15 or 30 feet. Under these conditions he could without difficulty, had he been permitted to pursue a straight and uninterrupted course, have slowed down to 10 miles an hour before reaching the intersection. It cannot then be held as a matter of law that he was guilty of negligence because of driving at the rate of 15 miles an hour at this point. If defendant had kept to the right side of the street until he had passed the center of the intersection, there is no reason to assume that the plaintiff would not have slowed down to the prescribed speed at the

intersection and allowed defendant the right of way to cross ahead of him.

We find no evidence of the presentation of any claim by plaintiff for compensation under the Workmen's Compensation Act (St. 1917, p. 831), or any assignment or subrogation of right, to support appellant's contention that plaintiff could not maintain this action in his own name and right.

[4, 5] The errors of law assigned upon admission of testimony over defendant's objections and motions to strike, so far as in any way suggestive of prejudice, arise upon the admission in evidence, as part of a conversation had with defendant, of defendant's declaration to plaintiff, immediately after the collision that he carried accident insurance that would provide for plaintiff if he had suffered injury. As this was admitted as tending to show an acknowledgment of responsibility by defendant for the accident, we think it was proper evidence. Later in the trial, upon questioning on behalf of defendant of a physician who had made an examination of plaintiff to discover the extent of his injuries, plaintiff's counsel was permitted over defendant's objection to ask if he made the examination at the instance of the Fidelity & Casualty Company. This line of examination was objectionable and improper, but as the trial was before the court without a jury, and the affirmative answer of the witness was afterwards struck out by the court as incompetent, irrelevant, and immaterial, it may be treated as error without prejudice.

[6] Appellant complains of the judgment as excessive. It appears that \$1,000 of the total amount of \$1,241.50 included in the judgment was for personal injuries to the plaintiff. The evidence discloses that he was pinned beneath the overturned automobile, subjected to a severe nervous shock, and received numerous contusions and bruises, which, while they only confined him to his bed nine days, were still evidenced by swellings and soreness four months later. It also appeared that he was suffering from soreness of the kidneys, which the physician attributes to the accident, and expresses doubt as to whether or not it may be permanent. Under these conditions we are not prepared to say that the damages allowed are so great as to justify disturbing the findings and judgment of the court.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; LENNON, J.

(183 Cal. 273)

**CITY AND COUNTY OF SAN FRANCISCO  
v. INDUSTRIAL ACC. COMMISSION  
et al. (S. F. 9260.)**

(Supreme Court of California. June 30, 1920.  
Rehearing Denied July 30, 1920.)

**1. Constitutional law §20—Choice of Legislature between two possible meanings controls.**

Where a constitutional provision may well have either of two meanings, the action of the Legislature in adopting one of such meanings by statute is well-nigh, if not completely, controlling.

**2. Constitutional law §48—Court cannot invalidate statute except for plain conflict.**

The Supreme Court cannot declare void a provision of a statute, except for a plain and unmistakable conflict between it and the Constitution.

**3. Master and servant §372—"Injury" in provision for workmen's compensation includes disease.**

In view of the construction of the word "injury" in Workmen's Compensation Act, § 3, subd. 4, and section 6, Const. art. 20, § 21, providing the Legislature may create and impose liability on employers to compensate employes for any "injury" in the course of employment, irrespective of the fault of either party, permits an award of compensation for death of a city's hospital employé, caused by influenza contracted in the course of employment, and not by any bodily injury through violence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Injury.]

**4. Master and servant §405(4) — Evidence held to sustain conclusion influenza contracted in employment.**

In a widow's proceeding under the Workmen's Compensation Act for death of a city's hospital employé from influenza, evidence held sufficient to sustain the conclusion of the Industrial Commission that the employé contracted influenza in the course of his employment.

**In Bank.**

Proceedings for compensation for death of her husband under the Workmen's Compensation Act, by Geraldine Slattery, opposed by the City and County of San Francisco, a municipal corporation, the employer. To review an order of the Industrial Accident Commission awarding compensation, the employer applies for certiorari. Affirmed.

George Lull, City Att'y., Maurice T. Dooling, Jr., and Hugh L. Smith, all of San Francisco (Redman & Alexander, of San Francisco, of counsel), for petitioner.

A. E. Graupner and A. A. Tiscornia, both of San Francisco (W. H. Pillsbury, of San Francisco, of counsel), for respondents.

OLNEY, J. This is an application for a writ of certiorari annulling an award of the

Industrial Accident Commission. The applicant is a municipal corporation, and had in its employ as a hospital steward in one of its hospitals a man named Ernest F. Slattery. While so employed, Slattery was taken with influenza on October 15, 1918, and died of that disease eight days later. His widow presented to the commission a claim for compensation for his death, and the commission made an award in her favor. The present application is to annul this award.

Two grounds are urged why the award is invalid. The first, and more important, is that the awarding of compensation for death by disease, the origin of which was not a bodily injury suffered through violence, is beyond the powers of the commission. The second is that there is no evidence to support the finding of the commission that the disease of which Slattery died was contracted in the course of his employment, and arose out of it.

The decision on the first question presented turns on the meaning to be given to the word "injury" as used in article 20, § 21, of our Constitution. The section has been amended since Slattery's death, but at that time it read:

"The Legislature may by appropriate legislation create and enforce a liability on the part of all employers to compensate their employes for any injury incurred by the said employes in the course of their employment, irrespective of the fault of either party."

The word "injury" as so used means, of course, only bodily injury, and the position of the city is that it means only bodily injury suffered by or resulting from violence, while the position of the commission is that it covers any harmful effect upon the body, whether by violence or by disease. The word is frequently used in both the broader and the more limited sense. In common usage, it has the more general meaning. Thus, Webster defines "injury" as: (1) "Any wrong, damage, or mischief done or suffered"; as (2) "a source of harm"; or as (3) "a wrong, or damage done to another." On the other hand, when personal injuries are spoken of, there are apt to be meant only bodily injuries suffered through violence in some form or to some extent, traumatic injuries. The exact meaning of the word "injury" as used in Workmen's Compensation Acts, or in a similar connection, has come before the courts for consideration on numerous occasions, and their rulings are by no means harmonious. On the one hand, there are a number of cases holding that the word has the more limited meaning. An example of this is *Linnane v. Aetna Brewing Co.*, 91 Conn. 158, 99 Atl. 507, L. R. A. 1917D, 77, where it was held that the phrase "personal injury" did not include injury or harm suffered by disease, and that compensation was

not allowable for the death of an employé by pneumonia contracted as the result of unusual exposure and exhaustion in the course of his employment. Other examples along the same line are *Industrial Accident Comm., etc., v. Brown*, 92 Ohio, 309, 110 N. E. 744, L. R. A. 1916B, 1277; *Adams v. Acme, etc., Co.*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, Ann. Cas. 1916D, 689; *Richardson v. Greenburg*, 188 App. Div. 248, 178 N. Y. Supp. 661; *Llondale, etc., Works v. Riker*, 85 N. J. Law, 426, 89 Atl. 929.

On the other hand, there are a large number of decisions which adopt the broader meaning, and hold that compensation is allowable for the injury or harm done by disease, although the disease is not contracted as the result of any violence whatever in the ordinary sense of that word.

Under the English Workmen's Compensation Act, compensation is, or was, allowable only for "personal injury by accident," a much more limited expression than that found in our constitutional provision, and one in which it might well be thought there was some implication of an injury by violent external means. Nevertheless, the House of Lords held in *Brinton's v. Turvey*, L. R. Ap. Cases (1905) 230, that compensation was allowable for the injury sustained by a workman from anthrax contracted by him in the handling of infected wool; there being no violence other than that bacteria from the wool found their way into his system.

Similarly, it was held in *Scott v. Pearson*, L. R. 2 K. B. Div. (1916) 61, that compensation was allowable for cattle ringworm contracted by an employé by coming in contact, not violent, with infected calves.

Along the same line, the House of Lords held in *Glasgow Coal Co. v. Welsh*, L. R. 2 Ap. Cases (1916) 1, that a miner was entitled to compensation for rheumatism contracted by him as a result of his being required to stand for a number of hours in cold water to bale out the mine pit.

The Indiana Workmen's Compensation Act, like the English Act, allows compensation for "personal injury or death by accident." But in *United Paperboard Co. v. Lewis* (Ind. App.) 117 N. E. 276, compensation was allowed to a workman for acute nephritis contracted by him through his being required to work for several hours in heated paper pulp. The following portion of the opinion is pertinent here, the italics being ours:

"The courts have also differed as to whether a disease following an employment, should be considered an injury by accident within the meaning of such acts. In the various decisions on this subject it is generally recognized that diseases are of two classes: First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some un-

usual condition of the employment. The first class is illustrated by lead poisoning and the second by pneumonia following an enforced exposure. As a rule such industrial or occupational diseases are not considered as injuries by accident and in the absence of special statutory provision compensation is not allowed therefor. On the other hand, it is generally accepted that a *disease*, which is not the ordinary result of an employé's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, *is to be considered an injury* by accident, and comes within the provisions of acts providing for compensation for personal injury so caused [citing a long list of authorities]."

In *Hurle's Case*, 217 Mass. 223, 104 N. E. 336, L. R. A. 1916A, 279, Ann. Cas. 1915C, 919, a workman employed to tend furnaces for making gas claimed compensation for the loss of his sight due to an acute attack of optic neuritis induced by poisonous gases from the furnaces to which his work constantly exposed him. The Massachusetts act allowed compensation for "personal injury" without requiring that it be by accident, and the question discussed by the court was as to whether the case was one of a "personal injury." The discussion concludes thus:

"The learned counsel for the insurer in his brief has made an exhaustive and ingenious analysis of the entire act touching the words 'injury' or 'injuries,' and has sought to demonstrate that it cannot apply to an injury such as that sustained in the case at bar. But the argument is not convincing. It might be decisive if 'accident' had been the statutory word. It is true that in interpreting a statute words should be construed in their ordinary sense. Injury, however, is usually employed as an inclusive word. The fact remains that the word 'injury,' and not 'accident,' was employed by the Legislature throughout this act. It would not be accurate, but lax, to treat the act as if it referred merely to accidents."

In *State v. Trustees*, 138 Wis. 133, 119 N. W. 806, 20 L. R. A. (N. S.) 1175, the widow and children of a policeman dying from pneumonia contracted by exposure in the course of his duty made application for a pension under a statute which provided for a pension to the dependents of a policeman "injured" in the performance of his duty. It was contended that by injury was not meant disease merely, and upon this point the court said (138 Wis. 135, 119 N. W. 807, 20 L. R. A. [N. S.] 1175):

"The word 'injury,' in ordinary modern usage, is one of very broad designation. In the strict sense of the law, especially the common law, its meaning corresponded with its etymology. It meant a wrongful invasion of legal rights, and was not concerned with the hurt or damage resulting from such invasion. It is thus used in the familiar law phrase *damnum absque injuria*. In common parlance, however, it is used broadly enough to cover both the *damnum* and the *in-*

juris of the common law, and indeed is more commonly used to express the idea belonging to the former word, namely, the effect on the recipient in the way of hurt or damage, and we cannot doubt that at this day its common and approved usage extends to and includes any hurtful or damaging effect which may be suffered by any one. Hence, unless some reason to the contrary is presented, it should be so understood in these statutes. Subdivision 1, § 4971, Stats. (1898). The respondent contends that, nevertheless, the word should be limited to the results of external violence. By itself the word 'injury' or 'injure' has no more application to the result of violence than to the result of any other injurious influence. A disease resulting from negligence of a physician in failing to give treatment is just as much an injury in common phrase as if it resulted from affirmative maltreatment or external violence."

The following cases, in none of which was the element of violence present, are along the same line: *Alloa Coal Co. v. Drylle*, 6 B. W. O. C. 398 (death by pneumonia); *Hood v. Maryland, etc., Co.*, 206 Mass. 223, 92 N. E. 329, 30 L. R. A. (N. S.) 1192, 138 Am. St. Rep. 379 (contracting of glanders); *Dove v. Alpena, etc., Co.*, 198 Mich. 132, 164 N. W. 253 (death by anthrax); *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A, 273, Ann. Cas. 1918B, 293 (death by typhoid fever).

Finally there is the decision in this state in *Hartford, etc., Co. v. Industrial Accident Commission*, 82 Cal. App. 481, 163 Pac. 225, where an employé engaged in handling pulverized grain, and who contracted an affection of the nose and throat from the grain, was allowed compensation. The sole point discussed in the opinion, to be sure, is as to whether the disease was caused by the man's employment, but nevertheless it is a decision that cannot be justified unless the word "injury" is broad enough to include the harm done by disease.

[1] As between these two conflicting lines of decision it is not necessary to determine where the weight of authority lies, or which cases are the better reasoned. If those which give the broader meaning to the word "injury" do not lay down the better rule, they at least establish this, that it cannot be said that the broader meaning is an impossible or unreasonable one. The situation then, as it presents itself in connection with our constitutional provision, is at least that both by general usage and by the decisions of the courts the word "injury" may have either of two meanings, and that either is reasonable and possible. In such a situation, where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. When the Legislature has once construed the Constitution, for the courts then to place a different con-

struction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution. In *Fargo v. Powers* (D. C.) 220 Fed. 697, 709, it is said:

"If the constitutional provisions in question are susceptible of two constructions—one being that contended for by complainants, the other that taken by the Legislature—the action of the Legislature in adopting one of those constructions and enacting a statute carrying it into effect, as thus construed, must be deemed conclusive. That rule is: 'That the acts of a state Legislature are to be presumed constitutional until the contrary is shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly inconsistent with the language or subject-matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict.'

"Where a statute has been adopted in carrying into effect a constitutional provision, the constitutional provision and statute must both be so construed as to permit the act to stand. This question was passed on in *People v. Blodgett*, 13 Mich. 151, 161, 162, where Judge Christianity says: 'But it has been strenuously insisted here that these principles can only properly apply when the doubt exists as to the construction of the act, and not where it arises upon the meaning of a constitutional provision; that it is, in all cases the duty of the court first to fix and settle the meaning, definitely, of the Constitution, whatever may be their doubts upon it, and then to examine the act and apply it to the Constitution. Now, it strikes me, as a self-evident proposition, that the question whether a legislative act conflicts with the Constitution must, of necessity, equally involve the examination of both, and that, while it can make but little practical difference which is first examined and construed, the more logical order, when it is claimed that an act is unconstitutional, would be first to determine what the act is. Nor can I perceive any good ground for holding that the doubt which is to restrain us from pronouncing the act unconstitutional must be confined to the meaning of the act; nor why courts can be bound to settle, fix, and declare the meaning of the one, in spite of their doubts, more than of the other. The doubt which is to save the act is the doubt of the conflict; and this may arise alike from the construction of the one or the other, or both. In fact, it will be found that, in much the greater number of cases, where the rules above cited have been laid down, the doubts arise upon the



construction of the Constitution, and not upon that of the act which was claimed to conflict with it.

"In *Board of Education v. State Board of Assessors*, 133 Mich. 120, 94 N. W. 669, the question of the construction of this constitutional provision was before the court, which gave effect to the legislative construction, saying: 'But it is urged in behalf of the power exercised by the board in this case that, if the act is subject to this construction, it is in conflict with the constitutional amendment itself. In determining this question, under well-settled rules, we are not to ignore the contemporaneous construction placed upon the amendment by the Legislature itself.' *Kennedy v. Gies*, 25 Mich. 92; *Pfeiffer v. Board of Education*, 118 Mich. 564, 77 N. W. 250, 42 L. R. A. 536."

See, also, *County of Tulare v. County of Kings*, 117 Cal. 195, 49 Pac. 8; *Railroad Commissioners v. Market Street Ry. Co.*, 132 Cal. 677, 64 Pac. 1065.

In the present case, the Legislature has construed the Constitution, and has placed upon the word "injury" the broader meaning possible to it. Section 6 of the Workmen's Compensation Act (St. 1917, p. 831) provides that compensation shall be given by an employer "for any injury sustained by his employes arising out of and in the course of the employment and for the death of any such employe if the injury shall proximately cause death." Subdivision 4 of section 3 of the act defines injury as follows:

"4. The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment. In case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury."

[2, 3] The Constitution cannot be given the more limited meaning contended for by the city without declaring this provision in the statute void. This we cannot do, unless there is a plain and unmistakable conflict between the statute and the Constitution. But there is no such plain and unmistakable conflict, since the statute does no more than adopt what is at least a possible and not unreasonable construction of the Constitution. This being the case, it must be held that the provision of the Compensation Act, whereby a disease arising out of employment is declared to be an injury for which compensation shall be paid, is not unconstitutional, but is operative and controlling.

As to the second contention of the city, that Slattery did not contract the influenza from which he died because of his employment, the facts relied upon in its support are that an epidemic of the disease was raging in the city at the time, that the disease is highly infectious, and was so general that one out of every ten in the city con-

tracted it, and that every member of the community was exposed to it to a more or less extent. The existence of these facts cannot be doubted, and from them it is argued that it cannot be said with any reasonable certainty that Slattery contracted the disease because of his employment as hospital steward, even though he was handling influenza cases. It is also contended, and truly, that compensation is not due merely for injury by disease contracted by an employe, while employed. The injury must be one arising out of the employment, and where the injury is by disease there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute or, concretely, it must affirmatively appear here that Slattery contracted the disease from which he died because of his employment.

On the other hand, the evidence showed that the incubation period of the disease is from one to four days, that Slattery in the course of his duties during the five days preceding his being taken ill had had to handle and had been exposed to at least 12 developed cases of influenza, that so far as known he was not exposed to any cases except in the course of his employment, that he lived only half a block from the hospital where he was employed, and during the two weeks preceding his illness had been working very hard, and had gone directly from his home to his work and from his work to his home, and had not been out, that his exposure because of his work was far greater than that of the average person, and that among the nurses in the hospitals of the city, a class exposed in much the same degree as Slattery, the proportion who contracted the disease ran from 50 to 85 per cent. as against 10 per cent. for the community in general. The preponderance of the medical testimony also was to the effect that Slattery contracted the disease as a result of his peculiar exposure to it incidental to his employment.

[4] It, of course, cannot be said that from these facts it is certain that Slattery contracted his sickness because of his employment. But certainty is not required. It is not even required that the award be, in our judgment in accord with the preponderance of the evidence, in order that we be not at liberty to annul it. We cannot disturb the award unless we can say that a reasonable man could not reach the conclusion which the commission did. This we cannot say in the present case.

If there had been no epidemic in San Francisco at the time, and it appeared that Slattery as hospital steward had been exposed directly to a considerable number of influenza patients, and was not known to have been exposed otherwise, and had come down with the disease within the period

of incubation after his exposure, the conclusion that the disease was due to his exposure in the course of his work could hardly be questioned. But these are the actual facts, with the single exception that an epidemic was raging. To the extent of the severity of this epidemic the strength of the conclusion is weakened. It may well be that if the epidemic were so severe that the proportion of the general public who were attacked was anything like as great as the proportion of those exposed as was Slaterry, the question of whether he was attacked because of the exposure incident to his employment or because of the exposure general to the public would be so much a matter of conjecture and speculation as not to warrant a definite conclusion as the basis of an award. But the actual fact is that of persons exposed as was Slaterry the proportion of those attacked was from five to eight times as great as the proportion of those not so exposed. This ratio is so great that it cannot be said that the commission was not justified in concluding from it, in connection with the other facts, that Slaterry's illness was due to the peculiar exposure of his employment. Its conclusion is the more justified by the fact that it coincides with the conclusions of most of the physicians who testified. Their opinions upon a point of this character are entitled to consideration, since it is a part of their vocation to observe diseases and how they spread, and to draw conclusions from their observations.

Award affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; LENNON, J.; WILBUR, J.; SLOANE, J.

(47 Cal. App. 694)

**PETERSON v. RASMUSSEN et al.**  
(Civ. 2147.)

(District Court of Appeal, Third District, California. May 22, 1920. Rehearing Denied June 27, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Libel and slander §12(1)—Finding that writing imputed want of chastity held warranted.

Findings that a letter written by one of the defendants imputed want of chastity, etc., to plaintiff held warranted.

2. Libel and slander §21 — Party need not be named if otherwise identified.

To constitute libel a party need not be named in the writing if pointed to by description or circumstance tending to identify him.

3. Libel and slander §7(16)—Imputation of unchastity actionable per se.

Words imputing to a woman want of chastity are actionable per se.

4. Libel and slander §33—Damages to reputation presumed to result from libel per se.

Damages to a person's reputation are presumed to result from a libel per se; so, where a letter was libelous per se because imputing want of chastity to plaintiff, who was sufficiently identified, there is a sufficient presumption of damage.

5. Libel and slander §44(2) — Libelous letter not "privileged communication."

Under Civ. Code, § 47, subd. 3, a "privileged communication" is one made without malice to a person interested by one who is also interested or by one who stands in such a relation to a person interested as to afford a reasonable ground for supposing the motive for the communication innocent, etc.; hence a letter to plaintiff's friends written by defendant, the mother of one who was then engaged to marry plaintiff, imputing to her a want of chastity, etc., was not privileged, where it was not in response to any question by plaintiff's friends, who had introduced her to defendants' son.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

6. Libel and slander §101(4) — Burden of proving privilege on defendant.

Defendant has the burden of proving privilege set up in the answer.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Helga Peterson against Christ Rasmussen and Mrs. C. (Boline) Rasmussen. From a judgment for plaintiff, the last-named defendant appeals. Affirmed.

P. H. Johnson and Irving D. Gibson, both of Sacramento, for appellant.

Martin I. Welsh, of Sacramento, for respondent.

NICOL, Presiding Judge pro tem. This is an action for damages for an alleged libel on plaintiff, committed by means of a letter written by appellant Mrs. C. (Boline) Rasmussen in the Danish language. It is not disputed that the said appellant wrote the letter, and that it was delivered to and read by the addressees, a certain Mr. and Mrs. Simonsen, in Sacramento.

Briefly the complaint alleges that plaintiff is an unmarried woman of 24 years of age; that the defendants are husband and wife, residing together as such near Loomis in Placer county; that on the 7th day of March, 1917, the plaintiff and defendants knew each other personally, and on said day, and for a long time prior thereto, the plaintiff and Mr. and Mrs. Simonsen (the addressees of the letter) were close friends; that at all times prior to the publication of the defamatory statements contained in the letter hereinafter set forth plaintiff had always maintained a good

name and reputation among her neighbors, acquaintances, and friends for virtue, politeness, moral worth and integrity, and had never been suspected of being unchaste and without virtue; that on the 7th day of March, 1917, the defendant Mrs. C. Rasmussen wrote of and concerning plaintiff a letter in the Danish language to Mr. and Mrs. Simonsen in Sacramento; that by said letter the said defendant published of and concerning plaintiff a false, unprivileged, and malicious writing which, translated from the Danish into the English language, is as follows:

"Loomis, March 7, 1917.

"Mr and Mrs. Simonsen: Inclosed you will find receipt for \$50.00, there is \$15.00 due yet. We have heard you are selling milk for \$14.00 per month, so we see she is paying for herself, which we are very glad to hear, but there is one thing we are not satisfied with, and that is, you put that old thing on Andrew, why she looks old enough to be his grand mother, with her glasses on and false teeth, no, just leave other peoples children alone, you may have trouble enough before you have your own boys brought up and send out into this world, so you shall not do ill to others, it may fall back on yourself some day, and what is that kind of talk he is telling about her operation? is that why she had to wear a maternity dress, when she comes up to visit us, was she afraid we should see her shape and then she comes up here before I even had a chance to invite her, no, that is the most shameful I have seen, and I am absolutely ashamed that she is Danish, we have never in our lives seen such an impudent woman before in this country next time she comes up here I will lock the door, as we do not like to be insulted in our own house. Thanks for the money but let Andrew alone he has plenty of time he can get plenty of sickness, he don't need to marry it.

"[Signed] Mrs. C. Rasmussen

"Box 105.

Loomis, Cal."

It was alleged that by the language used in this letter the said defendant intended to charge, and to be understood as charging, that plaintiff was pregnant, and was wearing a maternity dress to hide and conceal her shape, in order that her pregnant condition might not be disclosed, and that she was to have an unlawful operation performed to relieve her of the child, and further that the letter was so understood by the readers thereof. It was further alleged that the charges so made in said letter were and are in every particular false, untrue, defamatory, libelous, and unprivileged, and that they did expose plaintiff to hatred, contempt, ridicule, and obloquy, and that by reason thereof she was injured in her reputation and good name, and has also caused her grievous mental suffering and humiliation.

The Simonsens, to whom this letter was addressed, were intimate friends of the plaintiff and had introduced appellant's son Andrew to plaintiff. The plaintiff and Andrew

thereafter were engaged to be married, but the engagement was broken when plaintiff learned of the letter above set forth. At the time of the trial Andrew was in the United States forces in France.

An answer was filed denying the material allegations of the complaint, and by way of defense sets up that the communication was privileged. The case came on for trial before the court without a jury, and the court filed its findings of fact and conclusions of law sustaining the material allegations of the complaint and gave judgment in favor of plaintiff and against the defendant Mrs. C. Rasmussen, from which judgment said defendant has appealed.

Appellant argues that the judgment should be reversed for the following reasons: (1) That the allegations of the complaint that the letter was written "of and concerning plaintiff" is not sustained by the evidence; (2) that the plaintiff was not entitled to damages, as there is no presumption of general damages, since the words in the letter are not libelous per se; that they do not on their face apply to plaintiff and are not libelous of themselves; and (3) that the letter was a privileged communication.

[1] 1. The court found that by the use of the words and language contained in said letter "the said defendant Mrs. C. Rasmussen intended to charge and assert and to be understood as charging and asserting, and was by the readers of the said letter, and those to whom the contents thereof were disclosed, in fact understood as charging and asserting and it did charge and assert therein, among other things, that the plaintiff was pregnant and with child and was wearing a maternity dress to hide and conceal her shape in order that her pregnant condition might not be disclosed, and that the said plaintiff was to have an unlawful abortion performed to relieve her of the child."

And the court further found that the said charges "were in every particular false, untrue, defamatory, libelous, and unprivileged. \* \* \*

These findings are fully sustained by the evidence. That the said defendant referred to the plaintiff in this letter appears from her own testimony given at the trial:

"Mr. Welsh: Q. Who were you referring to, Mrs. Rasmussen? A. I was referring to that girl. Q. Miss Peterson here? A. Yes; I did. Q. That is the one you referred to? A. Yes."

It is also plain from the record that Mr. and Mrs. Simonsen (the addressees of the letter) understood the letter as referring to the plaintiff. S. Simonsen testified:

"I have known Helga Peterson since she came to this country. She came to our house quite often. Miss Peterson and my wife are very close friends. \* \* \* I have no feeling against the Rasmussens. I don't like that let-

ter they sent her very much. I have a feeling against them at the present time on account of the letter. \* \* \* I did not make any effort to have Andrew Rasmussen become engaged to Miss Peterson, nor did my wife, that I know of. It is not true that my wife invited her there when she came there in the first place. My wife invited her to come to my place in North Sacramento. Andrew Rasmussen was there at the time. He came first."

The plaintiff testified that when Mrs. Simonsen showed her the letter the first time "she said some mother-in-law I had to write a letter like that." This evidence of the plaintiff was received without objection. The testimony in the case shows that the Simonsens understood the letter to refer to the plaintiff and plaintiff's engagement to Andrew Rasmussen, the son of defendants.

[2] To constitute libel a party need not be named in the writing if pointed to by description or circumstance tending to identify him. *Burkhart v. North American Co.*, 214 Pa. 39, 63 Atl. 410; *Clark v. North American Co.*, 203 Pa. 346, 53 Atl. 237; *Bohan v. Record Publishing Co.*, 1 Cal. App. 429, 82 Pac. 634.

[3,4] 2. The appellant takes the position that, since plaintiff's name is not mentioned in the letter, there is no libel per se, and therefore no presumption of general damages. Her position in this regard is untenable. The letter, we think, is on its face libelous; and it is alleged and proven that the said letter referred to the plaintiff. Words imputing to a woman a want of chastity are actionable per se. *Preston v. Frey*, 91 Cal. 107, 27 Pac. 533; *Hitchcock v. Caruthers*, 82 Cal. 523, 23 Pac. 48; *Kedrovivansky v. Niebaum*, 70 Cal. 216, 11 Pac. 641; *McKinney v. Roberts*, 68 Cal. 192, 8 Pac. 857. Damages to a person's reputation are presumed to result from the publication of a libel per se. *Bohan v. Record Publishing Co.*, 1 Cal. App. 429, 82 Pac. 634.

[5] 3. There is nothing in the record showing, or tending to show, that the letter was a privileged communication. The letter was not in response to any inquiry made by the Simonsens. A privileged communication is one made "without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information." Section 47, subd. 3, Civ. Code.

[6] The burden of proving the privilege as set up in the answer was upon the defendant. *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Adams v. Cameron*, 27 Cal. App. 625, 150 Pac. 1005, 151 Pac. 286. The testimony shows an absence of privilege and the said letter and charges were by the trial court

found to be false, malicious, and unprivileged. The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(47 Cal. App. 555)

**BOWDEN v. HERBERGER et ux.**  
(Civ. 2684.)

(District Court of Appeal, Second District, Division 2, California. May 19, 1920.)

1. Appeal and error  $\S$  1001(1)—Verdict not disturbed where sustained by evidence.

Where there is sufficient evidence to warrant the jury on finding as it did on a question of fact, the appellate court will not disturb the verdict.

2. Animals  $\S$  70—Knowledge of viciousness essential to liability for injury.

The owner of an animal not naturally vicious is liable for injuries done by it if in fact vicious and he had knowledge.

3. Animals  $\S$  74(7)—Instruction on dog's propensity termed "mischievous," held not erroneous.

In an action for injuries to a boy when bitten by defendant's bulldog, use of word "mischievous" in addition to "vicious," in an instruction on the dog's propensity and defendant's knowledge thereof, held not erroneous as importing misconception into the instruction.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Edward Frank Bowden, a minor, by K. K. Keith, his guardian ad litem, against L. J. Herberger and wife. From judgment for plaintiff, defendants appeal. Affirmed.

Griffith Jones, Warren L. Williams and Leonard S. Bower, all of Los Angeles, for appellants.

Riddle & Cheroske, of Los Angeles, for respondent.

WELLER, J. This is an action to recover for injuries to plaintiff, caused by the attack of a dog belonging to the defendants. A jury fixed the damages at \$1,000, and from the judgment entered on the verdict defendants appeal.

Defendants were the owners of two bulldogs, and kept them in defendants' back yard, which was inclosed with a high-board fence, and from which a gate opened into the alley in the rear of the premises. Plaintiff, a minor six years of age, lived with his mother in the same block, and was accustomed to play in the alley. On the occasion of the injury, he was in the alley spinning a top. One of the dogs had escaped from defendants' premises into the alley, and Mrs. Herberger stood at the open gate calling him.

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From this point confusion reigned. No witness gives a clear statement of what occurred. Mrs. Herberger testified that as the dog approached her the boy threw the top at him, provoking the assault. Plaintiff denied being the aggressor, and stated that he struck the dog with the top after the animal bit him. But the result was that the dog attacked the boy, and inflicted the injuries upon which this action is based.

[1] Appellants challenge the sufficiency of the evidence to sustain the verdict claiming a lack of proof that the dog was vicious, and that the defendants were aware of its viciousness. Witnesses testified to previous attacks by the dogs on other persons, and that knowledge thereof had been communicated to defendants. While there is a conflict in the testimony on this point, there is sufficient evidence to warrant the jury in finding as it did; and, under the well-established rule, this court will not disturb the verdict.

The second point urged by appellants is that the court erred in instructing the jury. Defendants requested the following instruction:

"You are further instructed that the plaintiff's evidence must be sufficient to sustain the allegations of the complaint as to the vicious character of the dog and the defendants' knowledge thereof, and the plaintiff's ignorance thereof."

The court modified the instruction by striking out the words "and the plaintiff's ignorance thereof." Counsel cites the case of *Haneman v. Western Meat Co.*, 8 Cal. App. 688, 97 Pac. 695, as authority for his assignment of such action by the court as error. The court in that case did hold that the plaintiff was required to prove the allegations of his complaint that the horse was vicious, that the defendant knew of that fact, and that plaintiff was ignorant thereof. But that was an action by a servant against his master; and, as stated in the opinion, the employe assumes the risks that are ordinarily incident to the business in which he is employed.

[2] The general rule is that the owner of an animal, not naturally vicious, is liable for injury done by the animal if it was in fact vicious, and the owner had knowledge of that fact. *Finney v. Curtis*, 78 Cal. 498, 21 Pac. 120. The instruction as given was in accord with that rule, and the court properly applied it.

The jury was fully instructed on the question of contributory negligence, and it was not limited in its scope to a child of tender years; so that the defendants had the advantage of the instruction as though plaintiff had been an adult and in full possession of his faculties.

At the request of plaintiff the court gave the following instruction:

"Before the plaintiff can recover you must find from the evidence: First, that the dogs before the biting, or alleged biting, of the plaintiff complained of, were of a vicious, mischievous propensity, and accustomed to biting mankind. Second, that the defendants had knowledge or notice of these characteristics."

[3] Appellants assert that the use of the word "mischievous" imports a wholly erroneous conception into the instruction. In support of their criticism counsel cite *Fries v. American Lead Pencil Co.*, 141 Cal. 610, 75 Pac. 164. We cannot find therein any analogy to the facts in the instant case. The word did not add to or detract from the efficacy of the instruction.

No other points are discussed by appellants, and we find no error in the record.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(47 Cal. App. 673)

**COMMERCIAL ACETYLENE SUPPLY CO.  
v. FOX. (Civ. 3221.)**

(District Court of Appeal, First District, Division 2, California. May 22, 1920.)

**1. Bailment ⇨11—Contract enlarging bailee's liability must be clear.**

A contract, enlarging a bailee's liability to that of an insurer, must be specific and in clear and unambiguous language, when, though it will not be extended beyond its terms, it must be given effect as showing the intention of the parties.

**2. Bailment ⇨14(1)—Bailee of gas cylinders liable as insurer.**

Contract covering bailment of gas cylinders sent defendant by plaintiff as containers of gas sold, and providing that defendant was responsible for any damage to the cylinders while in his possession or control, held to render defendant liable for damage not caused by his negligence; provision defendant should trace and make claim against railroad company for lost cylinders being insufficient to nullify effect of agreement to be responsible.

**3. Bailment ⇨14(1)—Bailment consideration for bailee's obligation as insurer.**

The bailment of gas cylinders as containers of gas sold was sufficient consideration for the bailee buyer's obligation to make good all damage to the cylinders while in his possession, whether or not due to his negligence.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Commercial Acetylene Supply Company against E. Fox, doing business under the firm name and style of Markovits & Fox. From judgment for plaintiff, defendant appeals. Affirmed.

E. M. Rosenthal, of San Jose, for appellant.

Adams & Adams, of San Francisco, for respondent.

NOURSE, J. Judgment in the sum of \$400 was rendered in favor of plaintiff and against defendant in this action, from which the latter appeals.

The action (which was tried on an agreed statement of facts) was for damage to four gas cylinders, of the value of \$440, owned by plaintiff, and which were almost totally destroyed by fire while in the possession of defendant, without negligence on his part. Their value, when subsequently returned to the plaintiff, was but \$40. The cylinders contained acetylene gas sold by plaintiff to defendant upon a contract in the form of a letter addressed by plaintiff to defendant and accepted by the latter. It provided as follows:

"We acknowledge, with thanks, your order for one tank of acetylene, which we are shipping to-day via Southern Pacific freight. This cylinder is the property of this company and valued at \$110. It is merely loaned you while you are using the gas contained therein. Refilling of same, except by us, or the reloading of any cylinder without our written consent, is prohibited. When empty they are to be returned to us at West Berkeley, via Southern Pacific freight, charges prepaid. You are also responsible for any damages to any of our cylinders while they are in your possession or care, and we hold you responsible for same until they are received back at our plant. Any cylinders lost in transit to us are to be traced by you until located and if this cannot be done, you are to enter claim with railroad or express company for the value of the cylinders. We require this as our gas is sold f. o. b. West Berkeley, Cal. We reserve the right to charge rental on cylinders retained by you in excess of thirty days. The above is equally applicable to future orders for acetylene except that should you at any time receive different size cylinders the value of same will vary accordingly. Kindly sign and return duplicate of this agreement, sent you herewith. Yours very truly, Commercial Acetylene Welding Co. [Signed] A. R. Chandler. Accepted. [Signed] Markovits & Fox. E. Fox. [Customer.]"

The determination of this action resolves itself into a proper interpretation of the foregoing agreement. It is conceded that a bailee may by a special contract assume the liability of an insurer. The question here is whether this agreement met the requirements necessary for such a contract so as to

make the bailee liable for damages occurring without his negligence.

Appellant argues that it enlarged his liability only in that it increased the degree of care to be exercised by him; that otherwise it merely expressed what the law would have implied in the absence of an agreement, and that, therefore, with the exception mentioned, his liability was the same; that is, the damage having occurred without negligence on his part, he was not liable.

[1, 2] A contract enlarging a bailee's liability must be specific and in clear and unambiguous language; and, while it will not be extended beyond the obvious scope of its terms, it must be given effect as showing the intention of the parties. The provision, "You are responsible for any damages to any of our cylinders while they are in your possession or care," determines the nature of the contract and fixes appellant's liability. As the obligation to be responsible for any damages is not one which the law would have implied—the law implying responsibility only for damage due to a bailee's negligence (*Commercial Elec. Sup. Co. v. Missouri Com. Co.*, 186 Mo. App. 332, 148 S. W. 986, 997)—it must be presumed that the purpose of including this clause in the agreement was to protect respondent from loss occurring under just such circumstances. It does not appear that the provision for tracing and making claim against the railroad company for lost cylinders is, when taken in connection with the entire agreement, sufficient indication of a contrary intention to nullify the effect of the definite agreement to be responsible for any damages while in appellant's possession. This provision is easily distinguishable from the provision of the contract in *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, 67 C. O. A. 265, cited by appellant, holding that an agreement to be "responsible" for coal after delivery was not a contract of insurance.

[3] There is no merit in the point urged by appellant that there was no consideration to support this obligation. The bailment itself is a sufficient consideration for such an obligation. *Commercial Elec. Sup. Co. v. Missouri Com. Co.*, supra. In addition to that, in this instance, the bailee was given the use of the cylinders for one month without rent.

For the foregoing reasons the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(47 Cal. App. 617)

**BOYER v. CITY OF LONG BEACH.**  
(Civ. 3371.)(District Court of Appeal, First District,  
Division 2, California. May 20, 1920.)**1. Appeal and error §134(2)—Order of dismissal an appealable "final judgment."**

Order, dismissing an action under Code Civ. Proc. § 581a, in view of section 581, when entered upon the minutes of the court, is a "final judgment," from which an appeal may be taken.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

**2. Appeal and error §927(2)—Proceedings on hearing of motion to dismiss action presumed to have been regular.**

In the absence of a record of proceedings had on hearing of motion to dismiss action, the presumption is that they were regular.

**3. Dismissal and nonsuit §81(5)—Motion to vacate order dismissing action held properly denied.**

Where the trial court had jurisdiction of the subject-matter of the action, and notice of substitution of attorneys was not treated as an appearance by either party until long after dismissal of the action, the notice was not followed by demurrer or answer, no attempt was made to bring the cause to trial, no stipulations were made on behalf of defendant, and no concessions were given by plaintiff, plaintiff's motion to vacate order dismissing the action was properly denied.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Samuel C. Boyer against the City of Long Beach. From an order denying motion to vacate order dismissing the action, plaintiff appeals. Affirmed.

J. W. Falkner, of Los Angeles, for appellant.

James E. Kelby, G. Hoodenpyl, and Christian Hoepfner, all of Los Angeles, for respondent.

**NOURSE, J.** This is an appeal by plaintiff from an order denying his motion to vacate an order dismissing his action against defendant, made under section 581a, Code of Civil Procedure, on the ground that the summons in the action was not served on defendant within three years next after the commencement of the action, and that defendant had not appeared in said action. The complaint was filed on May 12, 1914. Summons was not served upon defendant at any time. On October 4, 1915, the mayor of the defendant city served on counsel for plaintiff a notice that certain attorneys had been substituted by defendant for other attorneys, and this notice was filed with the papers in the case. Nothing further was done until January 4, 1918, when the attor-

neys so substituted for the first time appeared in the action and moved a dismissal on the grounds above stated. This motion was granted on January 16, 1918, no opposition being made thereto on behalf of plaintiff. Thereafter, and on August 5, 1918, plaintiff filed a notice of motion to vacate the order of dismissal on the grounds that: (1) The motion was made by one who was not an attorney of record; (2) that the face of the record showed that a general appearance had been made by defendant; and (3) that the motion was not supported by affidavits or other evidence. This motion was denied by the trial court, and from that order the appeal is taken.

[1] An order dismissing an action under section 581a, Code of Civil Procedure, is, when entered upon the minutes of the court, a final judgment from which an appeal may be taken. It was so held in *Marks v. Keenan*, 140 Cal. 33, 73 Pac. 751, when the provisions of this section were contained in section 581. It is true the latter section also provided that the orders of dismissal should be entered in the minutes of the court and that when so entered they should be effective for all purposes. This language was not carried into section 581a when the change was made, but the record here discloses that the order was entered in the minutes of the court, and the effect of the entry can be none other than that specified in section 581. When a judgment or order is not void on its face because the subject-matter is without the jurisdiction of the court reviewing it, the law provides sufficient methods to reverse or correct it by appeal, by certiorari, by a suit in equity, and by motion under section 473, Code of Civil Procedure. The time within which relief may be sought by appeal or motion under section 473 is limited by statute, the time within which certiorari or a suit in equity may be instituted is determined by the equities of the case. There is no statutory authority for a motion to set aside a judgment after the period fixed by section 473 has expired, at least if such judgment is not void on its face because of want of jurisdiction of the subject-matter. It is not necessary to discuss the remedies for relief from the latter class of judgments, because this is not such a case.

[2] The motion to vacate the judgment was made more than six months after its entry. The first and third grounds urged in the motion cannot be considered because, in the absence of a record of the proceedings had on the hearing of the motion to dismiss, the presumption is that they were regular. The second ground urged—that the defendant had made a general appearance in the action within the three-year period—presented a mixed question of law and fact which the trial court was required to determine up-

on the hearing of the motion. If it correctly determined that no appearance had been made—failure of service of summons being admitted—then the order dismissing the action was proper. If the court was in error, plaintiff had a plain remedy by appeal.

[3] In any event, the trial court certainly had jurisdiction of the subject-matter, and the judgment is not void on its face for that reason. It is apparent that the notice of substitution of attorneys was not treated as an appearance by either party until long after the action had been dismissed. The notice was not followed by demurrer or answer, no attempt was made to bring the cause to trial, no stipulations were made on behalf of defendant, and no concessions were given by plaintiff. That the notice was not intended to be an appearance is clear.

The trial court properly denied the motion to vacate the judgment, and its order is therefore affirmed.

We concur: LANGDON, P. J.; BRIT-TAIN, J.

(47 Cal. App. 608)

**MOSLEY v. SEELY. (Civ. 3131.)**

(District Court of Appeal, Second District, Division 1, California. May 20, 1920.)

1. Bills and notes  $\S$ 211 — Indorsement by payees rendered note transferable by delivery.

A note payable to parties who indorsed it was like a note payable to bearer, subject to transfer by mere delivery with intent to pass title.

2. Patents  $\S$ 215 — Evidence held to show plaintiff's agreement to repurchase invention for which note was given.

Evidence held sufficient to support finding that plaintiff suing on a note agreed to rebuy from defendant the interest in a camera improvement for which the note was given at a like price to that paid by him, and that subsequently defendant elected to sell back and did so sell.

3. Appeal and error  $\S$ 1170(1)—Errors not resulting in miscarriage of justice not reversible.

Under Const. art. 6,  $\S$  4½, errors committed on trial but not resulting in a miscarriage of justice are not reversible.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by L. J. Mosley against Will H. Seely. From judgment for defendant, plaintiff appeals. Affirmed.

Allison & Dickson, of San Bernardino, for appellant.

Cecil H. Phillips, of San Bernardino, for respondent.

SHAW, J. Action to recover upon a promissory note for \$500 made by defendant to plaintiff and one H. K. Fairall, in which, as alleged in the complaint, Fairall transferred his interest therein to plaintiff, who was the legal holder thereof, and all of which remains unpaid.

The answer not only raised issues as to the ownership of the note and nonpayment thereof, but alleged that the note was in part consideration for a transfer to him by plaintiff and Fairall of a one-third interest in an invention for the improvement of cameras, for which at the time he paid \$500 in cash and gave the note in question; that thereafter by mutual consent he reconveyed the interest, whereupon the obligation was rescinded.

Further answering and as a counterclaim, he alleged that, at the time of the making of the note, plaintiff and Fairall gave him a written agreement that in case he should desire to sell the interest and improvement in cameras so transferred to him on September 8, 1914, which was the date of the note, they would repurchase the same on or about January 15, 1915, at the price so paid by him; that thereafter, to wit, on or about January 14, 1915, he elected to sell the same back to them and so notified Fairall and plaintiff, who repurchased his interest for the sum of \$1,000, upon which they paid the sum of \$250, leaving a balance due and unpaid of \$750, all of which allegations plaintiff by answer denied.

[1; 2] Upon the issues so tendered, the court made findings adverse to plaintiff and gave judgment thereon in favor of defendant, from which plaintiff appeals, claiming the evidence is insufficient to support certain findings. These findings are, first, that plaintiff is not the legal holder and owner of the promissory note. As appears from the record, the note was made payable to H. K. Fairall and L. J. Mosley, by both of whom it was indorsed and, therefore, like a note payable to bearer, subject to transfer by mere delivery with intent to pass title thereto. *Meyer v. Foster*, 147 Cal. 166, 81 Pac. 402; *Eames v. Crosier*, 101 Cal. 260, 35 Pac. 873. Conceding, however, that this and the further finding that the payees of the note agreed that they would not transfer the same are without support of evidence, the error could not affect the judgment, since the note was not transferred, and, in our opinion, the evidence is sufficient to support the further finding, upon which the judgment rests, to the effect that plaintiff agreed to rebuy from defendant the interest in said camera improvement at a like price to that paid by him therefor, and "that on or about the 14th day of January, 1915, defendant elected to sell and on or about the 20th day of May, 1915, did sell his said one-third interest in said improvement in cameras, to



said plaintiff and said Fairall, in accordance with last-mentioned agreement, and on or about last-mentioned date said plaintiff and said Fairall bought the same back from defendant in accordance with said agreement," which sale so made by defendant to plaintiff and Fairall was by them accepted. And, in this connection, the court, upon sufficient evidence, further found that plaintiff and Fairall paid to him the sum of \$250, which, together with the promissory note, amounted to \$750, thus leaving a balance due him of \$250, for which he was given judgment. The evidence in support of these findings is: First, a written agreement signed by Fairall and Moseley whereby they agreed to repurchase the improvement in cameras from defendant at the same price paid therefor by him; and, second, testimony of Fairall to the effect that, for himself and plaintiff and pursuant to the terms of said agreement, he purchased from defendant the interest by them sold to him in said camera invention, and paid thereon the sum of \$250. This was on May 29, 1915, from which date, his testimony tends to prove, they did not regard defendant as having any interest in the invention and dealt with other parties as to the invention, assuming they owned the whole thereof. The alleged insufficiency of evidence to support these findings is based upon the sole claim that defendant did not execute a written assignment of transfer of his interest in said invention to plaintiff and Fairall; the argument being that, under section 4898 of the Revised Statutes of the United States, an interest in a patent cannot be assigned except by an instrument in writing, in support of which he also cites several authorities. Conceding this to be true, there is no evidence that the invention was patented or that it was even patentable, and, as said in *Burr v. De La Vergne*, 102 N. Y. 415, 7 N. E. 866, said section 4898 has reference solely to patents or an interest therein. It does not relate to an invention which has not been and may never be patented.

[3] The evidence clearly tends to prove that plaintiff and Fairall, his copartner, agreed in writing to repurchase the interest sold by them to defendant in case he desired to sell; that he did express his desire to resell, and thereupon Fairall, with the knowledge of plaintiff, paid him \$250 towards the repurchase, and, according to his testimony and that of defendant, both regarded the interest as belonging to plaintiff and Fairall, and in subsequent transactions dealt with it as being their own. We perceive no merit in the errors pointed out by appellant. Plaintiff and Fairall owned the invention. They agreed, at his option, to buy back the interest therein sold to him, and, upon his exercising the option, paid him

\$250 on account of such resale, thus leaving a balance due him of \$750, upon which the effect of the judgment is to credit them with the \$500 note. Applying section 4½ of article 6 of the Constitution, we cannot escape the conviction that, whatever errors were committed in the trial, they did not result in a miscarriage of justice.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(47 Cal. App. 691)

# **LINELL v. GORDON. (Civ. 2839.)**

(District Court of Appeal, Second District, Division 1, California. May 22, 1920.)

**Account stated—19(3)—Evidence held insufficient to support finding of no account stated.**

Evidence held insufficient to support the court's finding that there was not an account stated and that the defendant had not agreed to pay balance shown thereby.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by N. L. Linell against J. A. Gordon. Judgment for defendant, and plaintiff appeals. Reversed.

Andrew Johnston, of Turlock, and Walter C. Davison, of Riverside, for appellant.

Thomas C. Yager, of Los Angeles, for respondent.

CONREY, P. J. Action to recover money due on an account stated. From the judgment entered in favor of the defendant the plaintiff appeals.

The only controversy which we shall find it necessary to determine arises upon appellant's contention that the evidence is insufficient to justify the finding of the court that there was not an account stated and that the defendant did not agree to pay the balance shown by the alleged statement of account. Under date May 5, 1914, the defendant sent to plaintiff by mail a statement of account showing the result of certain financial transactions in which the plaintiff and the defendant were jointly interested, which statement of account closed as follows: "May 5/14. By balance due L. Linell, \$1,009.65." The statement was accompanied by a letter in which the defendant informed the plaintiff that defendant had traded 40 acres of land of the plaintiff, together with other land of the defendant, and had received a trust deed for \$21,000 secured on an alfalfa ranch near Riverside; that plaintiff's land had been put in at \$4,000 and defendant had paid a commission of 5 per cent. The letter closes as follows:

"The trust deed is drawing 7% interest and no taxes, and the first payment will be Dec. 1/14, when you will get your money and 7% interest on it. I am very sorry that I could not get cash for this, but this is the very best offer that I have had since I saw you, and I hope this will meet with your approval. I have some notes due in Aug., and if I get the money on them I will pay you off. There will be some more small charges for certificate of title and escrow charges."

Plaintiff replied to that letter under date July 12, 1914, wherein he acknowledged receipt of defendant's letter, and said:

"I am very glad that you succeeded in disposing of the land at Thermal Heights."

The defendant, in his answer, denied that he rendered to the plaintiff an account stated, and denied that by said account stated there was any amount found due to the plaintiff from the defendant. To the contrary, defendant alleged that on or about February 14, 1913, they entered into a contract in writing, set out as Exhibit A of the answer. This contract, over plaintiff's objection, was received in evidence. It shows that the defendant advanced a sum of money to secure the redemption of plaintiff's 40 acres of land, and the plaintiff conveyed the land to the defendant; that the defendant thereupon agreed "that when said property shall be sold, and that at the time of such sale and out of the proceeds of which second party shall receive" certain specified moneys advanced by him, "then the balance of the proceeds shall be divided equally between both parties hereto." The account rendered in May, 1914, represents the outcome of that transaction down to that date.

Respondent contends that the evidence shows, not an account stated, but only an agreement under which appellant was not to receive any moneys from the defendant, except out of the proceeds of the sale of the plaintiff's property. It should be conceded that if the property had been sold for money only, as contemplated by the agreement of February 14, 1913, the defendant would have been bound to pay to plaintiff only plaintiff's share of the net proceeds of such sale. It appears, however, that, acting upon his own responsibility, he disposed of plaintiff's land in connection with the trade which he made for the trust deed. His statement to the plaintiff, and the report which he made, that "I have some notes due in Aug., and if I get the money on them I will pay you off,"

are inconsistent with his present theory that, having traded for the trust deed, he was to pay the plaintiff only out of the cash proceeds of the sale of plaintiff's land. In making this statement, together with his statement of account showing "balance due" from himself to Linell on May 5, 1914, he offered a statement of account, which, when accepted by the plaintiff, as it unqualifiedly was accepted, constituted an account stated. The money was then due, but the defendant explained that he was not prepared to pay at that time.

Our conclusion that this was an account stated on which the specified amount then became due is confirmed by the subsequent conduct of the defendant. Under date of September 20, 1915, the defendant wrote to the plaintiff a further statement of the situation. Here he states for the first time that the land covered by the \$21,000 trust deed was subject to a first mortgage of \$15,000. He then states that the owner of the land failed to pay the interest on the first mortgage; that defendant had been required to pay the interest, together with taxes and other expenses on the land; that—

"I finally had to foreclose on the trust deed and that cost me \$438, and now that I have a title to it I am trying to sell or trade it, but times are so hard that I have not much hopes of doing either. You can rest assured that as soon as I get any money out of the property that I will pay you with interest, but it is impossible for me to do anything now."

The promise to pay plaintiff "with interest" implies a debt due; for if defendant was to pay only out of cash proceeds of the sale of plaintiff's land, he would not be chargeable with interest until such cash proceeds had been received. Moreover, defendant's admission that he foreclosed on the trust deed and obtained title to the land secured thereby, places him in the same position as if, on foreclosure of such trust deed, the land had been purchased by some third person and the purchase price paid over to the defendant. From the foregoing summary of the evidence we conclude that the evidence is insufficient to support the court's finding that there was not an account stated and that the defendant had not agreed to pay the balance shown thereby.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(47 Cal. App. 563)

**PRATT v. PADGETT.** (Civ. 2954.)

(District Court of Appeal, Second District, Division 1, California. May 19, 1920.)

**Landlord and tenant** ⇨ 29(3)—Landlord renting house for gambling cannot recover for injury to its reputation.

One renting a house, with the intention of both parties that it be used for gambling, could not claim damages because the reputation of the house was injured by such use; the contract having for its object the violation of law; but the tenant, on landlord's seizing apparatus in the house to reimburse himself for damage by reason of such loss of reputation, could recover the same.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by G. M. Pratt against J. M. Padgett. Judgment for plaintiff, and defendant appeals. Affirmed.

E. L. Johnson, of San Diego, for appellant.

H. V. Richardson, of San Diego, for respondent.

**SHAW, J.** From a judgment for \$265 entered in favor of plaintiff, the defendant has appealed upon the judgment roll.

The findings, in so far as applicable to the cause of action upon which the judgment was rendered, are as follows: On February 28, 1918, plaintiff was the owner, entitled to and in possession of certain personal property consisting of tables, pictures, stools, cushions, water, and wine glasses, cuspids, a quantity of assorted liquors, one ice box, 2,000 chips, and a faro card case and check rack, of the value of \$265, all of which defendant on said date wrongfully and unlawfully took possession of and converted to his own use. That these findings fully support the judgment rendered is not open to the slightest question. It is true that, in response to the allegations of a cross-complaint filed by defendant, wherein he sought a judgment against plaintiff for damages due to the fact that plaintiff had conducted a gambling house in a residence leased to him by defendant, thereby injuring the reputation of the house, as to which the court found that such lease of said premises so made by defendant to plaintiff was with the intention of both parties that the same should be so used, and hence, as held by the court, defendant was estopped from claiming damages by reason of such use. In other words, as to defendant the court applied the well-recognized rule that no recovery can be had by either party to a contract having for its object the violation of law. As said in *Dunn v. Stegemann*, 10 Cal. App. 38, 101 Pac. 25:

"Where it appears that a contract has for its object the violation of law, the court should sua sponte deny any relief to either party."

The lease of the house for an unlawful purpose, so far as shown by the findings, had no connection with defendant's act in wrongfully converting plaintiff's property to his own use, and which presumably he took to reimburse himself for the alleged damage sustained. For aught that appears to the contrary, the property converted might have been elsewhere than in the building let by defendant to plaintiff, and which was used for gambling purposes. However this may be, there is nothing in the findings which brings the unlawful act of defendant within the rule invoked by appellant.

The judgment is affirmed.

We concur: **CONREY, P. J.; JAMES, J.**

(47 Cal. App. 611)

**HALL v. PUENTE OIL CO. et al.**  
(Civ. 3063.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920.)

**1. Master and servant** ⇨ 330(3) — Evidence held insufficient to sustain findings salesman did not operate automobile on own business.

In an action against an oil company and its salesman, who used an automobile, for injuries to a pedestrian struck by the car, evidence held insufficient to sustain findings that the salesman was not operating the car on his own business, but within the scope of his employment by the oil company at the time.

**2. Master and servant** ⇨ 302(1)—Respondent superior not invoked unless servant engaged in employment.

The doctrine of respondent superior cannot be invoked unless at the time of the negligent act causing the injury the servant was engaged in performing a service for the master or incidental thereto.

**3. Master and servant** ⇨ 302(6)—Loan of car to salesman by company did not render it liable for injuries.

Where an oil company lent to its salesman for his own use an automobile which he used in the course of his employment, the consent of the company to such personal use did not render it liable for negligent injuries to a pedestrian.

**4. Appeal and error** ⇨ 1011(1)—Determination of trial court on conflicting evidence conclusive.

Where the evidence on the question of the contributory negligence of plaintiff injured by defendant's automobile presented a conflict, the determination of the trial court was conclusive.

**5. Compromise and settlement** §23(3)—Evidence held insufficient to show settlement of claim for personal injuries.

In an action against an oil company and its salesman for injuries from the company's automobile driven by the salesman, evidence held insufficient to show the making of any agreement between plaintiff and the salesman whereby the latter agreed to pay plaintiff \$15 a month for 100 months, which plaintiff agreed to accept in full settlement.

**6. Frauds, statute of** §44(1)—Parol agreement to pay sum per month for 100 months not enforceable.

Agreement of defendant, who injured plaintiff with an automobile, to pay plaintiff \$15 a month for 100 months, not being in writing, was not enforceable against defendant under Civ. Code, § 1624, the statute of frauds.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by John Hall against the Puente Oil Company and John J. Roberts. From judgment for plaintiff, defendants appeal. Reversed as to the corporate defendant; affirmed as to the individual defendant.

H. W. Kidd and Perry F. Backus, both of Los Angeles (A. J. Verheyen, of Hollywood, of counsel), for appellants.

Hugh E. Macbeth, of Los Angeles, for respondent.

SHAW, J. Defendants appeal from a judgment in favor of plaintiff, awarded as damages for personal injuries.

Roberts was employed by his codefendant, whose place of business was in Los Angeles, as a traveling salesman of oil, and, in the performance of his duty, which required him to travel in Los Angeles and adjoining counties, the oil company provided him with an automobile and at all times furnished the oil and gasoline necessary in the operation thereof. His daily duties covered the period from 8 o'clock a. m. to 5 o'clock p. m. With the consent of his employer, Roberts used a garage at his home in Alhambra, wherein the car was kept at night and when not in use. In addition to his use of the car in traveling back and forth from his residence to the oil company's place of business in Los Angeles, he had the privilege, when not on duty to his employer, of using it for pleasure rides and purposes of his own. On the day of the accident he returned from Orange county to the yard of the oil company at approximately 5 o'clock p. m.; whereupon, his day's work being at an end, he, in his car, came up town, in Los Angeles, where, at Fourth and Spring streets, he had an appointment to meet a friend at 7 o'clock, who was to accompany him to a meeting of the lodge of Elks in Alhambra. During the time between his arrival up town, at about a quarter after 5 o'clock, and 7 o'clock, at

which hour he met his friend, he wandered around town, "loafing and taking a drink here and there." At 7 o'clock he left Fourth and Spring streets, Los Angeles, for the lodge rooms at Alhambra, and at First street the automobile operated by Roberts collided with plaintiff, who was thereby injured.

Upon these facts the trial court found that it was untrue, as alleged in the answer of defendant Puente Oil Company, that John J. Roberts, at the time of said accident, was operating the car on and about a mission of his own and not within the course or scope of his employment as an employé of said oil company, or in the performance of any act for or on behalf of said oil company, and also found that "the defendant John J. Roberts, while engaged within the general scope of his said employment, carelessly and negligently drove and operated the said Ford automobile, then and there the property of the said Puente Oil Company."

[1, 2] In our opinion, appellants' challenge to these findings, upon the ground that they are not supported by the evidence, must be sustained. It is apparent the trial court, in making the findings, deemed the facts sufficient to establish a case for the application of the doctrine of respondeat superior; but this principle cannot be invoked unless at the time of the negligent act causing the injury the servant was engaged in performing a service for the master or incidental thereto. The doctrine rests upon the proposition that in doing the acts out of which the negligence arose the servant was representing the master at the time and engaged in his business. As said in *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75, 50 N. E. 500, 66 Am. St. Rep. 537:

"Beyond the scope of his employment the servant is as much a stranger to his master as any third person. \* \* \* And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and an act of the servant during such interval is not to be attributed to the master."

"The test," says the court in *Chamberlain v. California Edison Co.*, 187 Cal. 500, 140 Pac. 25, "is, whether the act was done in the prosecution of the business in which the servant was employed to assist."

To the same effect see *Gousse v. Lowe*, 183 Pac. 295; *Brown v. Chevrolet Motor Co.*, 179 Pac. 697; *Stephenson v. Southern Pacific Co.*, 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223.

Clearly Roberts was not engaged in the performance of any duty which he owed to his employer. Since the garage in which he was accustomed to keep the automobile was at his home, the taking of the car from his place of employment to such garage would

have been an act within the scope of his employment. *Riordan v. Gas Consumers' Ass'n.*, 4 Cal. App. 639, 88 Pac. 809. The evidence, however, shows that he was not operating the car with a view of reaching such destination; and, while the testimony shows that he might have accepted an order for the delivery of oil by his employer at any time or place, he owed no duty to his employer so to do and was not seeking such sales and did not take any orders on the day of the accident after 5 o'clock, when his duties to his employer ended for the day. Neither, in our opinion, does the fact that the employer supplied the gasoline and oil required in the operation of the car affect the question in the slightest degree. After 5 o'clock p. m. on the day of the accident his time was his own to use as he pleased, and he likewise, with the consent of his employer, had the use of the car for his own purposes, and when the injury to plaintiff occurred he was engaged in a mission the purpose of which was his own pleasure, and which could have no possible connection with the duties which he owed to his employer, any more than if he had taken the car on a holiday or Sunday for a pleasure ride for himself and family or upon a fishing trip.

[3] Respondent lays much stress upon the fact that the use of the car by Roberts for his own purposes was with the consent of the Puente Oil Company, his employer. At most, this was a mere lending of the car to him for his own use, as to which, says the court in *Brown v. Chevrolet Motor Co.*, supra, "it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver whose only relation to the owner is that of borrower," in support of which the court cites *Berry on Automobiles*, § 684, *Hartley v. Miller*, 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81, and *Segler v. Callister*, 167 Cal. 377, 139 Pac. 819, 51 L. R. A. (N. S.) 772. We are unable to draw any distinction between a case where the use of the car by a servant for his own purpose is without the master's consent and that where such use is permissive. Carried to its logical conclusion, the contention of respondent, which was adopted by the trial court, would render the owner of a shotgun liable for the act of one to whom he had loaned it for use on a hunting trip and due to whose negligent use thereof he had shot another. Our conclusion, therefore,

is that the findings of which appellants complain are not supported by the evidence.

[4] Appellants also predicate error upon the insufficiency of evidence to support the finding whereby the injury to plaintiff was by the court attributed to the negligence of Roberts, and exonerating plaintiff from contributory negligence. An examination of the record discloses no merit in this contention. At most, the evidence presents a conflict from which, and the circumstances shown to exist, different inferences might be deduced, and hence the determination of the trial court thereon must be deemed conclusive. Neither is there the slightest merit in the contention that the finding as to the extent of plaintiff's injury, is without support.

[5] Both defendants alleged the making of an agreement between plaintiff and Roberts whereby the latter agreed to pay him \$15 per month for a period of 100 months, which plaintiff agreed to accept in full settlement of his damages, which allegation the court found to be untrue, but allowed upon the judgment rendered the sum of \$60, which defendant had paid to another for plaintiff's benefit. There is nothing in the evidence upon which to base a finding other than that made. It appears from the evidence that plaintiff was not a party to any agreement touching the matter, but that in some criminal proceeding growing out of Roberts' negligent act Judge Craig, before whom he appeared, told defendant that he would have to make some reparation for the injury sustained by plaintiff, and left the matter in the hands of the probation officer of the court who, upon consulting Roberts and his wife and going over his income and his domestic expenses, concluded that he could pay plaintiff \$15 a month, which sum, it seems, defendant paid for four months.

[6] There was no writing executed between plaintiff and Roberts evidencing such agreement, and, since the same was to cover a period of 100 months, it was not, in the absence of such writing, enforceable against Roberts. Section 1624, Civ. Code. In addition to all of this, the evidence touching the question is too vague and uncertain upon which to base a contract of such character.

As to the defendant Puente Oil Company, the judgment is reversed; and as to the defendant John J. Roberts, it is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(47 Cal. App. 564)

**BAILIFF v. HILDEBRANDT. (Civ. 2049.)**

(District Court of Appeal, Third District, California. May 19, 1920.)

1. Judgment  $\S$  161—Application to set aside default must be accompanied with copy of answer.

An application, under Code Civ. Proc.  $\S$  473, as amended in 1917 (St. 1917, p. 242), to set aside a default upon the ground of mistake, inadvertence, and excusable neglect, must be accompanied with a copy of the answer or other pleading proposed to be filed, and it was not sufficient that, prior to default, the defendant had filed a demurrer; such demurrer having been overruled, and defendant having been given time to answer and having failed to do so.

2. Appeal and error  $\S$  938(4)—Not presumed that defendant filed answer with application to set aside default.

Where certificate of judge to bill of exceptions stated that it "contains the statement of all papers and evidence used in the above entitled matter," and a stipulation of attorneys was "that the foregoing bill of exceptions contains a true and correct statement of all the evidence introduced, etc.," it will not be presumed in support of an order of the court setting aside the default that defendant filed an answer with his application to set aside such default as required by Code Civ. Proc.  $\S$  473, as amended by St. 1917, p. 242, assuming that it is necessary that bill of exceptions affirmatively show that no other evidence was offered than that stated in the bill, and that, in absence of such showing, it would be presumed that an answer was filed.

Appeal from Superior Court, Sonoma County; Thom. C. Denny, Judge.

Action by J. D. Bailiff against A. M. Hildebrandt. Judgment for plaintiff. From an order setting aside defendant's default and the judgment, plaintiff appeals. Reversed.

Hiram E. Casey, L. R. Lambert, and Casey & Lambert, all of Santa Rosa, for appellant.

W. F. Cowan, of Santa Rosa, for respondent.

NICOL, Presiding Judge pro tem. This is an appeal by plaintiff from an order vacating and setting aside the default of defendant and the judgment entered thereon against the said defendant.

The motion to set aside the default and judgment was one under section 473 of the Code of Civil Procedure and in substance was made upon the ground of mistake, inadvertence, and excusable neglect. The defendant's demurrer to the complaint was overruled by the court on December 9, 1918, and by the order he was given 10 days within which to answer. On December 26, 1918, the defendant not having answered in compliance with the said order, his default was

entered, and on the same day judgment was duly entered for the amount prayed for in the complaint, together with costs; execution was issued and levied upon moneys belonging to the defendant, and the judgment by virtue thereof was fully paid and satisfied on the 26th day of December, 1918. On June 2, 1919, defendant filed his notice of motion to set aside the said default and judgment. The motion came on for hearing before the court on June 16, 1919, and was on said day by the court granted.

[1] The notice of motion stated that it would "be made and based upon all the records, papers and files and proceedings in this action, and upon this notice and the affidavit of defendant and of W. F. Cowan which is served and filed herewith, and upon such oral and documentary evidence as may be offered. \* \* \*" No copy of any answer, or other pleading proposed to be filed, accompanied said notice of motion. Section 473, Code of Civil Procedure, as amended in 1917 (Stats. 1917, p. 242), provides that an application like the one in the case at bar "must be accompanied with a copy of the answer, or other pleading proposed to be filed therein, otherwise said application shall not be granted." The Supreme Court, in speaking of this amendment in the case of *Los Angeles County v. Lewis*, 179 Cal. 398, 177 Pac. 154, said:

"The plain object of the provision was simply to require the delinquent party seeking leave to contest on the merits, to show his good faith and readiness to at once file his answer in the event that leave is granted by producing a copy of the proposed answer for the inspection of his adversary and the court. Substantial compliance with the provision of course requires such production in connection with the application for relief."

In this case of *Los Angeles County v. Lewis*, no copy of the answer was served with the notice of motion to set aside the default, but the defendant two days before the giving of the notice of motion offered his proposed answer for filing and left the same in the custody of the clerk and served the same by delivery of a copy on the adverse party. The notice of motion stated that this was the answer that the defendant desired to file and that the motion would be based in part on the same and the affidavit of the defendant, a copy of which was served with the notice of motion, showed that the answer that the defendant desired to be filed was the one which the defendant had offered for filing and which had remained in the custody of the clerk. The Supreme Court held that this was a compliance with the said amendment, and that—

"The provision of section 473, Code of Civil Procedure, here involved, like the remainder of

the section, must be liberally construed with a view to substantial justice, and we are of the opinion that it must be held that, in view of the facts stated, the application for relief was 'accompanied' with a copy of the answer proposed to be filed."

In the case at bar, as before stated, no copy of any answer, or other pleading proposed to be filed, accompanied defendant's notice of motion, nor does the record anywhere show that any answer, or other pleading, was served upon the plaintiff or offered to the clerk for filing. There was no compliance made by defendant with the said provision.

[2] The respondent argues that the record or bill of exceptions must affirmatively show that no other evidence was offered than that stated in the bill of exceptions, and that in the absence of such showing it will be presumed in support of the order of the court that an answer was filed. Conceding that respondent's argument in this respect is sound, nevertheless we are of the opinion that the record in this case sufficiently shows that no other evidence was offered on this motion than that which is contained in the bill of exceptions. The certificate of the judge to the bill of exceptions states that it "contains the statement of all papers and evidence used in the above-entitled matter," and the stipulation of the attorneys is:

"That the foregoing bill of exceptions contains a true and correct statement of all the evidence introduced and of all of the proceedings had upon the hearing of the above-entitled motion."

It follows that the order appealed from should be reversed, and it is so ordered.

We concur: HART, J.; BURNETT, J.

(47 Cal. App. 642)

KOEHL et ux. v. CARPENTER et al.  
(Civ. 3367.)

(District Court of Appeal, First District, Division 2, California. May 21, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Municipal corporations  $\S$ 706(5)—Alighting passenger held not shown to be negligent as to passing automobile.

In an action against an automobile owner for death of one alighting from a street car, evidence held sufficient to sustain finding that decedent was not guilty of contributory negligence.

2. Appeal and error  $\S$ 1010(1)—Finding sustained by evidence not disturbed.

Where there was sufficient evidence to sustain the finding of the trial court, it will not be disturbed on appeal.

3. Municipal corporations  $\S$ 705(10)—Pedestrians not under positive duty to stop, look, and listen.

There is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, and the question of negligence of such a pedestrian must be examined in the light of all the attending circumstances, one of which may be knowledge of existence of statute, or ordinance, prescribing fixed regulations for observance by automobile drivers.

4. Municipal corporations  $\S$ 705(4)—Motorists should not trail street cars so closely they cannot stop.

In view of the obvious danger in an automobile passing a street car when it stops for accommodation of passengers, motorists should neither trail cars so closely that they cannot comply with city ordinance requiring that they stop, nor attempt to pass a car at a regular stopping point until they are sure it will not stop.

5. Appeal and error  $\S$ 1004(1)—No reversal for amount of recovery for death unless conscience is shocked.

The amount of damages to be awarded for a death is a matter peculiarly within the province of the trial court, and its action will not be disturbed unless the amount is so disproportionate to the injury as to shock the conscience at first glance.

6. Death  $\S$ 77—Evidence held to support allowance for funeral expenses.

Allegation of parents' complaint for death of daughter that funeral expenses had been incurred held sufficient to support finding that plaintiffs had been damaged to the amount of \$1,000, including funeral expenses of \$272.50, though the undertaker's bill was made out to the brother of the girl, colloquy between counsel regarding funeral expenses being sufficient to support implied finding expense was incurred by parents.

Appeal from Superior Court, Los Angeles County; Paul McCormick, Judge.

Action by John W. Koehl and Mary Koehl, his wife, against Adolph D. Carpenter and Julia L. Carpenter. From judgment for plaintiffs, defendants appeal. Affirmed.

E. B. Drake, of Los Angeles, for appellants.  
G. C. De Garmo, of Los Angeles, for respondents.

BRITAIN, J. The defendants, sued as husband and wife, by the parents as heirs of Mae C. Koehl, who died as the result of her being struck by an automobile driven by Mrs. Carpenter, appeal from a judgment for \$1,000, rendered by the trial court sitting without a jury. The appellants rely on three grounds which will be disposed of in the order of their presentation, after the following statement of facts shown by the record:

Mae Koehl was between 21 and 22 years of age. She had previously been employed as a

cashier in a business concern in Los Angeles. She was out of employment for about a month, during which time she remained at home, helping with the household duties. She then went to work as an assistant bookkeeper in the office of her father, who, with his son, was engaged in the manufacturing business. She had been so occupied about a month, and was acquainted with the streets in Los Angeles and with the particular crossing, near her place of business, where the accident occurred.

At the time of the accident, in November, 1917, there was, and had been from some time in 1914, an ordinance of the city of Los Angeles which provided that it should be unlawful for the driver of any vehicle, "upon overtaking any street or interurban railway car which has stopped for the purpose of discharging or taking on any passengers, to fail, neglect or refuse to stop such vehicle at least ten feet in the rear of such \* \* \* car and to keep such vehicle standing where so stopped until such passengers or intending passengers have safely alighted from or boarded said \* \* \* car, or until such \* \* \* car shall have started."

About noon on November 27, 1917, Mae Koehl was a passenger on a street car running west on Seventh street, and told the conductor to stop the car at Anderson street. The car stopped on the east side of Anderson street at the corner and she alighted, starting to walk diagonally in a northwesterly direction toward the sidewalk at the corner of Seventh and Anderson streets. The conductor heard a scream, and the car, which had started and had gone a few feet, again stopped. The conductor saw her reach a point 3 or 4 feet from the curb line when she was struck.

Mrs. Carpenter was driving her motor west on Seventh street, trailing the street car, and had been following it for several blocks. At the time of the accident, she testified she was moving at the rate of about 10 miles per hour. She did not stop the automobile, nor did she sound any warning as she approached the crossing. She testified that she thought the car was slowing down for the crossing, that when she saw Miss Koehl in the act of alighting she screamed, and, being afraid that the brakes would not hold, she turned the machine sharply to the right to avoid the impending collision. She did not run it into the sidewalk, but turned it so that it continued its course westerly near the curb. She testified that the brakes were in good order, and that at the rate at which she was traveling she could have stopped the car in about 5 feet. The street car had been running at about 6 or 8 miles an hour, and as it reached Anderson street Mrs. Carpenter turned from immediately behind it to the north side to pass it while crossing Anderson street. She testified she had put on the foot brake, but when she struck Miss Koehl she lost control

of herself, and did not know what happened. When she first saw Miss Koehl she was 10 or 15 feet away. Miss Koehl was struck when she was near the curb line of Anderson street and her body was carried nearly to the middle of the street, the automobile running over her and for 10 to 15 feet beyond.

During the trial the plaintiffs' attorney said: "Here is a list of the costs of burial, subject to your objections as to some items." The attorney for the appellants replied: "Yes, Bresee Brothers have put it in. I suppose we have to pay these things when we die. I will not raise any question about it." The document was marked Plaintiffs' Exhibit 8, and was in the form of a receipted bill of Bresee Brothers, undertakers, for \$272.50, funeral expenses of Mary Koehl. It was made out to Albert Koehl, a brother of Miss Koehl.

[1-3] The appellants argue that Miss Koehl was guilty of contributory negligence. This court cannot so determine as a matter of law in view of all the circumstances. Considered as a question of fact it was determined by the trial court adversely to the appellants. There was sufficient evidence to sustain its finding. In such a case that finding will not be disturbed on appeal. The rules of law concerning the respective rights and obligations of persons using the public streets recently received lengthy consideration by the Supreme Court. It was there held that there is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, and that the question of negligence, under the usual rule of ordinary care that devolved upon foot travelers, must be examined in the light of all the attending circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing fixed regulations for observance by automobile drivers. *Mann v. Scott* (Sup.) 182 Pac. 281.

[4] It is argued that the ordinance was only operative against those automobile drivers who are so far back of a street car as to be able to stop 10 feet in the rear of the street car when it stops for the purpose of taking on or discharging passengers. There are two answers to this contention. Cars ordinarily stop for those purposes at street corners. In view of the obvious danger of passing cars when they do stop for the accommodation of passengers, it behooves motorists neither to trail cars so closely that they cannot comply with the ordinance, nor to attempt, as Mrs. Carpenter did, to pass a car at a regular stopping point until they are sure that there will be no stop. Further, the court is of the opinion, that, regardless of the provisions of the ordinance, there is ample evidence to sustain the judgment.

[5] It is next contended that the damages are excessive, but the amount of damages is a matter peculiarly within the province of the trial court, and its action will not be dis-



turbed unless the amount is so disproportionate to the injury as at first glance to shock the conscience. This does not appear to be the case in the present instance. *Martin v. Shea* (Sup.) 187 Pac. 23.

[8] Lastly it is contended that the damages should not have included the amount paid to the undertaker, because the bill was not paid by either of the plaintiffs. The allegation of the complaint was that these expenses had been incurred. This was sufficient to support the finding that the plaintiffs had been damaged to the amount of \$1,000, including funeral expenses of \$272.50. The colloquy between counsel at the trial regarding the funeral expenses is sufficient to support the implied finding that though the bill was made out to the brother of Miss Koehl, the expense was incurred by her parents, the plaintiffs. If timely objection had been made, the plaintiffs might have supplied the missing proof. After the statement of counsel for the appellants that he would not raise any objection about it, referring to the list of costs of burial, that objection will not be seriously considered here.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(47 Cal. App. 560)

FERRARIS v. SOUTHERN PAC. CO. et al.  
(Civ. 2778.)

(District Court of Appeal, Second District, Division 1, California. May 19, 1920.)

1. Evidence ¶13—Well recognized that cold for short time will not damage fruit.

It is a well-recognized fact that fruit for a short time will stand a low degree of temperature without damage, when under a temperature several degrees higher, but prevailing for a longer time, damage will result from the cold.

2. Carriers ¶134—Finding that fruit was damaged by cold through carrier's negligence sustained.

In an action against a carrier for damage to fruit by cold, evidence held to justify finding that the damage resulted from negligence of the defendant in leaving a door open at destination all night, and not from cold weather encountered for a short time en route.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Peter Ferraris against the Southern Pacific Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry T. Gage, W. I. Gilbert, and Floyd S. Sisk, all of Los Angeles, for appellants.

Frederick R. Levee and W. R. Law, both of Los Angeles, for respondent.

SHAW, J. Action to recover damages alleged to have been sustained by plaintiff on account of defendants' negligence in transporting a car of bananas from New Orleans to Los Angeles. Judgment went for plaintiff, from which defendants appeal, claiming the evidence is insufficient to justify the finding of the court to the effect that the deterioration of the fruit, delivered to defendants at New Orleans in good condition, was due to the failure of defendants to keep the same under proper refrigeration.

Testimony received on the part of plaintiff was to the effect that in shipping bananas in carload lots it is necessary to place them in charge of a messenger, as was done in this instance, whose duty it is to maintain a temperature inside the car of 58 or 60 degrees, which is done by the opening and closing of plugs and vents, depending upon the outside temperature, which varies along the route of travel. The testimony also tends to show that the messenger in charge of the car properly looked after the ventilation thereof, which arrived in Los Angeles at 8:20 p. m. December 18, 1917, with the fruit in good condition; that the damage to the bananas occurred between the time of arrival on December 18th and 8:30 a. m. December 14th, and was caused by the fact that, due to defendants' negligence, one door of the car had during the night been opened and left in that condition, as a result of which the fruit was badly chilled and spoiled. As against this evidence, which, if true, was ample to justify the finding, defendants introduced a report made by the messenger in charge as to the degrees of temperature through which the fruit was transported from New Orleans to Los Angeles, and which, it is claimed, shows the inaccuracy of his testimony. From this report it appears that the outside temperature along the route of travel varied from 20 degrees to 68 degrees above zero, and that the inside temperature, so far as shown by the report, was not less than 54 degrees above zero, and the difference between the outside and inside temperature, so far as shown by this report, and in the absence of a stove or other means of heating, varied from 4 degrees to 18 degrees; for instance, at one point, when the outside temperature was 60 degrees, it was 64 degrees inside, and at another point, when the outside temperature was 38 degrees, it was 54 degrees inside. At one point along the line, however, the outside temperature is shown to have dropped to 20 degrees, and at another point 22 degrees, without any showing made by the report as to the inside temperature at such times, and hence appellants' claim that the inside temperature must have dropped to 40 degrees or less, which it is conceded was so low that the fruit would have been damaged, and that

such damage must be attributed to the negligence of the messenger. While the argument is plausible, it omits from consideration the length of time during which the low outside temperature of 20 degrees at one point and 22 at another prevailed, and also ignores the degree of heat generated inside the car by reason of the bananas being packed in bulk, the extent of which, according to the testimony, depends upon the density of the loading and other varying conditions.

[1] It is a well-recognized fact that fruit for a short time will stand a low degree of temperature without damage when, under a temperature several degrees higher, but prevailing for a longer time, damage will result from the cold. Hence, since the injury due to the low temperature would depend upon the duration thereof, we cannot assume the direct testimony overcome by the mere showing that en route the car passed through a zone where the outside temperature was 20 or 22 degrees, and therefore the temperature on the inside of the car dropped and continued at a point, as a result of which the fruit was damaged.

[2] We agree with the trial court that the direct testimony of the messenger in charge of the car and others, which tends to show that the damage resulted from leaving the car door open during the night of December 18th, after its arrival in Los Angeles, is not overcome by the inferences sought to be drawn from the report as to the varying outside temperature along the line of travel.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

(47 Cal. App. 597)

**GLOCKNER v. PALACE AMUSEMENT CO.**  
(Civ. 3122.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920.)

1. Judgment  $\S$ 744—Defendant estopped to plead same fraud which in former action was adjudged unavailing.

In an action to recover installments upon a contract, the defendant is estopped to plead the same fraud which in a suit under the same contract for former installments was adjudged unavailing.

2. Judgment  $\S$ 948(1)—Where answer pleaded fraud already adjudged against defendant, plaintiff could prove the estoppel without pleading it.

Plaintiffs could not anticipate that defendant would plead a defense of fraud which had already been adjudged against defendant in a prior action, and hence was entitled without pleading the judgment to offer evidence of such facts as constituted estoppel.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by William L. Glockner, doing business under the name of the William L. Glockner Music Company, against the Palace Amusement Company. Judgment for defendant, and plaintiff appeals. Reversed.

Smith & Breslin, of Los Angeles, for appellant.

Wm. T. Blakely, of Los Angeles, and M. L. Haines, of San Francisco, for respondent.

SHAW, J. Action to recover certain unpaid monthly installments of money alleged to be due under a contract for the purchase by defendant from plaintiff of a motion picture orchestra.

Judgment went for defendant, from which plaintiff appeals.

For defense to the action defendant relied upon certain alleged fraudulent acts practiced by plaintiff, whereby defendant was induced to enter into the contract, as to all of which the court found in defendant's favor.

[1] It appears that prior to the institution of the action there had been another action between the same parties and upon the same contract to recover monthly installments of money theretofore accruing thereon and which defendant had failed to pay. In this first action the defendant, as here, pleaded in defense of recovery therein the same fraudulent acts of plaintiff which it sets up in its answer in the instant case, and, as shown by the judgment roll in said first action, introduced in evidence, the court, as to such defense, found adversely to defendant and gave judgment for plaintiff, which judgment had, at the time of filing the complaint herein, become final. Hence, the court having in the trial of the first case adjudged as unavailing the defense of fraud therein pleaded, defendant must, in the second suit, upon the principle of estoppel, be deemed concluded thereby. While the subject of the action in this case was different installments from those involved in the former action, the defense to recovery thereof was the same in both; hence, as said in *Koehler v. Holt Manufacturing Co.*, 146 Cal. 335, 80 Pac. 73:

"The case comes clearly within the principle that a judgment operates as an estoppel to preclude the parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them."

Indeed, we know of no authority holding to the contrary, while the proposition is, among other cases, supported by *Baker v. Eilers Music Co.*, 175 Cal. 657, 186 Pac. 1008; *Wiese v. San Francisco Musical Society*, 82

Cal. 645, 28 Pac. 212, 7 L. R. A. 577, and Williams v. Hawkins, 34 Cal. App. 146, 166 Pac. 899.

[2] Respondent attempts to avoid the result by suggesting that plaintiff did not plead the former judgment as an estoppel. A sufficient answer to this is that he could not anticipate that defendant would, as a defense, plead facts which had been theretofore, on issue joined, adjudged against it; and hence, when defendant by answer tendered the same issue, he was entitled, without pleading the judgment, to offer evidence of the facts constituting the estoppel.

Our views render it unnecessary to notice other points.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(47 Cal. App. 605)

HYMAN v. KARL STERN CO. (Civ. 3135.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1920.)

1. Corporations  $\S$ 308(3) — Agreement between sole owners of corporation as to salaries, valid.

If two persons, who owned and controlled a corporation to all substantial effect, agreed on the salary to be paid to each, where the corporate form was adopted only as a convenient agency for the handling of the business, such an agreement was valid and binding.

2. Appeal and error  $\S$ 1011(1) — Findings on conflicting evidence not disturbed.

Finding of the trial court based on conflicting evidence will not be disturbed on appeal.

3. Appeal and error  $\S$ 1169(7) — Appellate court cannot direct an amendment of findings of fact, but must reverse.

Where judgment was too large by reason of an error in preparing findings of fact, a reversal was required in the appellate court, because such court cannot direct an amendment of findings of fact.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Almeda Bresee Hyman against the Karl Stern Company. Judgment for plaintiff, and defendant appeals. Reversed.

Benjamin W. Shipman and Henry O. Wackerbarth, both of Los Angeles, for appellant.

James E. Kelby, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover on two counts for amounts of salary alleged to be unpaid to her by the defendant corporation. Judgment was in her favor, and defendant has appealed.

It was shown in evidence that, about the 1st of April, 1917, Karl Stern, who was then conducting a business similar to that which was and theretofore had been engaged in by the plaintiff, proposed to the plaintiff that she consolidate her business with that of Stern. The terms of consolidation were agreed upon, and the defendant corporation was formed and shares issued in the proportion of ten to Stern and one to plaintiff. Some few shares were placed in the hands of an employé for the purpose of making a third director. Stern characterized himself as the manager of the concern. By-laws were adopted, among which was one containing the provision that salaries of the officers and employés should be fixed by the board of directors. It does not appear that the directors formally acted under that provision. As a part of the arrangement between the plaintiff and Stern, the matter of salaries to be drawn by each of them was considered, and it was agreed that Stern should receive \$50 per week and the plaintiff \$25. However, according to the plaintiff's testimony, Stern said that as the business needed capital he and the plaintiff should not draw the full amount of their salary at the start, and, agreeing to that suggestion, plaintiff for the first year drew but \$15 per week. At the end of the first year a meeting of the stockholders was held, and an advance of \$2.50 per week was allowed on account of the salary to be paid to the plaintiff. Plaintiff, from April 1 to August 10, 1918, drew \$17.50 per week. At the latter date she ceased to render any services, and later brought this action. In her complaint she claimed the right to recover the unpaid \$10 per week for the first year's work and \$12.50 per week for that period of time from April 1, 1918, to August 10th of the same year.

[1-3] The first contention of appellant is that the condition of the by-law, declaring that the directors should fix the salaries of officers and employés, was not complied with, and that any arrangement entered into between Stern and the plaintiff as to salaries to be paid was invalid. We think there is no merit in this contention. If the two persons who owned and controlled the corporation to all substantial effect agreed upon the salaries to be paid, where the corporate form was adopted only as a convenient agency for the handling of the business, such an agreement we think was valid and binding. Plaintiff testified that Stern and she "were the only ones concerned," and further, that when she suggested that some minutes be made on the books of the corporation, setting forth the amount of salaries, Stern replied that it was not necessary, and that his attorney had so advised him. The association of the two individuals constituted practically a partnership; the corporate organization being a

mere agency to be used in conducting the business. As to whether the agreement to pay the added compensation had been made as alleged and testified to by the plaintiff, was for the trial court to determine, as the evidence was conflicting on that point. There was ample evidence to sustain the finding that such agreement had been made. However, the amount for which the court gave judgment is in excess of the amount shown by the evidence to be due the plaintiff. This condition, no doubt, arose through error in preparing the findings, but it necessitates a reversal of the judgment, as we cannot here direct an amendment of findings of fact. The court's findings followed the allegations of the complaint, particularly as to the second cause of action, which covered the period of service between April 1, 1918, and the 10th day of August, 1918. The complaint alleged that between those dates plaintiff received only \$15 per week, when her own testimony showed that she received \$17.50. Hence the findings are not sustained by the evidence, and the amount of the judgment, under the facts, should be reduced.

For the reason given, the judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(47 Cal. App. 646)

**PETERSON v. LIGHTFOOT.** (Civ. 3373.)

(District Court of Appeal, First District, Division 2, California. May 21, 1920.)

**1. Appeal and error**  $\S$  80(3)—**Judgment in accounting between partners held final and appealable.**

A judgment in a suit for partnership accounting, providing that the assets of the partnership be sold by a commissioner and that upon the return of the commissioner and the equal division of the assets between the parties a final judgment should be entered dissolving the partnership or declaring it dissolved, was a final judgment from which an appeal could be taken.

**2. Appeal and error**  $\S$  1010(1)—**Findings supported by evidence not disturbed.**

Findings of the lower court when supported by evidence will not be disturbed on appeal.

**3. Partnership**  $\S$  318—**Suit for accounting addressed to equitable jurisdiction.**

A suit for partnership accounting is one addressed to the equitable jurisdiction of the court.

**4. Partnership**  $\S$  310—**Partner on dissolution held entitled to interest in name of business owned by another partner.**

Where one partner was in business under a certain name prior to the creation of the

partnership, the name at such time having no value, but being made valuable by the joint efforts of the partners, in an accounting on dissolution the name should be considered an asset of the corporation, the partnership not having any other asset.

**5. Partnership**  $\S$  310—**Recordation of name of partnership by partner in own name is in interest of partnership.**

The relationship between partners is confidential, and the recordation by one partner, in his own name, of the name under which the partnership had been doing business for six months, in contemplation of law, was in the interest of the partnership.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Gus A. Peterson against R. W. Lightfoot. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Alderson, of Los Angeles, for appellant.

Halsey W. Allen, of Redlands, for respondent.

**BRITTAI, J.** The defendant appeals from a judgment in a suit for partnership accounting. The judgment provided that the assets of the partnership be sold by a commissioner, and, upon the return of the commissioner and the equal division of the assets between the parties, a final judgment be entered dissolving the partnership or declaring it dissolved.

[1] The respondent contends that the judgment is a nonappealable interlocutory order. The findings and conclusions of law finally determined the rights of the parties, leaving only the transmutation of the assets into cash and their equal division to be done. The appellant claims that the court was in error in determining that the assets ordered to be sold belonged to the partnership and he claims ownership of them himself. If his contentions in this regard should be sustained by the appellate court after the sale of his property, he would be without remedy or find himself compelled to resort to a doubtful remedy against the purchaser at the commissioner's sale. For all practical purposes of disposing of the issues tried the judgment was final. "The question, as affecting the right of appeal is not what the form of the order may be but what is its legal effect." *Estate of West*, 162 Cal. 352, 122 Pac. 953; *Byrne v. Hoag*, 126 Cal. 283, 58 Pac. 688; *People v. Bank of Mendocino County*, 133 Cal. 107, 65 Pac. 124; *Clark v. Dunnam*, 46 Cal. 204.

[2] There was no written agreement by which the partnership was formed. From the oral testimony of the partners and others, the trial court found that the claim of the appellant that the partnership was one of

profits only was not sustained. There was evidence to support this finding and it is controlling on this appeal. The appellant states that there is but one question to be determined, and that is whether the name "Redlands Auto Service" was a part of the assets of the partnership.

From the findings it appears that in May, 1914, the defendant purchased an automobile on which he caused to be painted the name in question. For about three weeks he operated the machine for hire under that name to designate the business in which he was engaged. In June he associated with himself, his brother, who owned another automobile, which was thereafter similarly used. The partnership business was operated under the firm name of "Redlands Auto Service." Shortly after, during the same month, the plaintiff became a member of the partnership, he contributing \$640 to the common fund, that being the value of each of the machines then used in the business. In April, 1915, the defendant's brother sold his interest to the partnership, then composed of the parties to this suit. Thereafter the business was carried on under the same name it had been carried on from the time the first partnership was formed. In December, 1914, while the partnership was composed of the three men the defendant caused the name "Redlands Auto Service" to be registered in the office of the secretary of state in his own name. This was done without the knowledge of the plaintiff, who was not informed of the fact until after the dissolution of the partnership in July, 1918. During all the intervening time the business of the partnership was carried on under that name. It was further found, and the finding is supported by the evidence and by reasonable inferences therefrom, that at the time of the formation of the partnership the name had no value, but by the joint efforts of the partners in conducting the business from June, 1914, to July, 1918, when the partnership was dissolved, "the good will of the partnership business, including the right, title and interest of said partnership in said firm name, became, and at the time of the dissolution of said partnership was, and now is, of the value of \$800."

[3] The appellant's contentions that the adoption and use of a trade-name immediately fixes its status as personal property, and that a single act of use with the intent to continue that use confers a right in the original user, may be conceded without affecting the propriety of the judgment. The

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suit for partnership accounting is one addressed to the equitable jurisdiction of the court. *Andrade v. Superior Court*, 75 Cal. 459-463, 17 Pac. 531.

[4] Under the facts found, even though the name was originally owned by the appellant, the court, in adjusting the respective interests of the parties, properly considered all the circumstances. The name, which had been used for three weeks, was of no value. The respondent went into the business carried on by appellant at the request of the latter as a partner. It was agreed that the appellant's automobile, which had value, should be used in the business, but the ownership retained. It was also agreed that the money invested in the business by the respondent should be used for the purchase of a machine. Before the termination of the partnership each of the partners had in use in the business two automobiles owned by them separately. On dissolution each retained his own tangible property. The name which was worthless when the partnership was formed was an asset and apparently the only asset of the business at that time. It was made valuable by the joint efforts of the two partners. If it had been some other kind of tangible personal property so worthless as not to have been the subject of agreement, but a part of the business establishment when the partnership was formed, and had had bestowed upon it the work of both partners for a period of three years, in use constantly as partnership property and without claim by the original owner, until at the time of the dissolution it came to have a substantial value produced solely by their joint work, it would be manifestly inequitable that it should be given to only one of the two who had produced the value.

[5] It is said in the appellant's brief that the recordation of the name added nothing to his common-law rights. Neither could the secret recordation of the name by the appellant cause any diminution of the rights of his partner. The relationship was confidential and the recordation by one of the partners of the name under which the partnership had been doing business for six months, in contemplation of law, was in the interest of the partnership.

From an examination of the entire record it does not appear that incidental matters touched upon in the briefs require notice here.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(47 Cal. App. 866)

**IMPERIAL DEVELOPMENT CO. v. CITY OF CALEXICO et al. (Civ. 3356.)**

(District Court of Appeal, First District, Division 2, California. May 22, 1920. Hearing Denied by Supreme Court July 19, 1920.)

**1. Commerce §77—Imported cotton in storage in original bales not taxable.**

Flat bales of cotton and bales of bollies imported into California by a Mexican corporation authorized to do business there, and stored by it in a warehouse, held not subject to taxation by the state, though flat bales were not suitable for transportation, though the cotton was not stored all in one portion of the warehouse, but was stored with home-grown cotton and at different dates, and though no import duties were paid on it to the United States, cotton being on the free list.

**2. Taxation §543(8)—Taxpayer asking general relief entitled to relief warranted by facts shown.**

Where plaintiff, a Mexican corporation seeking to be relieved from taxes by the state on imported cotton in storage in the original bales, has asked for general relief, it is entitled to such relief as the facts shown on trial warrant, whether by way of return of the goods or refund of the amount of tax paid under protest.

**3. Appeal and error §883 — Respondent on account of stipulation and lack of objection not in possession to urge exceptions tendered late.**

Where counsel stipulated that the judgment roll, notice of intention to move for new trial, order denying motion for a new trial, and plaintiff's bill of exceptions, should constitute the record on appeal, and no objection was made to the power of the trial court to allow and determine motion of new trial, or to settle bill of exceptions, respondent is not in position to urge on appeal, in objecting to consideration of the bill of exceptions containing the agreed statement of facts, that the bill was not tendered until too late because appellant relied on pendency of his motion for new trial to interrupt running of time allowed for presenting bill.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Development Company, against the City of Calexico and others. From judgment for defendants, plaintiff appeals. Reversed, with instructions to render judgment for plaintiff.

Louis Lamy, of Calexico, for appellant.

M. C. Atchison, City Atty., of Calexico, for respondents.

J. W. Hocker, of Los Angeles, amicus curiae.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it in an action to have certain taxes assessed against

its property declared void, and for general relief. The trial was had upon an agreed statement of facts as follows:

"That at all times mentioned or referred to in plaintiff's amended complaint herein, the plaintiff was, and now is, a corporation duly formed and existing under the laws of the republic of Mexico, duly qualified and entitled to do business in the state of California, and having a branch office and place of business in the city of Calexico, in the county of Imperial and state of California.

"That the defendant city of Calexico is a municipal corporation of the sixth class in said state.

"That the defendant Paul B. Steintorf is, and at all times mentioned or referred to in said amended complaint was, the duly elected, qualified, and acting assessor of said city of Calexico.

"That the plaintiff at all said times and at noon of March 4, 1918, was the owner of, in the possession and entitled to the possession at and in said city of Calexico, county and state aforesaid, of 349 bales of cotton, and 14 bales of bollies; said cotton being of the value of, to wit, \$63,000, and said bollies being of the value of, to wit, \$2,000, at all the times mentioned or referred to in said amended complaint.

"That said cotton and bollies were owned and imported by plaintiff from said Republic of Mexico, and were duly entered through the port of Calexico aforesaid, after the payment by plaintiff of all the duties imposed by law. That said cotton and bollies were contained in unbroken original packages, to wit, in flat bales as same came from the gin; and, immediately after the entry of the same at said port, said merchandise was placed, for storage, in the Calexico Compress Company's yards at Calexico aforesaid, where it remained the property of plaintiff in the original forms and packages in which it was imported.

"That said cotton was not stored in any one place, or in one particular portion of said compress company's building or yards, but was scattered in different portions of said yards in different amounts in which it was brought in on different occasions. That although marked for identification, it was scattered here and there with the general mass of cotton stored in said yards. That said Calexico Compress Company had stored with it, and was storing thousands of bales of cotton owned by divers and many persons, much of which was produced in the United States. That plaintiff at different times since the said 4th day of March, 1918, and after payment by it under protest of the taxes levied and assessed against said cotton has sold and offered for sale portions of said cotton. That said cotton at the time of the assessment herein was not in transit, or in the possession of any railroad company for transit, but was being held indefinitely, subject to storage charges and sales. That there is no difference in the manner of storing and handling cotton of the plaintiff from the manner of storing and handling cotton of other producers storing cotton in said yards which last cotton has been raised and produced in the state of California.

"That said Calexico Compress Company is a public service corporation of the state of California, which offers, among other things, to the cotton growers, including this plaintiff, facilities for storing, compressing, exposing for sale, selling, transporting, shipping, and the general handling of cotton.

"That cotton as it comes from the gin in 'flat' bales is not in a suitable condition for shipping or transportation, except between points where the distances are very short, but, before said cotton is shipped any long distance, it is the custom to compress said bales into a more compact form by the Calexico Compress Company, before delivering same to the railroad for transportation.

"That while said imported property was so owned and possessed by plaintiff as aforesaid, and in the condition stated in this stipulation, on, to wit, March 4, 1918, the defendants levied an assessment and tax upon the same, of \$1.12 per bale for said cotton, and of 90 cents per bale for said bollies.

"That plaintiff demanded of defendants the delivery of said imported property, but defendants always refused to deliver the same, and now refuse unless the taxes so levied and assessed against said property were and are first paid, which plaintiff refused and refuses to do."

[1] These facts, we think, make the present case closely analogous to the case of *Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517. This was a California case which was carried to the United States Supreme Court on a writ of error, the contention there being the same as the contention here, i. e., that goods imported from a foreign country are not subject to state taxation while remaining in the original packages, unbroken and unsold in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the state which is subject to an ad valorem tax.

In the present case, the respondent contends, as was done in the *Low* Case, that the goods have become a part of the general property of the state and are subject to ad valorem taxes; that they are stored with goods grown in the United States, and therefore have become mingled with such goods and are subject to the same taxes, etc. Almost precisely the same arguments appear in the decision of the state court in the *Low* Case, a considerable portion of which decision is set out in the opinion of the Supreme Court of the United States, at pages 30 and 31 thereof. But these contentions were held to be unsound by the highest court in the land. In said case of *Low v. Austin*, supra, the plaintiff had imported wines from France, which he had placed in his warehouse at San Francisco in the original cases, and had offered them for sale. While in the warehouse the wines were assessed for state, city, and county taxes. *Low* refused to pay the

tax, and the collector levied upon the wines and was about to sell them, when *Low* paid the charges under protest, and brought an action to recover the amount so paid. The opinion of Mr. Justice Field in that case seems to us to answer all the contentions of the respondent here. It is based upon the well-known case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, and reasserts the doctrine of that case that goods imported do not lose their character as imports and become incorporated into the mass of property of the state until they have passed out of the hands of the importer, or until they have been removed by said importer from the original packages in which they were imported.

It is admitted by the stipulation as to facts that the goods were in their original bales. Respondents seek to distinguish flat bales from other varieties of bales, and urge upon our attention that flat bales are not a suitable arrangement for long transportation. This seems to us quite immaterial. The pertinent fact is that the goods were in the bales in which they were imported. When the importer seeks to convey the goods any considerable distance, he will be obliged to change the original packages, and then become liable to state taxes.

Respondents seek aid from the admitted fact that the cotton was not all stored in one portion of the warehouse, and that it was stored in a warehouse in which home-grown cotton was also stored, and, further, that it was assembled and stored at different dates. The relevancy of these matters is not apparent to us. If the rule would be applicable to 349 bales of cotton considered as one lot, it would be applicable to one bale. Therefore, if each bale was stored in a different warehouse, or in a different part of the same warehouse, and if each bale had been brought to the warehouse at a different time, the principle would be none the less applicable, for it is admitted that the goods were marked for identification and were in the original bales. Under such circumstances, it could not become so mingled with the other goods stored in the warehouse as to lose its character as an import while it continued to be the property of the importer. In the case of *Low v. Austin*, supra, the state court assumed in its opinion that the imported wines might be stored with wines of home manufacture, which would be sold in the same kind of container, but the United States court held that, nevertheless, the goods, so long as contained in the original packages and remaining in the hands of the importer, were beyond the taxing power of the state. See, also, *Brown v. Maryland*, supra; *Waring v. Mayor*, 8 Wall. 110, 122, 19 L. Ed. 342.

The respondents ask us to take judicial notice that no duties were paid to the United

States on the cotton, as it is one of the articles upon the "free list," and they argue that since no duties were exacted by the United States, the state has power to tax. We cannot agree with the respondents that this fact changes the principle involved. We have been cited to no case involving this particular point; but it would seem reasonable that if the permission of the United States to import articles into the country, granted upon the payment of a tax, means immunity from state taxation under certain conditions, that permission to import goods is equally as efficacious when it is given without the payment of a special tax or duty. The duties upon imported articles are fixed in larger or smaller amounts, or are removed entirely, according to the policy adopted by the government for the best interests of the country, and the fact that the policy may vary in the case of different articles and at different times should not affect the principle applied to imported goods. We think goods are no less imported goods when the government permits them to be imported without exacting a duty for that privilege, than when the government imposes a heavy charge upon the privilege of importation.

[2] This disposes of the only question raised by the briefs which goes to the merits. The respondents interpose numerous technical objections. They argue that because the statement of facts shows that the plaintiffs paid the taxes under protest, therefore the goods are no longer held by the collector, and the question of whether the tax is illegal or not has become a moot question in this action, and that the plaintiff must bring another action to recover its money. Plaintiff has asked for general relief. It is entitled to such relief as the facts shown at the trial will warrant. The court has power to do full justice between the parties in disposing of this litigation. The determination of the validity of the tax sought to be levied is but the determination of the foundation of plaintiff's relief. If the facts had shown that the tax had not been paid, the court should have declared the tax illegal and ordered a return of the cotton, or the portion of the cotton, if any, held by the assessor. The stipulation as to facts is not clear. It seems contradictory. It does not show whether all or part of the cotton is being held by the assessor, or whether it has all been released. At one place it is stipulated that—

"After payment by it under protest of the taxes levied and assessed against said cotton, plaintiff has sold, and offered for sale, portions of said cotton."

In the last paragraph of the stipulation, the fact appears as follows:

"That plaintiff demanded of defendants the delivery of said imported property, but defendants always refused to deliver the same, and now refuse unless the taxes so levied and assessed against said property were, and are first paid, which plaintiff refused and refuses to do."

Findings of fact were waived, and this stipulation as to facts takes the place of findings by the court, but, because of its uncertainty in regard to this important matter, we are unable to tell whether judgment should be directed for a return of the property, or for a return of the tax collected. Plaintiff is entitled to some relief, but the record is not sufficiently definite to enable us to make anything but an alternative order.

[3] Respondent objects to a consideration of the bill of exceptions, containing this agreed statement of facts because the judgment was rendered and notice of entry given on August 30, and the bill of exceptions was not tendered until October 2. Appellant relied upon the pendency of its motion for a new trial to interrupt the running of the time allowed for presenting the bill of exceptions, and respondent contends that, as the case was tried upon an agreed statement of facts, plaintiff was not entitled to a new trial, and therefore the pendency of its motion would not serve to extend the time for appeal. The record contains a stipulation of counsel that the "judgment roll, notice of intention to move for a new trial, order denying motion for a new trial, and plaintiff's bill of exceptions shall constitute the record on appeal herein." No objection appears to have been made to the power of the trial court to hear and determine the motion for a new trial, or to settle the bill of exceptions. Under such circumstances, we do not think respondent is in a position to urge the point here, even though it were meritorious. Furthermore, even though we take respondent's position and consider only the judgment roll, we find that substantially all the facts set out in the stipulation of facts are admitted by the pleadings, and upon the judgment roll alone, with these admissions in the pleadings, we should reach the same conclusion.

The judgment is reversed with instructions to the trial court to render judgment for the plaintiff declaring the tax illegal and void, and for a return of the property held, or of the money collected by the assessor, as the facts may warrant.

We concur: NOURSE, J.; BRITAIN, J.



(47 Cal. App. 794)

**IMPERIAL DEVELOPMENT CO. v. IMPERIAL COUNTY et al. (Civ. 3357.)**

(District Court of Appeal, First District, Division 2, California. May 22, 1920.)

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Imperial Development Company against the County of Imperial and others. From judgment for defendants, plaintiff appeals. Reversed, with instructions to render judgment for plaintiff.

Louis Lamy, of Calexico, for appellant.

E. R. Simon, Dist. Atty., of El Centro, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it in an action to have certain taxes assessed against its property by the assessor of the county of Imperial declared illegal and void, and for general relief. The facts are identical with the facts in the case of Imperial Development Co. v. City of Calexico (No. 3356) 191 Pac. 50, this day decided by this court, except that this action involves a county tax sought to be levied, while No. 3356 involves a city tax sought to be levied. The questions of law involved are identical, and, for the reasons set forth in the decision this day rendered in case No. 3356, the judgment herein is reversed, with instructions to the trial court to render judgment for the plaintiff declaring the tax illegal and void, and for a return of the property held, or of the money collected by the assessor, as the facts may warrant.

We concur: NOURSE, J.; BRITTAIN, J.

(47 Cal. App. 599)

**SECURITY MORTGAGE CO. v. DELFS et al. (Civ. 3368.)**

(District Court of Appeal, First District, Division 2, California. May 20, 1920. Rehearing Denied June 17, 1920. Denied by Supreme Court July 19, 1920.)

1. Appeal and error ¶1011(1)—Finding on conflicting evidence not disturbed.

Appellate court is bound by a finding of trial court based on conflicting evidence.

2. Estoppel ¶72—Loss from fraud of third person borne by party rendering injury possible.

As between two innocent parties who have both suffered from fraud of a third person, the loss must fall where the course of business has placed it, if no fraud or negligence is imputable to either party; but where the fraud or negligence of either has furnished the means whereby the third party has perpetrated the fraud and occasioned the loss, equity demands that the loss must be borne by the one who by his conduct has rendered the injury possible, under Civ. Code, § 3543.

3. Pledges ¶23—Claim of assignee of collateral prior to rights under prior unrecorded assignment.

An assignee of a note and mortgage as collateral for a loan did all that was required of him in the ordinary course of business when he made inquiry of the mortgagors to ascertain if they had any equitable defenses, and his rights were prior to rights under a prior unrecorded assignment.

4. Pledges ¶23—Prior assignee not injured by failure of subsequent innocent assignee to record assignment.

An assignee of a note and mortgage, which failed to record the same, cannot maintain that the equities between itself and a subsequent assignee are equal because the subsequent assignee did not record its assignment.

5. Estoppel ¶72—Second assignee had rights superior to first assignee because he caused the loss.

When a mortgage on realty is fraudulently transferred to two innocent assignees under separate assignments prior to recordation, or other notice, of either assignment, as between the two innocent parties, the priority of transfer and of the recordation, or other notice, is important only when the equities are equal, but where the assignee second in point of time takes without notice and for a valuable consideration through the negligence of the other, and the equities are otherwise equal, he by whose negligence the fraud occurred must be the sufferer.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Security Mortgage Company against John Delfs and others, in which the Continental National Bank of Los Angeles intervened. Judgment for plaintiff, and intervenor appeals. Affirmed.

Kemp, Mitchell &amp; Silberberg, of Los Angeles, for appellant.

Swanwick &amp; Donnelly and S. E. Vermilyea, both of Los Angeles (J. W. Swanwick, of Los Angeles, of counsel), for respondent.

NOURSE, J. Defendant and cross-complainant appeals from a judgment in favor of plaintiff foreclosing a mortgage executed by the defendants John and Rosa Delfs to one Gore, in February, 1917, and assigned by him to appellant in March, 1917, and thereafter on July 26, 1917, assigned by Gore to respondent. The facts material to the case are that, after the execution and delivery of the note and mortgage, Gore, the payee thereof, assigned both on a separate paper to appellant as security for the payment of an independent debt due from Gore to appellant; that thereafter, and on July 18, 1917, appellant, acting through its regularly employed note teller, delivered the note and mortgage to Gore, taking his receipt therefor; that on July 26, 1917, Gore

assigned the note and mortgage to respondent as security for the payment of \$10,000 borrowed by him from respondent at that time; that thereafter, and on the 21st day of September, 1917, appellant duly recorded its assignment of March, 1917, and four days later respondent's assignment of July 26th was recorded. The action was commenced by respondent to foreclose the mortgage so assigned to it, and appellant intervened, claiming to be the owner of the note and mortgage as a prior assignee.

The trial court found that respondent was the owner of the note and mortgage at the time of the trial, that appellant was estopped from claiming ownership, and that the note and mortgage had been voluntarily delivered to Gore by appellant. These findings are attacked by appellant, the first two as being insufficient to support the judgment, the last as not being supported by the evidence.

[1] First giving consideration to the attack upon the finding of voluntary delivery of the note and mortgage, it appears that the evidence was conflicting, a portion of it having been given by deposition, and this being contradicted by appellant's witnesses during the course of the trial. The evidence was that the documents were voluntarily delivered to Gore by the regularly employed note teller of the bank, who took Gore's receipt upon a printed form of receipt for collateral furnished him by the bank for the purpose. The teller testified that he had been specially authorized by the bank president to so deliver collateral to Gore whenever he wanted it, and that it was a customary and frequent thing to do if the particular form of receipt was signed. The only conflict in the evidence as to this point was in the testimony of one of the witnesses for appellant to the effect that the authority given the note teller was restricted, so that he should not permit Gore to take the documents away from the bank premises. Upon such conflict this court is bound by the finding of the trial court.

With this finding taken as conclusive, the evidence is that, on the 18th day of July, 1917, appellant, while then having possession of the note and mortgage as security for an indebtedness of Gore to appellant, voluntarily delivered them to Gore, indorsed in blank by Gore, the payee thereof, with nothing appearing upon either document to indicate that appellant, or any one other than Gore, had any interest in them; that appellant permitted the note and mortgage to remain in the possession of Gore without recordation of its assignment or notice to the mortgagors until some six months after its execution; that the loan of respondent to Gore was made in good faith, for a valuable consideration, and without notice or knowledge that any one other than Gore

claimed any interest in the note and mortgage; and that the loan would not have been made by respondent if appellant had not permitted Gore to assume possession of the documents free from any notice of adverse claims.

Upon this showing it is argued that appellant was negligent in failing to record its assignment prior to the transfer to respondent, in failing to give notice to the mortgagors, and in delivering the documents to Gore without some notation thereon showing its claim. From this it is argued that, as respondent was an innocent purchaser for value and without notice, appellant is estopped by its own negligence from asserting its claim, or that, the loss having occurred through appellant's negligence, it must be the one to suffer.

[2] As between two innocent parties who have both suffered from the fraud of a third, the loss must fall where the course of business has placed it, if no fault or negligence is imputable to either party. But where the fault or negligence of either has furnished the means whereby the third party has perpetrated the fraud and occasioned the loss, equity demands that the loss must be borne by the one who by his conduct has rendered the injury possible. 10 R. C. L. p. 695. This is in effect a restatement of the well-known maxim of jurisprudence found in section 3543 of our Civil Code that—

"Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer."

[3,4] The doctrine so expressed is often referred to as estoppel by negligence, which is not strictly correct because some of the essential elements of estoppel are lacking in ordinary negligence. But it makes little difference by what term the rule is designated. If the facts found are sufficient to bring the conclusion of law within the rule, the judgment must be affirmed. Here the findings of fact amply support the conclusion that respondent was the innocent party, and that the loss occurred through the negligence of appellant. The note and mortgage were made payable to Gore, and bore every evidence of title and transferability in him. Respondent made inquiry of the mortgagors to ascertain if they had any equitable defenses against the apparent liability, and ascertained that they had none. This was all that prudence in the ordinary course of business required. If appellant had recorded its assignment or had given notice thereof to the mortgagors, its rights could have been protected. "The policy of the law is against upholding secret liens and charges to the injury of innocent subsequent purchasers and incumbrancers." *Smitton v. McCullough* (Sup.) 189 Pac. 686. But appellant argues that the equities are equal be-

cause respondent also was negligent. The only negligence ascribed to respondent in the briefs is its failure to record its assignment prior to recordation by appellant. But negligence without injury is of no avail to appellant. Upon its theory of the case, if respondent had so recorded its assignment, appellant would have been without any remedy whatsoever, while the failure to record did not injure appellant.

The facts of the case differ materially from those in *Chase v. Whitmore*, 68 Cal. 545, 9 Pac. 942, *Kohn v. Sacramento Elec. Gas, etc., Co.*, 168 Cal. 1, 141 Pac. 626, and *Crocker National Bank v. Byrne & McDonnell*, 178 Cal. 329, 173 Pac. 752, because in each one of those cases the securities were taken from the true owner by fraud or theft, whereas in the case at bar the note and mortgage were assigned to appellant as security for the payment of another independent debt, and the pledgee voluntarily released its security to the pledgor without fraud on the part of any one acting for the pledgee. Furthermore, as Gore was the payee of the note, he was, so long as it remained in his possession at least, the apparent, if not the true, owner. Under such circumstances respondent was not required to make inquiry of all the world to see if others had some prior claim.

[5] There remains for consideration the question of the effect of the recordation acts upon the rights of the parties. Appellant contends that respondent's assignment must be held void because under section 1215, Civil Code, an assignment of a mortgage upon real property must be treated as a conveyance within the meaning of section 1214, Civil Code, which provides that every such conveyance is void "as against any subsequent purchaser \* \* \* in good faith and for a valuable consideration, whose conveyance is first duly recorded." But assuming that the section includes an assignment of a mortgage, appellant was not a "subsequent purchaser" within the meaning of the section, the purpose of which is to protect the interests of the innocent purchaser as against the claim of the prior owner who has failed to avail himself of the protection afforded him by the statute of giving notice to the world by the recordation of the conveyance. But even so, these sections of the Code were enacted at the same time as sec-

tion 2934 of the same Code, which provides that—

"An assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor."

Here again is the evident purpose to make the recordation of the assignment notice to those subsequently deriving title. "There is no provision as to prior assignees, or that the recordation should have 'like effect' as recordations of grants." *Adler v. Sargent*, 109 Cal. 42, 49, 41 Pac. 799, 800. The effect of the recordation of a grant of real property is fixed by section 1107 of the Civil Code, which favors the one who in good faith and for a valuable consideration has acquired title by an instrument that is first duly recorded. There is no express provision in the Code to the effect that the recordation of an assignment of a mortgage on real property shall in itself operate to defeat the title of an innocent assignee for value who took without notice and prior to the recordation. Inasmuch as section 2934 relates specifically to assignments of mortgages and was adopted concurrently with sections 1214 and 1215, Civil Code, the effect of recordation of an assignment must be that prescribed therein, namely, notice to those subsequently deriving title. And such must be the rule in view of the decision in the *Adler Case*, which has been accepted as the judicial interpretation of that section. From this it follows as a rule of law that when a mortgage on realty is fraudulently transferred to two innocent assignees under separate assignments prior to recordation or other notice of either assignment, as between the two innocent parties the priority of the transfer and of the recordation or other notice is important only when the equities are equal. But where the assignee second in point of time takes without notice and for a valuable consideration through the negligence of the other, and the equities are otherwise equal, he by whose negligence the fraud occurred must be the sufferer.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRIT-  
TAIN, J.

(47 Cal. App. 197)

**GOULD v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.** (Civ. 3434; S. F. 9501.)

(District Court of Appeal, First District, Division 2, California. April 22, 1920. Opinion of Supreme Court in Bank, Denying Hearing, June 21, 1920.)

**1. Divorce §156—Marital status not affected by interlocutory decree.**

Under the provision of Civ. Code, § 132, the marital status of parties to a divorce action is not affected by the interlocutory decree, further than that it establishes conclusively, unless set aside on appeal or in some other manner expressly provided by statute, the right to divorce upon the expiration of the statutory period of one year.

**2. Husband and wife §266—May change character of community property by agreement.**

Husband and wife may agree in regard to their real property rights, and may change community property to separate property.

**3. Husband and wife §266—Court may change community to separate property.**

Court has the power to change community property to separate property in an action between husband and wife, where such disposition is essential to a proper determination of their relative rights.

**4. Divorce §156—Preliminary interlocutory order, when final.**

Despite the old equity rules, under which preliminary interlocutory orders had none of the characteristics of a final decree, the statutory interlocutory decree in divorce suits is final, except as against such attack as is authorized by statute.

**5. Divorce §252 — Interlocutory decree of divorce a "contract" as to property rights.**

An interlocutory decree of divorce, dividing the community property, constitutes a contract between the parties, especially where entered by consent, and settles the property rights of the parties for the time being, and until some proceeding is begun to change the status.

**6. Divorce §156—Death of husband after interlocutory decree terminated marital relations.**

Death of husband after interlocutory decree of divorce terminated the marital relationship, and the entry of a final decree thereafter had no effect upon the personal status of the surviving wife.

**7. Prohibition §28—Legal effect of decree not reviewable.**

On application for prohibition to prevent the setting aside of a final decree of divorce, it would not be proper to determine legal effect of contract evidenced by interlocutory decree upon property rights of the parties, if any, which vested in the wife on the death of the husband shortly after the entry of the interlocutory decree.

**8. Prohibition §27—Presumption in favor of action of trial court.**

On application for prohibition to prevent setting aside of a final decree of divorce entered in accordance with the interlocutory decree, every presumption in favor of the action of the trial court in entering the final decree must be indulged.

**9. Divorce §156—Court may enter final decree after death of husband.**

Where husband died shortly after entry of an interlocutory decree of divorce in his favor, the court, under Civ. Code, § 132, had jurisdiction thereafter to enter a final decree of divorce; the interlocutory decree having made a division of community property.

**10. Divorce §165(4)—No jurisdiction to set aside final decree of divorce after expiration of year.**

One year having expired from entry of final decree of divorce, court had no jurisdiction to entertain a motion to set aside the decree under Code Civ. Proc. § 473.

**On Hearing in Supreme Court.****11. Husband and wife §266—Contracts dividing property valid.**

Contracts between husband and wife respecting the division of property are valid, under Civ. Code, § 159, even though made in an action for divorce, and the rights thereunder do not of necessity cease upon the death of either party after interlocutory decree of divorce, and before final decree.

Angellotti, O. J., and Wilbur, J., dissenting.

Application by E. B. Gould, as special administrator of the estate of Frank H. Gould, deceased, for a writ of prohibition, prayed to be directed to the Superior Court of the State of California in and for the City and County of San Francisco and others. Writ granted in District Court of Appeal, and hearing denied in Supreme Court.

See, also, 183 Pac. 146.

Walter E. Drobisch, of San Francisco, and Frank Freeman, of Willows, for petitioner.

Joseph A. Brown and Fabian D. Brown, both of San Francisco, for respondents.

**PER CURIAM.** The petitioner, as the special administrator of the estate of Frank H. Gould, deceased, seeks by prohibition to prevent the superior court, and Hon. E. P. Shortall, one of its judges, in San Francisco, from setting aside a final decree of divorce, entered after the death of petitioner's intestate.

In his lifetime Frank H. Gould was the husband of Nettie Gould. There was one child of the marriage, a daughter, who was between 16 and 17 years old in October, 1916, when the husband sued for divorce. After answer and cross-complaint, the trial resulted in an interlocutory decree of divorce in favor of the wife. It was dated

January 19, 1918. The court found there was community property, which, except as hereinafter stated, was not described in the findings. The divorce was granted on the ground of willful desertion by the husband. The decree recited that the parties had agreed in open court "to the division of the community property and the provision for alimony as hereinafter provided." The provisions referred to were that the husband pay the wife as permanent alimony and for her support the sum of \$75 per month, commencing on January 21, 1918; that he should pay her immediately \$2,500 in cash; that out of the community property and the homestead there be assigned and allotted to the wife a certain lot of land in San Francisco, together with the dwelling house and other improvements thereon, and all the furniture and personal property contained therein, "the same to be her sole and separate property and estate." It was ordered that the plaintiff pay and discharge a certain incumbrance upon said real property within three years, and in the interim that he should pay all interest and other charges secured by mortgage; "it being the true intent of this decree to award said real property to the defendant, Nettie Gould, free and clear of incumbrances, but to allow the said Frank H. Gould the said period of three years from and after date hereof within which to discharge the said lien or incumbrance." All other property of the community was expressly assigned and allotted to the plaintiff, free and clear of all claim of the defendant. It was further decreed that each of the parties respectively should immediately execute and deliver to the other quitclaim deeds conveying the respective property, and providing that, if either party should fail or omit to make the deed within a period of 10 days after the date of the decree, the clerk of the court execute the deed to carry the decree into effect. The last clause of the decree provided that upon the expiration of one year final judgment granting the defendant a divorce, "and providing for the permanent alimony and support of defendant and the division and allotment of the community property, and other relief, as hereinbefore in this interlocutory decree provided, be entered herein." The decree was recorded on January 21, 1918.

[1] Under the provisions of section 132 of the Civil Code, the marital status of the parties was not affected by the interlocutory decree, further than that it established conclusively, unless set aside on appeal or in some other manner expressly provided by statute, the defendant's right to divorce upon the expiration of the statutory period of one year, which must elapse between the entry of the interlocutory decree and the final judgment dissolving the marriage. In *re Seller's Estate*, 164 Cal. 181, 128 Pac. 334,

*Ann. Cas.* 1914B, 1093; *Pereira v. Pereira*, 156 Cal. 9, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; *Estate of Walker*, 169 Cal. 400, 146 Pac. 868; *Brown v. Brown*, 170 Cal. 1, 147 Pac. 1168; *London Guaranty & Accident Co. v. Industrial Accident Commission*, 154 Pac. 864.

[2-4] In so far as the interlocutory decree affected the property rights of the parties, it appears from the facts in the record that they agreed to the division of the community property in accordance with the terms of the decree. Husband and wife may agree in regard to their real property rights, and may change the character of community property to separate property. A court has the power to do so in an action between them, where such disposition is essential to a proper determination of their relative rights. *Fay v. Fay*, 165 Cal. 469-472, 132 Pac. 1040. Despite the old equity rules, under which preliminary interlocutory orders had none of the characteristics of final decrees, the statutory interlocutory decree in divorce suits in this state is final, except as against such attack as is authorized by statute. *Suttman v. Superior Court*, 174 Cal. 243, 162 Pac. 1032; *Bancroft v. Bancroft*, 178 Cal. 367, 178 Pac. 582.

[5] The interlocutory decree constituted a contract between the parties, both because the provisions for division of the community property were by consent and because "a judgment is a contract, in the highest sense of the term." *Wallace v. Eldredge*, 27 Cal. 498; *Stuart v. Lander*, 16 Cal. 372, 76 Am. Dec. 538; *Bean v. Loryea*, 81 Cal. 151, 22 Pac. 513; *Dore v. Thornburgh*, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100; *Weaver v. San Francisco*, 146 Cal. 728, 81 Pac. 119. The interlocutory decree, so far as it determined the rights of the parties, is a contract between them, temporary and provisional in its nature; but it settled the rights of the parties for the time being, "and until some action, proceeding, or motion is begun to change the status, and some order is made thereon which has that effect, or until they become reconciled and resume marital relations, in which event their mutual obligations are, for the time being, at least, restored." *London Guaranty & Accident Co. v. Industrial Accident Commission*, supra; *Olson v. Superior Court*, 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589.

Frank H. Gould died after the entry of the interlocutory decree, and within one month after its date, on February 14, 1918, an order was made in the superior court reciting the fact that an affidavit and consent of Nettie Gould, special administratrix of the estate of Frank H. Gould, deceased, had been filed, and E. B. Gould, special administrator of the estate, was substituted and made a party plaintiff in the divorce action. On January 23, 1918, two days after the expiration of

the year following the entry of the interlocutory decree, on the court's own motion, the final decree of divorce was entered. It embodied all the provisions of the interlocutory decree. On January 4, 1920, Nettie Gould moved in said court for an order setting aside the final decree of divorce, which motion remained under submission until the application for writ of prohibition was filed in this court and the alternative writ issued on March 13, 1920, more than one year after the entry of the final decree.

[8, 7] The death of the husband terminated the marital relationship. The entry of the final decree thereafter had no effect upon the personal status of the surviving wife. *Estate of Seller*, supra; *Estate of Dargie*, 162 Cal. 51, 121 Pac. 320. Upon the death of the husband, the rights of the wife under the laws of succession, if he died intestate, were fixed, unless those rights had theretofore been changed by contract with the husband. Since no appeal was taken from the interlocutory decree, and it was not set aside under section 473 of the Code of Civil Procedure, it became final and conclusive at the expiration of six months from its entry. It was a contract in regard to the community property. It is not necessary, nor would it be proper on this proceeding, to determine the legal effect of the contract evidenced by the interlocutory decree upon the property rights, if any, which vested in the wife on the death of the husband. It may be in a proper proceeding that it will be necessary for a court, called upon to construe the interlocutory decree, to determine whether the transfer of the property to the wife and her waiver of claim against other property of the husband barred her from claiming in his estate any property under the laws of succession, or whether the legal effect of the decree was simply to convert the portion of what had theretofore been community property into separate property of the husband, in which, if he died intestate, it may appear that she has a heritable right. These statements are not to be understood as conveying any expression of opinion on the part of this court upon these matters, but as a basis for the conclusions reached in regard to the power of the trial court to enter the final decree or to set it aside.

[8, 8] Because this court on this proceeding cannot determine the legal effect of the interlocutory decree, it must, under well-established rules, indulge in every presumption in favor of the action of the trial court in entering the final decree, if, indeed, that action requires support by presumption. In the absence of a showing to the contrary, it must be presumed that the deeds, required to be executed within ten days after the interlocutory decree was made, were in fact executed, and that to forestall any doubt which might arise as to the vesting of title

under such deeds, or pursuant to the interlocutory decree, the final decree was entered. It does not seem necessary either to indulge in presumption upon this subject or to consider the reason which may have actuated the trial court to enter the final decree. The last clause of section 132 of the Civil Code expressly provides that "the death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided." Since the marriage was not dissolved by the entry of the final decree, but by the death of the husband, and since the interlocutory decree established the property rights to the extent above indicated, it would appear, on the one hand, that the entry of the final decree accomplished nothing; on the other, that it injured nobody. While the law neither does nor requires idle things, it cannot be said that, when the Legislature expressly reserved the power in the court to make the final decree, it was an idle act. Under the Code section, it is concluded that the court had jurisdiction to enter the final judgment.

[10] The decree not having been set aside until more than one year had elapsed, the application for the writ of prohibition is based on the ground that to grant the pending motion is beyond the jurisdiction of the trial court. The respondents resist the granting of the writ solely on the ground that a judgment, which appears on its face to have been made without jurisdiction, is void, and may be attacked at any time. The conclusion that the trial court had jurisdiction to make the final decree disposes of the respondents' contention. The time having expired within which the trial court might have set aside the final decree under section 473 of the Code of Civil Procedure, on motion, it has lost jurisdiction to entertain such a motion. *Byrne v. Hoag*, 116 Cal. 1, 47 Pac. 775.

Let the peremptory writ of prohibition issue as prayed for by the petitioner.

All three Justices concur.

#### Opinion of Supreme Court in Bank Denying Hearing.

PER OURIAM. The petition for rehearing is denied. The opinion of the District Court of Appeal does not mention the decision given by the District Court of Appeal of the Second District, filed on October 30, 1919, in *Gloyd v. Superior Court*, 185 Pac. 995. In that case a petition for a rehearing was denied by the Supreme Court. It is claimed in the present petition for rehearing that the opinion in this case is directly contrary to that in the *Gloyd Case*. We think there is a clear distinction between them, and one which takes away any apparent conflict. In the *Gloyd Case* the interlocutory decree of divorce was a simple declaration that the husband, who was plaintiff, was

entitled to a divorce. It did not purport to adjudicate property rights of any character. It was there held that in such a case, upon the death of the plaintiff during the ensuing year, the superior court lost jurisdiction to proceed further in the case, because the death dissolved the marriage, and extinguished the pre-existing marriage status which formed the subject-matter of the action, leaving nothing upon which the only final decree that could be made could operate.

[11] In the present case the interlocutory decree not only declared that the wife, who was cross-complainant, was entitled to a divorce, but also purported to confirm and provide for the performance of an agreement made by the husband and wife in open court dividing the community property between them and providing for the payment to the wife by the husband of a permanent monthly sum for her support. It was held that, although the court may have lost jurisdiction to make a final decree, after the death of the husband, dissolving the marriage status, the property rights fixed by the agreement and confirmed by the interlocutory decree still remained in existence, and that as to them the court retained jurisdiction to enter the final decree in the manner specified in the interlocutory decree. Inasmuch as a husband and wife may, even if no divorce action is pending, make such contracts as they may choose respecting property (Civ. Code, § 159), such contracts, whether made in an action for divorce or otherwise, are valid, and the rights thereunder do not of necessity cease upon the death of either party. Consequently the subject-matter of the interlocutory decree, so far as such rights are concerned, was not extinguished by the death of Gould during the year succeeding the interlocutory decree, and the court to that extent retained jurisdiction. This distinction is clearly indicated in the opinion of the District Court, and it was also intimated in the Gloyd Case, although in that case it was not necessary to say what the result would be as to the property relations inasmuch as none had been adjudicated by the interlocutory decree.

SHAW, OLNEY, SLOANE, LAWLOR, and LENNON, JJ., concur.

ANGELLOTTI, C. J., and WILBUR, J., dissent from order denying rehearing.

(47 Cal. App. 742)

**MALOOF v. DAVIS et al.** (Civ. 2134.)

(District Court of Appeal, Third District, California. May 26, 1920.)

**1. Brokers** § 86(4)—Evidence held to show broker the procuring cause of sale.

In real estate broker's action for commission, evidence held to sustain finding that broker was the procuring cause of the sale.

**2. Appeal and error** § 1010(1)—Court's finding conclusive where rational inference from evidence.

Questions of fact must be resolved in favor of court's finding if the finding is a rational inference from the showing.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by A. Maloof against Ona M. Davis and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. L. Thompson, of Santa Rosa, for appellants.

Kellogg & Kyle, of Santa Rosa, for respondent.

BURNETT, J. The action was for compensation for securing a purchaser of real estate belonging to defendants. The written contract, executed by the parties, upon which the action was brought, as far as necessary to quote, was in the following language:

"I hereby authorize A. Maloof, as my agent, for a term of ——— days from this date, and hereafter until notified by me in writing that the same is withdrawn (this is not exclusive), to offer for sale and sell for me for the sum of \$35,000, my real property (describing it). And I further agree that if my said agent shall procure a buyer for said property, or if a sale or exchange is made by, or upon any information received through such agency, whether such sale or exchange be made before or after the expiration of this agreement, at the above or any other amount named or accepted by me, I will pay to said agents five per cent. of such selling price, as a commission and compensation for such services."

The court found that—

"The plaintiff interested one John Greott in the purchase of said property \* \* \* and thereafter, the said defendants sold said ranch property to said John Greott and accepted and received from him, in payment thereof, the sum of thirty thousand dollars \* \* \* That the said buyer of property, to wit, John Greott, was procured by plaintiff, and said sale to said John Greott was made by and upon information received by said defendants from plaintiff."

The foregoing findings present the only questions that are in controversy between the parties. In fact, during the progress of the trial the learned counsel for appellants declared, "I suppose the only question in this case is, was Mr. Gray or Mr. Greott the purchaser," and subsequently he said:

"Of course, the real issue in this case is what was the procuring cause of the sale; that is the real question in this case."

The record contains evidence of these facts as substantially stated by respondent: After the execution of this contract, and before any written notice of its withdrawal, plain-

tiff took several persons out to look at the property in an endeavor to interest them as buyers. Finally he did interest one John Greott, took him and his wife out to inspect the property in person, introduced them to the defendants as being possible purchasers, and spent with them some two or three hours while they examined and talked with the defendants about the entire property. Greott liked the place and was very much interested in it, but, having already an offer outstanding for another place, said he would make no offer until he heard from that, when he would talk business, would let them know and would make them an offer. Within a short time afterward plaintiff saw Greott twice, and each time was advised that Greott had not yet found out about his offer for the other place, and was not ready to talk business concerning the purchase of this. While plaintiff was still waiting for Greott to answer, he evidently learned that he was not to get the other place, and the transaction occurred by which the defendants conveyed their property to Greott by deed dated April 19, 1919, and on the same day taken by Greott himself to the recorder's office, and there recorded. Thereupon plaintiff sought out Greott and inquired why he had bought defendants' place from other agents, and he replied that it was because he could get it cheaper from Gray, the real estate agent with whom the property had been listed by defendants. Respondent thereupon went to one of the defendants, and demanded his commission on account of the sale to his customer, and was informed that appellants had obtained a contract from Gray that they should have no commission to pay, and if any was paid it was up to Gray. Greott paid the entire purchase price of \$30,000, which was accepted by defendants, in the form of three personal checks, one April 12, 1919, for \$5,000; two on April 19, 1919, the date of the execution and delivery of the deed, one for \$12,640, and one for \$12,360.

[1] Of course, we are not concerned with the fact that evidence was introduced on behalf of appellants to the effect that one Gray was the real purchaser of the property, and that the deed was taken in the name of Greott to secure him for the purchase price, which he advanced. It is sufficient for us to say that the court's conclusion to the contrary finds in the record sufficient legal support. Moreover, according to the testimony of Mr. Gray, he and Mr. Greott were partners in the transaction; in other words, the purchase was made by and for the benefit equally of both of them. Upon this theory the participation of Greott in the purchase is sufficient, in a legal sense, to satisfy the requirement that the purchaser must be one secured by the agent.

[2] The question whether the efforts of the agent were the procuring cause of the sale must be resolved in favor of the finding of the court, since such is a rational inference from the showing made. When an agent takes a prospective purchaser upon the land, introduces him to the owner, and succeeds in awakening his interest in the property, and the purchaser expresses a tentative or conditional purpose to buy the land, and a short time thereafter he does purchase it, no surprise should be occasioned if a court concludes that the agent's efforts were the procuring cause of the sale, or at least that the sale "was made by, through or upon information received through such agent."

Appellants have treated us to an interesting and instructive discussion of the principles governing brokers' commissions, but they are familiar to the profession and have been often considered by this and other appellate courts of the state, and we deem further consideration of them unnecessary.

The question here is one of evidence, and, since there is no legal objection to the validity of the contract made by the parties, and we are satisfied that there is support for the conclusion of the trial judge that plaintiff fully executed the terms and conditions of said contract entitling him to the compensation therein provided, we need to go no further.

The judgment is affirmed.

We concur: NICOL, Presiding Judge. pro tem.; HART, J.

(47 Cal. App. 650)

SMITH v. SMITH et al. (Civ. 3374.)

(District Court of Appeal, First District, Division 2, California. May 21, 1920.)

1. Appeal and error  $\S$ 1011(1)—Finding of trial court on conflicting evidence conclusive.

Where the testimony of plaintiff husband that an assignment was not made as a gift to his wife, a defendant, merely created a conflict of evidence on the point, the finding of trial court that it was a gift is conclusive as to the fact.

2. Husband and wife  $\S$ 259, 266—Earnings of wife during marriage may be relinquished to her.

Though the earnings of a wife from her labor or business during marriage are as a rule community property, the husband may relinquish to the wife the right to such earnings without any consideration other than their mutual consent, and they then become her separate property.

3. Husband and wife  $\S$ 266—Husband's agreement to relinquish wife's earnings to her may be inferred.

Agreement of a husband to relinquish to his wife her separate earnings may be proved



by evidence as to the acts and conduct of the husband, with relation to the earnings of the wife or business conducted by her as community property, indicating that he did not regard them as community property.

**4. Husband and wife ⇨286—Wife's earnings relinquished to her became separate property.**

Wife's millinery business and earnings derived therefrom relinquished to her by her husband held to have become her separate property.

**5. Husband and wife ⇨258—Expenditure of community funds on wife's separate realty does not change title.**

The expenditure by a husband of either his separate funds or the community funds of himself and wife in improving his wife's separate property does not change title to the realty as between them, in the absence of any specific agreement to the contrary; title to improvements following land.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by James E. Smith against Phelia L. P. Smith and others. From judgment for defendants, plaintiff appeals. Affirmed.

H. S. Laughlin and Muhleman & Crump, all of Los Angeles, for appellant.

Swaffield & Swaffield, of Long Beach, for respondents.

**NOURSE, J.** Action to quiet title. Judgment was rendered in favor of defendant on her cross-complaint, from which plaintiff appeals.

Plaintiff and defendant Phelia L. P. Smith are husband and wife. The property which is the subject of this litigation consists of a lot, with dwelling house thereon, situate in Long Beach, Cal. The complaint alleged that at the time of the commencement of this action plaintiff was the owner and in possession of the lot in question; that said lot was purchased and improved subsequent to the marriage of plaintiff and defendant Smith with the separate funds of plaintiff and the community funds of plaintiff and defendant Smith, and the deed for convenience was taken in the name of defendant Smith; that defendant Smith had incumbered the same by giving a trust deed to defendant the Title Insurance & Trust Company to secure the repayment of money had from defendant Long Beach Savings Bank & Trust Company, and had used the money thus acquired without the knowledge or consent of plaintiff to the detriment of plaintiff and his interests in said property. Defendant Smith answered and cross-complained, denying the allegations of the complaint and setting up title in herself as her separate property and estate. The trial court found that the property was neither purchased with the separate funds of plaintiff and the community funds of plaintiff and defendant

Smith nor the separate funds of plaintiff. On the contrary, the court found that defendant Smith acquired, by assignment from her sister, as a gift, her equity in a contract for the purchase of lot 8, on which the sister had paid the sum of \$335, leaving an unpaid balance of \$165, which defendant Smith thereafter paid out of her separate funds.

[1] Appellant contends that the property in question is community property because it was acquired subsequent to marriage and with community funds. This contention is based upon the testimony of appellant that the assignment was not made as a gift to his wife, but that she purchased her sister's equity in the lot for \$50 which he furnished for that purpose. This merely created a conflict in the evidence, and the finding of the court that it was a gift is conclusive as to that fact. Appellant further argues that the \$165 balance paid by defendant Smith on the purchase price of the lot was money derived from a millinery business conducted by Mrs. Smith subsequent to their marriage and hence was community property.

[2, 3] Although the earnings of the wife during marriage are, as a rule, community property, the husband may relinquish to the wife the right to such earnings without any consideration other than their mutual consent, and they then become her separate property. *Wren v. Wren*, 100 Cal. 276, 279, 84 Pac. 775, 38 Am. St. Rep. 287; *Larson v. Larson*, 15 Cal. App. 531, 535, 115 Pac. 340. Such an agreement may be proved by evidence as to the acts and conduct of the husband with relation to the earnings of the wife or business conducted by her as community property indicating that he did not regard them as community property. *Larson v. Larson*, supra; *Kaltschmidt v. Weber*, 145 Cal. 596, 599, 79 Pac. 272. Respondent Smith testified that she started the millinery business with \$200 received from the sale of property concededly her separate estate. This was denied by appellant, who claimed that he advanced the \$200 to help her start the business. But, as significant of his attitude with relation to that business, he testified:

"The proceeds from that store were kept in her personal bank account. I had no access to that bank account. I knew when she started the business and ran the bank account along that way. \* \* \* I knew that she started her bank account. The bank account was in her own name. \* \* \* I had a bank account and she had hers, and I do not think either had access to the other's account. She paid the bills for that millinery business out of her account except the first one; that was the money I let her have to start it with, that is, the big bill, \$200 or \$250; except for that she paid the bills out of her own account and she ordered the goods, selected them and determined what they should be. That was the way it always was from the beginning."

[4] It is apparent from an examination of the entire evidence that plaintiff made no claim to the business, but treated it as his wife's separate property. The right to the millinery business and the earnings derived therefrom having been thus relinquished by plaintiff to his wife, they did, in fact, become her separate property.

The only other question for determination is whether the original character of the lot was changed by the improvements erected thereon, which consisted of a dwelling house costing in the neighborhood of \$3,000. The trial court found on conflicting evidence that all improvements were made by respondent Smith out of her separate estate and property, that appellant from time to time advanced some moneys and funds out of his own separate estate and out of the community property, which were used in the improvements, that all such advancements were made by appellant as a gift to respondent Smith as and for her own separate estate and property; and that all improvements now on the real property are the sole and separate property and estate of respondent Smith, and that appellant has no interest in either the land or improvements thereon. The findings on the facts are conclusive. The conclusions of law drawn therefrom are supported by the authorities.

[5] The expenditure by a husband of either his separate funds or the community funds of himself and wife in improving his wife's separate property does not operate to change the title. As between them, in the absence of any specific agreement to the contrary, the title to the improvements follows the land. *Carlson v. Carlson*, 10 Cal. App. 300, 303, 101 Pac. 923; *Shaw v. Bernal*, 163 Cal. 262, 267, 268, 124 Pac. 1012. Appellant does not claim that there was any agreement that the property should become community property. Where no agreement has been made, "it must rather be presumed that it was the intention of the husband to advance the money paid for the benefit of the wife's estate and that it was intended to accrue to her interest." *Carlson v. Carlson*, supra.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRIT-  
TAIN, J.

(47 Cal. App. 571)

GORDON et al. v. HILLMAN et ux.  
(Civ. 3375.)

(District Court of Appeal, First District, Division 2, California. May 19, 1920.)

1. Judgment  $\S$ 925—Suit maintainable on foreign judgment under full faith clause.

Under Fed. Const. art. 4, § 1, suit on a final judgment affirmed by the Supreme Court of the state of Washington can be maintained in California.

2. Judgment  $\S$ 818(1)—Full faith clause applies only to records of courts having jurisdiction.

Federal Const. art. 4, § 1, requiring courts of one state to give full faith and credit to the judgments of a sister state, applies to records and proceedings of courts only in so far as they have jurisdiction, and the jurisdiction of the court rendering judgment sued on in another state is always open to inquiry under proper averments questioning its conclusiveness.

3. Judgment  $\S$ 820—Judgment of other state now sued on may be resisted for fraud going to jurisdiction.

Since a fraud may go to the question of jurisdiction, judgment rendered in another state may be resisted for fraud going to the jurisdiction of the court of such other state, either with respect to the subject-matter or the person, or which constitutes a fraud on the law of the forum, or which operates to deprive a party against whom judgment was rendered of opportunity to present a meritorious defense.

4. Judgment  $\S$ 946—Default in suit on judgment of other state reversed, where original judgment set aside.

If original judgment of the state of Washington sued on in California had been set aside prior to defendants' motion to vacate default judgment against them rendered in California, the default judgment would have been reversed as a matter of right, and restitution awarded defendants.

5. Judgment  $\S$ 922 — Setting aside former judgment sued on has same effect as where suit brought on judgment subsequently reversed.

The effect of setting aside former judgment sued on is the same as where suit is brought on a judgment which is thereafter reversed on appeal, when the judgment debtor is entitled to have the second judgment set aside as of record and as of right.

6. Judgment  $\S$ 946—Motion to vacate default judgment on judgment of other state sought to be vacated for fraud should have been granted.

While motion made under Code Civ. Proc. § 473, to vacate a default judgment is addressed to the discretion of the court, and its action will not be disturbed on appeal except for clear showing of abuse under particular circumstances shown, *held* that defendants' motion, made within the six months limited by the Code section to vacate default judgment against them on a judgment of the state of Washington, which they had instituted proceedings to set aside for fraud, should have been granted.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by E. M. Gordon, individually and as administrator of the estate of Eva P. Gordon, deceased, against C. D. Hillman and Bessie Olive Hillman, his wife. From an order denying defendants' motion to vacate default judgment against them, they appeal. Reversed.

Arthur C. Vaughan, of Los Angeles, for appellants.

R. B. Turnbull and Harold E. Thomas, both of Los Angeles, for respondents.

**BRITTAIN, J.** The defendants appeal from an order denying motion to vacate a default judgment in the superior court in Los Angeles in a suit to recover some \$40,000 upon a judgment alleged to have been rendered in the superior court of King county, in the state of Washington, on January 5, 1918.

Judgment was entered on June 4, 1918. Notice of motion to vacate the default judgment was given on November 9, 1918. It was accompanied by an affidavit of the defendant and a copy of the proposed answer. The judgment of the Washington court was attacked on the ground of fraud. It is stated in the affidavit that the defendant, Hillman, was not aware of the fact that he and his codefendant had a good and substantial defense to the action in Los Angeles until May 20, 1918. It further appears that on May 25, 1918, proceedings were commenced in the Washington court to vacate and set aside the original judgment. The defendants advised their attorney that they had done so, and instructed him to file an answer on their behalf in the Los Angeles suit, setting up the alleged fraud upon them as a defense therein. It is alleged they relied entirely upon their attorney to protect their interests in this connection, and to prepare and file all necessary papers and pleadings, and that they believed he had taken and would take such steps as were necessary and proper to protect their interests; that they did not know of the entry of the default or of the judgment by default until June 20, 1918, when they were advised by their attorney that they might move at any time within six months to vacate the judgment; that this statement was couched with the advice that the defendants should delay making their motion in the Los Angeles court, so that the Washington court might have an opportunity to pass upon the proceedings instituted there prior to the hearing of the motion in Los Angeles. It appears, inferentially, at least, that the proceedings to vacate the judgment were pending in the Washington court at the time of the hearing of the motion, which was denied on November 20, 1918. Reference is made in the appellants' brief to a decision rendered by the Supreme Court in the state of Washington on December 30, 1919, the effect of which was to cause the vacation of the judgment on which the suit in the Los Angeles court was based. *Gordon v. Hillman* (Wash.) 186 Pac. 651. Considered as a matter of fact, the action of the Washington court, after the determination of the motion in the Los Angeles court, can be given no consideration. When the motion was made,

however, within the six months limited by section 473 of the Code of Civil Procedure, it appeared that the proceedings to vacate the Washington judgment were pending.

[1-3] From the showing made on behalf of the defendants, it appeared that the judgment on which the suit was brought was a final judgment, having been affirmed by the Supreme Court of Washington. Suit on such a judgment may be maintained under constitutional provisions requiring courts of one state to give full faith and credit to the judgments of a sister state. Const. art. 4, § 1. That clause of the Constitution applies to records and proceedings of courts only so far as they have jurisdiction. *Board of Public Works v. Columbia College*, 17 Wall. (U. S.) 521, 21 L. Ed. 687; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Renaud v. Abbott*, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629. The jurisdiction of the court rendering the judgment is always open to inquiry under proper averments, where its conclusiveness is questioned in another state. *Knowles v. Logansport, etc.*, 19 Wall. (U. S.) 58, 22 L. Ed. 70; *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; *Brown v. Fletcher*, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966; *Hancock's Estate*, 156 Cal. 804, 106 Pac. 58, 134 Am. St. Rep. 177. Since fraud may go to the very question of jurisdiction, a judgment rendered in another state may be resisted on the ground of fraud which goes to the jurisdiction of the court to render the questioned judgment either with respect to the subject-matter or of the person, or which constitutes a fraud upon the law of the forum, or which operates to deprive the party against whom the judgment was rendered of an opportunity to defend the suit when he had a meritorious defense to it. 32 L. R. A. (N. S.) p. 939, note.

[4] Enough facts to resist a general demurrer appear in the answer proposed to be filed at the time of the hearing of the motion to vacate the default to show fraud in obtaining the judgment on which the suit was brought in a matter affecting the jurisdiction of the court. If the original judgment had been set aside prior to the motion, the default judgment rendered in this state would have been reversed as a matter of right, and restitution would have been awarded to the defendant. *Merchants' Ins. Co. v. De Wolf*, 83 Pa. 45, 75 Am. Dec. 577; *Davidson v. Smith*, 1 Bissel (U. S.) 352; *Faber v. Hovey*, 117 Mass. 108, 19 Am. Rep. 398.

[5] The effect of setting aside a former judgment is the same as where suit is brought on a judgment which is thereafter reversed on appeal, when the judgment debtor is entitled to have the second judgment set aside as of record and as of right. *Heckling v. Allen* (C. C.) 15 Fed. 196; *Banning v. Taylor*, 24 Pa. 297; *Ætna Ins. Co. v. Aldrich*,

88 Wis. 107; Mann v. Aetna Ins. Co., 38 Wis. 114; Ward v. Marshall, 96 Cal. 155, 30 Pac. 1113, 81 Am. St. Rep. 198; Dissenting Opinion, Justice Olney, in Re Vincent Riccardi (April 16, 1920) 59 Cal. Dec. 478, 484-485.

If within six months after the entry of the default judgment the Supreme Court of Washington had vacated the original judgment, that fact would have been a sufficient reason for vacating the default judgment. If the default judgment should be held good, the subsequent action of the Supreme Court of Washington would have required its vacation under the rules announced in the cases which have been last cited. If the Washington judgment had been set aside before the default was entered, that fact, properly pleaded, would have constituted a bar to the prosecution of the California suit. It is not the purpose of the law to deprive litigants of the right to have their cases determined upon their merits, nor to invite new litigation to overturn judgments. While the affirmative allegations of the proposed answer were denied in counter affidavits, the trial court was in no position to determine the merits of the case, nor to adjudge finally, in the absence of evidence, upon the truth of the formal allegations and denials. It clearly appeared both that proceedings were pending in Washington to set aside the judgment, which was the basis of the California suit, and that the issue of fraud was tendered by the proposed answer. The application amounted to a plea in abatement in a case where, but for the pendency of the Washington proceedings, a plea in bar must have been held good.

[8] While a motion made under section 473 of the Code of Civil Procedure is addressed to the discretion of the court, and its action will not be disturbed on appeal, unless it shall be made clearly to appear that such discretion has been abused, under the circumstances shown by the record, the motion to vacate the default judgment, made within the six months limited by the Code section, should have been granted.

The order appealed from is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

(47 Cal. App. 680)

**JIMENO v. COMMONWEALTH HOME BUILDERS et al. (Civ. 3187.)**

(District Court of Appeal, Second District, Division 2, California. May 21, 1920.)

**1. Libel and slander §89(1)—Allegation of special damages unnecessary.**

If an alleged defamatory publication is libelous per se, no allegation of special damages is necessary.

**2. Libel and slander §16—Written or printed words, when "libelous per se."**

Words written or printed may be libelous and actionable per se if they tend to expose the plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, and to induce an evil opinion of him in the minds of right-thinking persons and deprive him of friendly intercourse and society, even though the same words, if spoken, would not have been actionable, and such is true where the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the defamed person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Libel.]

**3. Libel and slander §100(1)—Allegation sufficient to permit proof that words applied to plaintiff.**

A broad allegation that the matter in articles was published of and concerning plaintiff was sufficient to permit proof that the readers, who knew the extrinsic circumstances, understood that the words referred to plaintiff, under Code Civ. Proc. § 460.

**4. Libel and slander §18—Charging stockholder with intent to wreck corporation libelous per se.**

An article charging that a stockholder, who was chairman of a committee of stockholders organized to investigate the affairs of a corporation and protect the rights and interests of its stockholders, intended to wreck it and to do some coarse financiering, held libelous and actionable per se, under Civ. Code, § 45.

**5. Libel and slander §19—Article must be considered as a whole.**

To test its libelous quality, a publication must be considered as a whole.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by F. D. Jimeno against the Commonwealth Home Builders, a corporation, and others. Judgment for defendants, and plaintiff appeals. Reversed.

N. C. Folsom, and Jesse A. Gyger, of Los Angeles, for appellant.

Fred W. Heatherly, N. Blackstock, and Alfred W. Allen, all of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action for libel. Defendants demurred to plaintiff's second amended complaint upon the grounds that it does not state a cause of action and that, in certain particulars, it is uncertain, ambiguous, and unintelligible. The demurrer was sustained. Plaintiff declined further to amend, and judgment for defendants was entered accordingly. From that judgment plaintiff appeals.

The extrinsic circumstances alleged in the complaint by way of inducement, and to be considered in connection with the alleged libel, are these: Plaintiff, an investment broker, dealing in real estate and mining invest-

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ments, was, at all times mentioned in the complaint, a stockholder in the defendant corporation, Commonwealth Home Builders, and chairman of a committee of stockholders organized to investigate the affairs of that corporation and protect the rights and interests of all its stockholders. The investigating committee was organized at the instance of plaintiff, with the advice and assistance of one C. E. Norton, a reputable auditor. Prior to the publication complained of, plaintiff was a stockholder in, and had been active in the promotion of, the Stone Chief Mining Company, a corporation.

The complaint alleges that, for the purpose of exposing plaintiff to contempt, hatred, ridicule, and obloquy, defendants maliciously published and circulated, in the American Globe, a magazine, among the stockholders of the defendant corporation, of and concerning plaintiff, the following false and defamatory articles:

"Norton's Filibuster Expedition on Commonwealth Home Builders—A Fizzle.

"C. E. Norton, president of Original Home Builders of Los Angeles, as well as trustee for a little more than half of the stock, also a director of the Southern California Home Builders, in conjunction with Mr. Jimeno, an official and promoter of the Stone Chief Mining Co., and a stockholder of Commonwealth Home Builders, entertained some twenty-five stockholders of Commonwealth Home Builders, in the office of the Stone Chief Mining Co. on the evening of December 1, 1916. The editor of the American Globe received no notice of this happening, but did manage to secure just the information desired by stockholders who do not desire their wealthy corporation wrecked. \* \* \* The little gathering seemed to be a cooked and dried affair. \* \* \* As usual money was desired. It seems that the 4,000 stockholders are to contribute on the assessment basis of so much per share (to these men) which has not the sanction of the present sane and responsible administration, and no statement rendered—no questions asked. An unauthorized bill for \$150 was presented by Mr. Jimeno, of the Stone Chief Mining Co. \* \* \*

"Protective System of Ruining Stockholders.

"Money greed will cause some people to do anything as long as they are able to keep out of jail. \* \* \* The stockholder calls on a so-called auditor about whose antecedents no one knows anything, and whose record in corporation activities has never shown a clean winding up of affairs for stockholders of the other corporations concerned. The master brain (?) so steeped with greed for gold as to care nothing for the majority of stockholders' interests, whom he terms 'boobs' autocratically rises to the occasion. He maps out the campaign in such a manner as to prevent himself from being caught on conspiracy-to-wreck-corporation charges. 'This will cost you nothing. I will get you in control of that corporation and between you and me we ought to milk it for a long time.' 'But I do not understand the building and investment company business,' replies

the stockholder. 'I have had some experience in oil, mining and wildcat schemes, though, if that would do any good.' Any office boy can do what you are to do, replied the self-styled auditor. \* \* \* I will have another man look for certain information which we twist into such shape as to put the management of that building and investment company on the defensive. Anything to arouse suspicion and shatter confidence and the credit of the company. 'We don't care how many business deals we knock out, thereby depriving the stockholders of future profits, neither do we care how much damage we may cause the company otherwise, or how much expense we put it to, all of which affects the assets of stockholders. \* \* \* Stockholders who satisfy themselves about the character and former business records of such 'Money Greed Meddlers' and corporation wreckers \* \* \* would hardly be inclined to give these 'Intolerance Individuals' their support, proxies or votes. They have nothing at stake. \* \* \* Protective Committee (?) composed of so-called auditor and stockholder receive: (1) Contributions from stockholders to carry on campaign of wrecking their own company, of which no account is given and which could run into some thousands of dollars. \* \* \* Fine business for the auditor and stockholder but rather coarse financiering."

[1, 2] Respondents have not favored us with any printed points or authorities, and we are, therefore, somewhat in the dark as to the precise reasons for their attack upon the complaint. At the oral argument, their counsel contented themselves with the bare statement that nowhere in the complaint has plaintiff alleged any special damages. From this we infer that the chief, if not the only, ground relied upon by respondents, is the absence of an allegation of special damages. If, as we believe, the alleged defamatory publication is libelous per se, then no allegation of special damages is necessary. The courts have long recognized a distinction between written and oral defamation. While whatever charge will sustain a suit for slander when the words are merely spoken will sustain a suit for libel if they are written or printed and published, yet many charges which if merely spoken of another would not be actionable without proof of special damages, will be libelous per se when written or printed and published. Accordingly, it may be stated as a general proposition that words written or printed may be libelous and actionable per se, that is, actionable without any allegations of special damages, if they tend to expose the plaintiff to public hatred, contempt, ridicule, aversion, or disgrace, and to induce an evil opinion of him in the minds of right-thinking persons and deprive him of their friendly intercourse and society, even though the same words, if spoken, would not have been actionable. 25 Cyc. 250. If, on its face, the publication is of a character that usually, ordinarily, and naturally detracts from the reputation and standing of the plaintiff, and tends proximately and naturally

to deprive him of the confidence and esteem of others, thus causing him to be shunned or avoided, it is libelous per se, and special damages need not be alleged or proved. From such a publication the law presumes general damages as a natural and probable consequence.

[3] Some of the defamatory language in the libelous articles published by defendants manifestly refers solely to the auditor, C. E. Norton. Other defamatory portions of the articles seem to be aimed at both plaintiff and Norton, as, for example, the reference to "money greed meddlers." Still other portions leave the reader, ignorant of the extrinsic facts, in doubt as to whether Norton or plaintiff is the one referred to. By no colloquium could the pleader make applicable to plaintiff those words that obviously apply to Norton only. As to all the other defamatory charges, the broad allegation that the matter in the articles was published of and concerning plaintiff is sufficient to permit proof that the readers who knew the extrinsic circumstances understood that the words referred to plaintiff. Code Civ. Proc. § 460; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845.

[4] We think the article is libelous and is actionable per se. Our Code defines libel as follows:

"Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Civ. Code, § 45.

As said in *Tonini v. Cevasco*, 114 Cal. 272, 46 Pac. 105, this definition "is very broad, and includes almost any language which upon its face has a natural tendency to injure a man's reputation either generally or with respect to his occupation."

If, as alleged, the defamatory matters were printed and published of and concerning plaintiff, no unprejudicial person of ordinary intelligence, reading the publication, could avoid the conclusion that it imputed to him grave and reprehensible misconduct—dishonest practices which, if established, would justly bring him into general contempt and disgrace. Upon its face, the language charged, if published of and concerning plaintiff, tended naturally, necessarily and proximately to produce some, at least, of the results mentioned in section 45 of the Civil Code.

[5] To test its libelous quality a publication must be considered as a whole. "The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer." *Cooper v. Greeley*, 1 Denio (N. Y.) 358. Thus in the case

cited, the charge was not "made in an open and direct manner," "but," it was said by the court, "an imputation made in that form is not the less actionable." In our opinion the innuendoes, as alleged in the complaint in this case, affix to the words their true meaning. It is alleged, by way of innuendo, that the language of the publication was intended to mean, and that the persons who read it understood it to mean, that "plaintiff had been connected with wildcat or fraudulent schemes in the past, and that plaintiff would 'do anything' so long as he should be 'able to keep out of jail'; that he had conspired with another to obtain information concerning the corporation Commonwealth Home Builders, and 'twist' such information into such shape as to rouse suspicion and shatter confidence and the credit of the company and to decrease the assets thereof for the purpose of obtaining a profit for himself, and that said plaintiff and one other are 'money greed meddlers and corporation wreckers'; that the plaintiff was attempting to get on a 'big pay roll,' and that the plaintiff was attempting unconscious and 'coarse financiering.'" We think the language of the articles warrants the construction thus put upon it by plaintiff, and that the effect of the publication was to expose plaintiff to "obloquy," which is defined by Webster as "blame; reprehension." Surely no intelligent person could read this publication without understanding that it was meant to charge that plaintiff is not an honorable man—that he is a person who had been guilty of such reprehensible misconduct as should deter others from trusting him. As chairman of a stockholders' investigating committee, organized for the purpose of protecting the rights and interests of the stockholders of the defendant corporation, plaintiff held an important position of trust and confidence that demanded of him the exercise of the utmost good faith. And yet, if the charges be true, he has grossly violated that trust and treacherously betrayed the confidence of those whose interests it was his duty to protect. Such an implication of lack of integrity is unquestionably actionable per se. A writing that charges another with violating a confidence that has been reposed in him or with treachery to his associates is actionable per se. 18 Am. & Eng. Ency. of Law (2d Ed.) 912.

In our opinion the complaint states a cause of action; and, as we see nothing in it that is ambiguous, uncertain, or unintelligible, we think it was not demurrable upon any of the grounds set forth in the special demurrer.

The judgment is reversed, and cause remanded, with directions to overrule the demurrer.

We concur: THOMAS, J.; WELLER, J.

(47 Cal. App. 688)

(191 P.)

**GLOS v. McBRIDE. (Civ. 3309.)**

(District Court of Appeal, Second District, Division 1, California. May 22, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Appeal and error  $\S$ 907(5)—Presumed that lease absent from record, which plaintiff sought to set aside for illegality, did not show same on face.

Where a complaint seeking to set aside a lease, part of the consideration of which was that plaintiff and defendant though unmarried should cohabit as husband and wife, it will be presumed, the lease not being set forth, that the same did not on its face show the illegal consideration so as to be void under Civ. Code,  $\S$  1608, declaring that, if any part of a single consideration or of several considerations for a single object is unlawful, the entire contract is void.

2. Evidence  $\S$ 60—Parties presumed not to have entered into immoral relation.

In a suit to set aside as illegal a lease on the ground that part of the consideration was that the parties, though unmarried, should cohabit, it will not, in the absence of evidence or allegation to that effect, be presumed that the parties had entered into the immoral relation.

3. Landlord and tenant  $\S$ 34(2)—Lessor may repudiate lease made in consideration of immoral relations, and have title quieted to remainder of term.

Where the parties to a lease agreed as one of the considerations that they should, though unmarried, cohabit, the owner of the land may, though she had begun the immoral relation, repudiate the lease and have her title quieted as to the remainder of the term, notwithstanding parties to an executed contract which is illegal will be left as the court finds them.

Appeal from Superior Court, Santa Barbara County; S. B. Crow, Judge.

Action by Amelia Glos against J. A. McBride. From a judgment for defendant after the sustaining of a demurrer to the complaint, plaintiff appeals. Reversed.

B. F. Thomas, of Santa Barbara, for appellant.

Benjamin P. Oakford, of Santa Barbara, for respondent.

SHAW, J. Action to quiet title. In addition to an allegation that plaintiff is owner of the land in fee simple and in possession thereof, it is alleged in the complaint that defendant, basing his right thereto upon a lease thereof made by plaintiff to defendant, the consideration of which "was in part that said plaintiff and said defendant (though not husband and wife) should live together on said parcel of land and should cohabit as man and wife," unjustly and without right claims an interest in the land adverse to plaintiff; followed by the usual prayer for

relief. To this complaint the court sustained a general demurrer without leave to amend and gave judgment for defendant, from which plaintiff appeals.

[1] The ground of this ruling, as stated by the trial court, is that section 1608 of the Civil Code provides that "if any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void"; and that, since it appeared from the complaint that a part of the consideration for the lease was unlawful, its existence did not cast a cloud upon plaintiff's title. Conceding that no cloud is cast upon a plaintiff's title to land by an instrument which on its face discloses that it is void, we cannot in this case, since the lease is not exhibited by the record, assume the existence of such fact. On the contrary, upon the allegations of the complaint, the presumption is that on its face nothing appears affecting the validity of the instrument. It is the extrinsic facts alleged which render the lease void.

[2, 3] The chief ground upon which counsel for respondent insists upon the correctness of the ruling is that, as shown by the complaint, the contract had for its object the creation and continuance during the term of the lease, of an illicit relation between plaintiff and defendant, thus exhibiting her own turpitude, which constituted the consideration for the transfer of the leasehold. In other words, the complaint presents a case where the doors of the court are, as to both parties to the contract, closed; it will neither aid the one in the enforcement of the contract, nor give aid to the other in avoiding it. *Abey v. Marr*, 14 Cal. 210; *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571. While as to executed contracts of such nature, this is a rule of almost universal application, it is equally true that as to like contracts, which are executory, the law recognizes what is termed a locus penitentiae accorded to a plaintiff, which, as applied to the facts here presented, is an opportunity to repudiate the agreement and refuse to be a party to the acts contemplated thereby. 2 *Bouvier's Law Dictionary*, p. 2043. Thus, it is generally held that a party to a wager, where the money is deposited with a stakeholder, may at any time before the event is determined repudiate the wager and demand the return of his money. *Falkenburg v. Allen*, 18 Okl. 210, 90 Pac. 415, 10 L. R. A. (N. S.) 494; *Johnston v. Russell*, 37 Cal. 670; *Gridley v. Dorn*, 57 Cal. 79, 80 Am. Rep. 110; *Wright v. Stewart* (C. C.) 130 Fed. 906.

Plaintiff, no doubt, intended to enter into the immoral relation and continue therein for the duration of the term of the lease, but persons may not be punished, either criminally or civilly, for wrongful intentions. It is the consummation of such intentions

that subjects them to the effects of the law. As to whether plaintiff and defendant lived together or cohabited as man and wife in accordance with the agreement made is not disclosed by the complaint, and, since the doing so would be *contra bonos mores*, we cannot, in the absence of allegation to that effect, assume they did. Indeed, the presumption is to the contrary. Conceding, however, that she did enter upon the life with defendant, as contemplated in the agreement, we do not think it can be said her day of repentance was past. The contract contemplated a continuing immoral relation, which, in our opinion, even though entered upon, plaintiff, in the *locus penitentiae* accorded to her, might at any time repudiate and discontinue; and while the law would afford her no relief for the use of the leasehold estate covering the expired portion thereof, it should, as to the unexpired term thereof, and upon a showing of repentance, abandonment, and discontinuance of the shameful relation, grant her redress. In our opinion, the court erred in sustaining the demurrer.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(47 Cal. App. 685)

**WRIGHT-CALLENDER-ANDREWS CO. v. EATON.** (Civ. 2935.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1920. Hearing Denied by Supreme Court July 19, 1920.)

1. Brokers  $\S$ 64(2)—Automobile not furnishing of house placed with broker for sale; "completely furnished."

An automobile held not included as part of the property to be sold under an agreement with a broker to furnish a buyer for a house "completely furnished," except certain articles named, and the broker was not entitled to compensation where the purchaser furnished refused to buy where the automobile was not included.

2. Evidence  $\S$ 460(5)—Parol evidence inadmissible to vary broker's contract.

In an action by a broker for compensation for furnishing a purchaser under a contract, whereby he was to furnish a purchaser for "property completely furnished," parol evidence was inadmissible to show that an automobile was to be included in the furnishings, in view of Code Civ. Proc.  $\S$  1856, 1858.

3. Evidence  $\S$ 442(1) — Contracts importing whole agreement not added to by parol.

Where parties deliberately and solemnly put their agreement in writing, using language which imports a complete expression of the agreement, the law presumes that they have introduced into it every material item and term intended to be inserted therein, and parol evi-

dence cannot be admitted for the purpose of adding other terms or items thereto, in view of Code Civ. Proc.  $\S$  1858.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Wright-Callender-Andrews Company against Marie S. Eaton. Judgment for plaintiff, and defendant appeals. Reversed.

William Ellis Lady, of Los Angeles, for appellant.

Leonard B. Slosson and Slosson & Mitchell, all of Los Angeles, for respondent.

SHAW, J. In this action the trial court gave plaintiff judgment for services rendered in procuring a purchaser of certain real and personal property pursuant to the terms of a written contract executed by defendant, who appeals from the judgment.

The property is described in the contract as "3828 Wilshire Boulevard (city of Los Angeles), being lot 20 Western Wilshire Heights Tract. Property as is completely furnished except piano player, music, cuckoo clock, sewing machine and (picture) boat. Old silver, family pictures, pier glass and books." Within the time fixed therefor in said contract, plaintiff, claiming to have acted in pursuance of authority conferred thereby, and representing to him that the personal property included an automobile owned by defendant, presented a party ready, able, and willing to purchase the property, if the automobile was included, at the price specified. Defendant refused to transfer the automobile, by reason of which fact the proposed sale was not consummated. The question is whether the contract covered the automobile. The error of the court upon which appellant argues for a reversal occurred in the trial of this issue, as to which the court found adversely to defendant.

[1, 2] No mention of the automobile is made in the contract. Nevertheless, counsel for respondent argue that, since the property was located in the "fashionable Wilshire residence district," an automobile might very well be deemed a part of the furnishing of "property completely furnished." With equal propriety, as said by counsel for appellant, they might insist that an aeroplane or pair of horses and carriage should be deemed a part thereof. We cannot believe the trial judge in making the findings was influenced in so doing by such argument; but that, deeming the case a proper one therefor, the court, over defendant's objection, and not for the purpose of reforming the contract, permitted the introduction of parol testimony, upon which, since the contract by its terms did not include the automobile, it is clear the court based its decision. In so



doing we think it erred. Section 1856, Code of Civil Procedure, provides that—

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings."

As stated, no such question is in issue here. This section further provides that, in ascertaining the proper construction of an instrument, other evidence as to the circumstances under which it was made may be received for the purpose of placing the judge in the position of those whose language he is to interpret; and further provides that where the contract is of doubtful meaning, or it is necessary to explain an extrinsic ambiguity, other evidence may be received.

[3] To our minds, the terms of the contract are perfectly clear, and it should be construed in accordance with the plain import of the language used therein. No reason was presented for the reception of parol evidence other than to add thereto terms which it did not, as written, include; and, as provided by section 1858, Code of Civil Procedure, when construing contracts of such character, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted." Including the automobile was clearly doing that which the judge is prohibited from doing by the provisions of the statute. Upon like evidence, since a written contract, however carefully drawn, would afford a party no protection, he could be completely divested of his substance. Authorities in support of the proposition would seem unnecessary. Suffice it to say that where parties deliberately and solemnly put their agreement in writing, using language which imports a complete expression of the whole agreement, the law presumes that they have introduced into it every material item and term intended to be inserted therein, and parol evidence cannot be admitted for the purpose of adding other terms or items thereto. *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Greenleaf on Ev.*, § 275; *Harrison v. McCormick*, 89 Cal. 327, 26 Pac. 830, 23 Am. St. Rep. 469. In our opinion, the court erred in admitting parol evidence upon which it based the finding that, under the terms of the contract, plaintiff was authorized to include in the sale of the property described in the contract the automobile, which was not specified therein.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(47 Cal. App. 637)

**FEDERAL CONST. CO. v. RYAN, Superintendent of Streets.** (Civ. 3325.)

(District Court of Appeal, Second District, Division 2, California. May 21, 1920.)

**1. Municipal corporations ⇨306—Resolution as to street work sufficient as to bonds.**

Resolution of intention to order street work done under Improvement Act of 1911, and Improvement Bond Act of 1915, stating that bonds would be issued as provided by the act, and reciting that "a" serial "bond," to represent unpaid "assessment" and bear interest, would be issued, *held* sufficient as incorporating the provisions of the act and therefore preventing property owner from being misled into belief one bond was to be issued for entire improvement.

**2. Municipal corporations ⇨336(1) — Reference to bonds in prior proceedings confers jurisdiction on council to award contract.**

Under Improvement Act 1911, § 61, as amended in 1915, requiring the first specific mention of amount of street improvement bonds to be included in the warrant, a general reference in prior proceedings adopting the provisions of the act is sufficient to confer jurisdiction on the city council for the purpose of a resolution awarding contract to lowest bidder.

**3. Municipal corporations ⇨336(1)—Codmoll had jurisdiction to pass amended resolution of award of street work correcting prior reference to bonds.**

Under Improvement Act 1911, § 16, as amended in 1915, city council had jurisdiction to pass amended resolution of an award of street work correcting reference to bonds in original resolution of intention to order work.

**4. Municipal corporations ⇨336(1)—Resolution and notice of award of street work sufficient in recital of award to lowest bidder.**

City council's resolution and notice of award of street improvement work under Improvement Act 1911, as amended in 1915, reciting respectively that contract was awarded to a company at prices named in its bid, and that the board of trustees awarded the contract to the lowest regular responsible bidder, the particular company, at the prices named for the work in its bid; *held* in substantial compliance with the law, in view of section 10.

Application for writ of mandate by the Federal Construction Company against William Ryan, Superintendent of Streets of the City of Paso Robles. Peremptory writ directed to issue.

Frank H. Powers and Heller, Powers & Ehrman, all of San Francisco, for petitioner. Paul S. Honberger, of Los Angeles, for respondent.

WELLER, J. Mandate to compel the respondent as street superintendent to execute a contract for the improvement of certain streets in the city of Paso Robles.

The petition recites that on January 19, 1920, the board of trustees of the city of Paso Robles passed a resolution of intention to order certain work done, under the provisions of the "Improvement Act of 1911" (St. 1911, p. 730), and "Improvement Bond Act of 1915" (St. 1915, p. 1464), and amendments thereto, and caused notice of the passage of the resolution to be published and posted according to law. No protests having been received, on the 4th day of February, 1920, the board adopted a resolution ordering the work to be done, and caused a notice inviting proposals for doing the work to be given, in accordance with the provisions of the acts above mentioned. Pursuant to that notice, petitioner presented its bid, and was found to be the lowest responsible bidder, whereupon the board, on February 24, 1920, passed a resolution awarding to petitioner the contract for doing the work.

By its resolution of intention, the board declared that serial bonds should be issued to represent the expenses of the improvement, specifying the rate of interest the bonds should bear, and also caused a similar description to be inserted in the resolution ordering the work to be done, as well as in all notices posted and published in connection with the prior proceedings; but no reference to bonds was contained in the resolution of award. On March 9, 1920, the city clerk posted a notice of award, which referred to the issuance of bonds substantially as did the resolution of intention. The owners of three-fourths of the frontage liable to be assessed for the improvement did not elect to take the work, and no person interested in the lands filed with the clerk a notice specifying any irregularity in the previous proceedings.

On April 5, 1920, the board adopted an amended resolution of award, including notice of the proposed issuance of bonds, and ordered the notice of award to be reposted and republished. In accordance with this order, the clerk posted notice of award on the 7th day of April, 1920, and caused it to be published.

On April 17, 1920, the petitioner presented to the street superintendent a contract for his signature, and tendered bonds duly approved, together with the necessary costs, all in accordance with the provisions of the act. Respondent declined to execute the contract, basing his refusal on the ground that the proceedings theretofore taken were void, and sets forth in his answer filed herein the reasons for his claim, which we will consider in their order.

1. That portion of the resolution of intention which declares that bonds shall issue, contains the recital:

"Notice is hereby given that a serial bond to represent unpaid assessment and bear interest at the rate of 7 per cent. per annum will be

issued hereunder in the manner provided by the Improvement Bond Act of 1915."

[1] Respondent contends that reference to bonds in the singular vitiates the resolution, arguing that the property owner might be misled into the belief that one bond was to be issued to represent the cost of the entire improvement, and thus be unable to determine or segregate his individual liability. In answer to this it is sufficient to say that the resolution states that the bonds will be issued in the manner provided by the act, and thereby incorporates the provisions of the statute into the resolution.

Section 61 of the Improvement Act of 1911, as amended in 1915 (page 1464), reads as follows:

"When said city council shall determine that serial bonds shall be issued to represent the expenses of any proposed work or improvement under this act, it shall so declare in the resolution of intention to do said work, and shall specify the rate of interest which they shall bear. The like description of said bonds shall be inserted in the resolution ordering the work, in the resolution of award, and in all notices of said proceedings required by this act to be either posted or published; and also a notice that a bond will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of the warrant, or five days after the decision of said council upon an appeal, shall be included in the warrant provided for in section twenty-two of this act."

[2] The first specific mention of the amount of the bonds is to be included in the warrant; hence, a general reference in prior proceedings adopting the provisions of the act is sufficient to confer jurisdiction. In proceedings under the Vrooman Act,<sup>1</sup> which contains provisions similar in effect to the Improvement Act of 1911, it has been held that the city council may fix the term the bonds are to run at any time prior to the issuance of the warrant. *Cohn v. Federal Construction Co.*, 171 Cal. 547, 153 Pac. 918.

[3] 2. It is claimed that the council had no jurisdiction to pass the amended resolution of award on the 5th of April, 1920, on the theory that it had exhausted its powers by the adoption of the original resolution of February 24, 1920. No authority is cited in support of this proposition, and we have found none. On the contrary, in our opinion, the act itself contemplates such a procedure as that taken by the board. Section 16 provides:

"At any time within ten days from the date of the first publication of the notice of award of contract, any owner of, or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings, relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the

<sup>1</sup> St. 1885, p. 147.

city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding occurring prior to the date of the first publication of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived; provided, the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act."

While there is no express authorization in the act for the correction of errors in the proceedings, the natural inference must necessarily be that it was intended that the council should have power to remedy defects occurring after it had acquired jurisdiction to order the work done, when its attention was directed to them. Any other conclusion would render the section nugatory; and we deem it our duty to construe the statute so as to carry into effect the intention of the Legislature as therein expressed.

At the time of the adoption of the amended resolution of award no rights of third persons had vested. It is as much to the interest of the property owner as of the contractor that the proper reference to the bonds be made in the proceedings wherever required, in order that he may legally avail himself of the election to pay his assessment in cash or to permit bonds to issue against his property. The effect of reposting the notice of award would be to extend the time within which the property owners might enter into the contract, and no possible injury could result therefrom.

[4] 3. It is urged that the resolution and notice of award are insufficient in that neither the resolution nor the notice contains a statement of the amount of the bid or the contract price. The resolution of award recited that the contract for doing the work was awarded to the Federal Construction Company "at the prices named in its bid." The notice of award as posted and published declared that the board of trustees "awarded the contract for said work to the lowest regular responsible bidder, to wit, Federal Construction Company, at the prices named for said work in said proposal or bid on file." This, we think, is a substantial compliance with the law. Section 10 of the act provides that the city council "may award the contract for said work or improvement to the lowest responsible bidder at the prices named in his bid." This was done, and nothing more was required. Any person interested could readily ascertain the contents of the bid by an inspection of the document on file in the clerk's office to which the notice of award refers.

No other points are made by respondent,

and we believe the objections we have discussed are without merit.

Let the peremptory writ issue.

We concur: FINLAYSON, P. J.; THOMAS, J.

(47 Cal. App. 750)

**MITCHELL v. MERCHANTS' FIRE ASSUR. CORPORATION OF NEW YORK.**  
(Civ. 3283.)

(District Court of Appeal, Second District, Division 1, California. May 27, 1920.)

Insurance §621—Action on fire policy prematurely brought.

Where, under a fire policy, insurer was entitled to 20 days within which to accept or object to amount of loss claimed, and, in absence of objection, was deemed to have assented to amount claimed in preliminary proof, and such loss became payable 30 days from expiration of the 20 days, action instituted 48 days after furnishing a preliminary proof of loss was prematurely brought.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Mrs. Rose D. Mitchell against the Merchants' Fire Assurance Corporation of New York, a corporation. From judgment for plaintiff, defendant appeals. Reversed.

W. W. Hindman, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

CONREY, P. J. Action to recover for loss incurred by fire and covered by a fire insurance policy issued to the plaintiff by the defendant. Judgment in favor of the plaintiff, from which the defendant appeals.

It was provided in the policy that—

"This company shall be deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, \* \* \* the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him. \* \* \*"

Further provision was made for appraisal in case of disagreement of the parties as to the amount of loss. It was further provided:

"Loss when Payable. A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisal; but if such ascertainment is not had or made within sixty days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in ninety days after such receipt."

The complaint alleged that on or about March 19, 1919, the plaintiff furnished the defendant with her proof of loss, and that the defendant refuses to pay the same, and has not paid the same or any part thereof. The complaint is silent as to any notice of disagreement as to the amount of loss, or any appraisal or attempt to obtain an appraisal.

The defendant demurred to the complaint on the ground that the complaint did not state a cause of action, and that demurrer was overruled. Thereafter the defendant filed its answer, in which it was denied "that any sum or sums of money were due, owing, or unpaid by the defendant to the plaintiff at the time of the commencement of this action, or at any other time or at all." The court found that—

"On March 19, 1919, and within the time and terms provided by said policy, plaintiff furnished the defendant with her proof of loss, but that defendant has at all times refused to pay the plaintiff any sum whatever under said policy, and that in truth and in fact by reason of said loss that the defendant became liable to pay the plaintiff the said sum of \$350, being the reasonable value of the furniture and personal effects so destroyed."

On the record thus produced, consisting of the judgment roll alone, it appears that the action was instituted prematurely. The complaint was filed on May 5, 1919, which was only 48 days after the preliminary proof had been furnished by the plaintiff to the defendant. The defendant was entitled to a period of 20 days within which to accept or object to the amount of the loss as claimed by the plaintiff. In the absence of any objection made, the company was "deemed to have assented to the amount of loss claimed by the insured in his preliminary proof of loss"; in other words, the amount was thus ascertained by agreement. Under those circumstances, the loss became payable in 30 days from the expiration of the 20 days. No right of action could accrue until the expiration of that period of 30 days. In *Borger v. Connecticut Fire Ins. Co.*, 24 Cal. App. 696, 142 Pac. 115, the action appears to have been based upon the same form of policy as that before the court in the case at bar; the complaint was subject to similar defects, and it was held that, the action having been commenced within less than 30 days after the expiration of 20 days from the presentation of the proofs of loss, the action was prematurely brought. On that ground the judgment was reversed. On the authority of that decision, and without discussing the other ground of appeal relied upon by appellant, the judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(47 Cal. App. 781)

LEWIS v. CRENSHAW et al. (Civ. 2946.)

(District Court of Appeal, Second District, Division 1, California. May 28, 1920.)

1. Vendor and purchaser  $\S$ 212—Grantee and assignee of sellers' contract as security did not assume obligation of sellers.

Where the transactions between the sellers of land and a party obligated for them, whereby deed was made and delivered to such party, and assignment of the sellers' contract with a purchaser was made, were as security only, such party did not assume the obligation of the sellers toward the buyer.

2. Trial  $\S$ 29(4)—Court's manner in making rulings did not deny plaintiff fair trial.

The trial court's manner in making proper rulings adverse to plaintiff laconically, decisively, and with great brevity did not prevent plaintiff from having full and fair consideration of his action.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by E. P. Lewis against G. L. Crenshaw, the Brent Investment Company, a corporation, and the Crenshaw Security Company, a corporation. From judgment of nonsuit, plaintiff appeals. Affirmed.

M. O. Graves, of Los Angeles, for appellant.  
Hickox & Crenshaw, of Los Angeles, for respondents.

JAMES, J. In this case, at the conclusion of the hearing of the testimony on behalf of the plaintiff, the court granted a motion for judgment of nonsuit as to Crenshaw Security Company. At the conclusion of all the evidence, the court directed the jury to find a verdict in favor of the defendant G. L. Crenshaw. The cause was not tried as to the defendant Brent Investment Company; that defendant apparently not having been required to answer the complaint of the plaintiff. The appeal is from the judgment. Originally there were several suits brought against the same defendants by different individuals, all the claims being based upon similar facts and, by stipulation, all of said causes were agreed to be considered and determined at the trial had under the title first above given. As no useful purpose will be served in treating the matter otherwise, we will refer to the case in general as though there were but the one plaintiff interested herein.

In May, 1914, the plaintiff entered into a contract with defendant Brent Investment Company, a corporation, by which contract, in consideration of the initial payment of a certain sum of money and monthly payments thereafter to be made until the whole sum mentioned in the contract was discharged, the Brent Investment Company agreed to convey to the plaintiff a certain parcel of land

Plaintiff made payment for a time of the various installments required, to the Brent Investment Company. A notice was then received by him, which was in part as follows:

"Your contract with the Brent Investment Company for the purchase of lot No. 52, in tract 909, has been turned over to us. \* \* \* Your future payments must be made to us, and we wish you to be prompt according to the terms of your agreement. We wish you would bring your contract with you when you make next payment, so that we may compare amounts paid and see if the duplicate and original contracts agree. This will be a convenience to us as well as yourself. Yours truly, G. L. Crenshaw."

That notice was dated May 30, 1916, and for a number of months thereafter plaintiff made payments to Crenshaw, and received receipts for the account. After having so made payments to Crenshaw, plaintiff was notified by Crenshaw at his office that no more payments would be received, as there was some question about the title of the land. It appeared that on the 12th of October, 1911, Brent and his wife, who were evidently the owners of the entire tract, a parcel of which plaintiff had later contracted to buy, had created a lien by mortgage against the same to secure a promissory note in the sum of \$29,507; that at about the time Crenshaw notified plaintiff that he would no longer receive payments on account of the contract referred to, foreclosure proceedings had been instituted on this mortgage. Having tendered payment of an installment, and meeting with Crenshaw's refusal to accept the same, plaintiff brought this action to recover back the money theretofore paid to Brent Investment Company and to Crenshaw. It was shown in evidence that Crenshaw had become surety on a bond for a large amount for the benefit of the Brents in connection with the leasing of property in the city of Los Angeles by the Brents; the lease transaction being wholly disconnected from the property affected by the contract of plaintiff. Crenshaw had been required to pay out a large amount of money—a sum in excess of \$10,000—on account of his surety liability, and in order to protect him the Brents, at Crenshaw's suggestion and as security for the repayment of the amounts which Crenshaw had paid out under the bond referred to, executed their deed to the tract of land affected by the contract of plaintiff, conveying the same to Crenshaw, and also for the same purpose made assignment of the contracts of plaintiff and other similar holders. Crenshaw did not become a party to the contract of plaintiff, unless the effect of the assignment imposed that relation upon him. The evidence as heard by the court, however, was uncontradicted to the point that the transaction between the Brents and Crenshaw, whereby the deed was made and de-

livered and the assignment of the contract made, were as security only.

[1] It was upon this state of the evidence that the court held as a matter of law that Crenshaw did not assume the obligation of the Brents toward the plaintiff; and upon that evidence we cannot perceive why any different conclusion should be contended for. The plaintiff and the other contract holders made their contracts with the Brent Investment Company, relying upon the ability of that company to perform its obligations, with full knowledge or means by which knowledge might be obtained as to the condition of the title to the property contemplated to be conveyed. They made no new contract with Crenshaw; Crenshaw did not indorse his name upon the contracts as assuming the obligations imposed upon the vendors thereunder. The Brent Investment Company at all times remained liable as the contracting party and the only contracting party against whom the plaintiff was entitled to seek redress. If the plaintiff at the time of the transfer of the contract so made by the Brent Investment Company to Crenshaw had ascertained that the Brent Investment Company would be unable to comply with its contract, and had been persuaded and induced fraudulently by Crenshaw to continue to make payments, it is possible some cause of action might have arisen in plaintiff's favor. No such cause of action is claimed or pleaded. Nor was there anything in the evidence to show that plaintiff no longer placed reliance upon the Brent Investment Company because of any reputed insolvency; or that he had any knowledge which gave him reason to believe that Crenshaw was financially responsible, and his grantor was not. There was some testimony given on the part of the plaintiff and other contract holders to the effect that Crenshaw had stated that they would get their deed or their money back; but this was neither predicated upon any pleading proposing the issue suggested, nor upon any further evidence showing that the plaintiff was induced because of such representation to continue making payments which he would otherwise not have made or been legally bound to make. On the statement of the case as the record shows it and as we have epitomized it in the foregoing, it must at once be clear that no right of recovery in the plaintiff existed as against Crenshaw or the Crenshaw Security Company; hence the court was entirely justified in the action taken.

[2] An objection is made that the court erred in admitting certain testimony and excluding other evidence offered; further, that the peremptory manner of the trial judge prevented plaintiff from having full and fair consideration in the presentation of his case. The trial judge, it may be stated, in expressing his rulings, spoke laconically, decisively;

and with great brevity. However much the abrupt manner of the judge may have been disconcerting to plaintiff's counsel, there is nothing to show that the disposition of the court was other than usual, or that any prejudice resulted to the plaintiff which prevented him from showing that the facts were different from those as we have stated them. The trial judge was headed in the right direction, and if he reached a legally logical conclusion, it makes little difference whether this end was arrived at by a short cut or otherwise.

We have examined all of the assignments for error, and are satisfied that no miscarriage of justice is expressed in the judgment as rendered.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(47 Cal. App. 785)

**KROGH MFG. CO. v. CHURCHILL et al.**  
(Civ. 3409.)

(District Court of Appeal, First District, Division 1, California. May 28, 1920.)

**1. Appeal and error ¶992—Determination of qualifications of expert for court.**

Whether a witness was qualified to testify as an expert as to the reasonable value of the mechanical labor expended on a pump, installation of which was sued for, was a matter for the determination of the trial court.

**2. Evidence ¶543(2)—Witness qualified as expert on value of labor on pump.**

In an action for installation of a pump, the trial court properly determined to be qualified as an expert on the reasonable value of the mechanical labor expended on the pump plaintiff's manager, shown to have been engaged in the pump and engine business for many years, and as designer and chief engineer of an iron works.

**3. Evidence ¶558(1)—Question to expert relative to speed of pump in operation proper.**

In an action for installation of a pump, question propounded to expert witness for defendants on cross-examination regarding the speed of the pump in operation in relation to the amount of water in the well *held* proper.

**4. Appeal and error ¶1011(1)—Conflicting evidence for trial court.**

In an action for installation of a pump, where there was competent evidence on each side as to whether the pump had been properly installed, the contradictions in the testimony, and the weight to be given each witness, were matters addressed to the discretionary consideration of the court.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by the Krogh Manufacturing Company, a corporation, against H. C. Churchill and another, in which defendants filed a

cross-complaint. From a judgment for plaintiff, defendants and cross-complainants appeal. Affirmed.

E. O. Leake and Goudge, Williams, Chandler & Hughes, all of Los Angeles, for appellants.

Seth B. Smith, of Los Angeles, for respondent.

**WASTE, P. J.** This is an appeal by the defendants from a judgment in favor of the plaintiff for the sum of \$1,384, the value of a pump, installed on the defendants' ranch, pursuant to a contract for the purchase of the same, and for services and accessories in connection with its operation.

The defendants denied any indebtedness to the plaintiff, and alleged that, by reason of the poor quality of the materials used in it, the bad workmanship thereon, and the improper, negligent, and careless manner of installing the machinery which was the basis of the second and third counts of the complaint, the pump broke down, never at any time ran in a satisfactory manner or reasonably well, and was absolutely worthless to the defendants. By reason of these facts, defendants claimed to have suffered a loss of their lemon crop for the year 1913, amounting to the sum of \$2,500; their orange and lemon groves being also damaged to the extent of \$720, by reason of their being unable to secure water to irrigate the same. To these amounts defendants added the amounts of various repair bills, and by way of cross-complaint prayed for judgment against the plaintiff in the sum of \$3,701.16.

The lower court found that the plaintiff installed the pump and machinery on the defendants' ranch in a first-class and workmanlike condition, and duly performed all the conditions of its contract, with the exception that the 8-inch cylinder, which the plaintiff first placed in the well, became broken, by reason of inevitable accident, whereupon plaintiff replaced it with a 7-inch cylinder; that the pump thus equipped was accepted by the defendants, and was, at the time of its installation and at the time of the trial, capable of pumping all the water in defendants' well, and of pumping 20 inches of water per minute, when pumping against a total head of 250 feet, as specified in the contract. It further found that the alleged breakdown, and interruptions in the operation of the pump, subsequent to its installation, were not due to any defects in materials used by plaintiff in the construction of the pump, and were not due to, and did not result from, the manner in which the pump was constructed or installed, but, on the contrary, were due to the negligent and careless manner in which the defendants operated the pump, and to the negligence of the defendants' employees in overhauling same, and

were further aggravated by lack of water in the defendants' well. The further findings were against the allegations of the cross-complaint, and the plaintiff was awarded judgment for the price of the pump as installed, together with \$74 for certain services, material, and pump accessories.

In seeking a reversal of the judgment, the appellants specify certain errors in the admission of testimony, insufficiency of the evidence to sustain the findings, and that the decision was against law.

[1-3] Whether or not the witness F. L. Emerson, manager of the plaintiff, was sufficiently qualified to testify as an expert as to the reasonable value of the mechanical labor expended on the pump, was a matter for the determination of the trial court, and in the instant case its determination of the question was undoubtedly correct. Before becoming manager for the plaintiff the witness had for many years been engaged in the pumping and engine business, and as a designer and chief engineer of an iron works. The question propounded to Joseph Darracq, a witness for the defendants on cross-examination, regarding the speed of the pump in operation in relation to the amount of water in the well, was proper. He was called by the defendants to testify to certain work he had done on the pump after its installation, and gave his expert opinion as to its construction. He also testified that in installing a pump it was necessary to regulate its capacity in accordance with the volume of water in the well. While, as argued by the appellants, the question of exhausting the water in the well was not an issue, the successful method of the installation and operation of the pump under varying conditions was testified to by the witness on his direct examination.

[4] As to the alleged insufficiency of the evidence, a careful reading of the testimony of the various witnesses, experts and others, called to testify as to the manner in which the pump was installed, and its working when in operation, develops only a marked conflict of testimony, which it was the province of the trial judge to consider and determine. There was competent evidence, on the one side, that the pump was workmanlike in its construction and properly installed in a first-class manner, and that if properly handled it would give satisfaction. On the other hand, witnesses for defendants testified to the contrary. The contradictions in the testimony and the weight to be given each of the witnesses was a matter addressed to the discretionary consideration of the trial court.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH,  
Judge pro tem.

MILLER v. HUNT, HATCH & CO.  
(Civ. 2958.)

(District Court of Appeal, Second District,  
Division 1, California. May 27, 1920.)

1. Sales  $\S$ 214—Contract held a sale, and not mere agreement to sell oranges, to be gathered by buyer.

A contract for the sale of an entire crop of oranges on the trees, fruit to be picked by the buyer and removed before December 25th, is a sale, and not a mere agreement to sell; and, where the fruit matured before the final date fixed for removal, and it was necessary to gather the same to insure good condition of the oranges, the buyer must bear the loss, where it failed to gather the fruit.

2. Sales  $\S$ 359(1)—Findings that orange crop had matured before frost, and that injured oranges could be separated warranted.

In an action by seller of a crop of oranges to recover unpaid balance of purchase price, evidence held to warrant finding that the good oranges, the crop having been previously damaged, could have been separated, and that, before the killing frost, the oranges were in a fit condition to gather.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by S. T. Miller against Hunt, Hatch & Co. From a judgment for plaintiff, defendant appeals. Affirmed.

Farnsworth, McClure & Burke, of Visalia, for appellant.

Charles W. Braswell, of Lindsay, and Middlecoff, Scott & Ham, of Visalia, for respondent.

CONREY, P. J. Action to recover an unpaid balance alleged to be due on the sale by plaintiff to the defendant of a crop of oranges. Judgment in favor of the plaintiff, from which the defendant appeals.

In a written agreement, of date April 20, 1916, it was stated that the plaintiff "has this day sold" to the defendant his entire crop of oranges, now on the trees growing on his ranch at Lindsay, Cal., at a stated price per hundredweight. "All fruit is to be weighed at the Hunt, Hatch & Co.'s Packing house and paid for upon the delivery of duplicate weight receipts at their office at the said packing house at Lindsay. Hunt, Hatch & Co. are to furnish all boxes to put the said fruit in and agree to pick and haul the said fruit free of all costs to the said S. T. Miller. Fruit is to be of merchantable quality and picked at the option of the said Hunt, Hatch & Co., provided same is removed on or before December 25, 1916." The court found that on the 13th day of December 1916, there remained in plaintiff's orchard 880 trees which were unpicked; the amount of unpicked oranges thereon being 85,500 pounds. Finding 5 reads as follows:

"That on November 16, 1916, some of said oranges were injured by frost but at least 80 per cent. of said oranges were from November 16, 1916, to December 13, 1916, uninjured, and were ripe, in good condition, ready for harvest, and merchantable; that between said November 16, 1916, and December 13, 1916, defendant had sufficient time to pick and haul said ripe and merchantable oranges, and could and should have done so, but defendant failed and neglected to pick or haul or pay plaintiff for said merchantable portion of said fruit within said time or at all; that said merchantable oranges were readily and easily separable from the injured oranges; that on the night of December 13, 1916, said merchantable oranges were injured by frost, and later about January 6, 1917, were totally destroyed by frost, and the amount of merchantable fruit which the defendant so left on said trees unpicked and unharvested in a ripened and merchantable condition and quality, which defendant should and could have picked in such merchantable condition, was 68,400 pounds."

Finding 7 is as follows:

"That from November 16 to the 18th day of December, 1916, all of said 68,400 pounds of fruit above mentioned came up to the test of an ordinance of the board of supervisors of the county of Tulare, mentioned in the answer of defendant, and none of said 68,400 pounds had been frozen prior to December 13, 1916, to such an extent as to render the same wholly unfit or unfit at all for consumption or merchantable."

[1] Appellant contends that there was only an agreement for sale, and not an actual sale of the crop; and that under the contract the purchaser had the right, at his own option, to defer the time of picking the fruit until the 25th day of December, 1916, provided only that it was all picked not later than that date. The effect of this contention, if allowed as appellant insists upon it, would be that, even if the fruit was mature and ready for the market on and after November 16th, the loss caused by its destruction by frost at any time prior to December 25th would have to be suffered by the plaintiff. With this contention and its claimed effect we do not agree. In *Bill v. Fuller*, 146 Cal. 50, 79 Pac. 592, the contract was for the sale of a crop of oranges not yet matured, and it was provided therein that the vendee "has this day bought" a described crop of oranges. It was provided that all of the oranges were to be taken by the purchaser on or before a stated date, and the vendor was to deliver at a certain station when wanted by the purchaser. Of this contract the Supreme Court said:

"Nor do we wish to be understood as holding that the title to the crop did not pass as soon as the contract was executed. The agreement in form imports a present sale, the thing sold was in existence and was identified and separate from other things."

The contract in that case limited the time of delivery in a similar manner as in the

case at bar; the language used being, "all oranges to be taken by H. Fuller on or before April 1st, 1901." The court found that the oranges became ripe and ready for market in January, 1901, but the defendant refused to receive them until March, at which time, without fault of the vendor, some of the fruit had become unmerchantable by becoming too ripe and puffy for the market. Under these circumstances it was held by the Supreme Court that the contract should not be construed to give Fuller the absolute right to defer the delivery of the oranges to the injury of the plaintiff; that it must be construed to mean that the oranges were to be taken by Fuller on or before April 1, 1901, and at such reasonable time as should be necessary to insure their good condition with respect to maturity and fitness for the market. "The merchantability which was warranted by the contract, if there was any such warranty, was nothing more than a warranty that the fruit should be merchantable on the tree, and that when gathered in due season it should be handled and delivered with proper care. This being the case, under the findings we think the defendant was not justified in refusing to accept the oranges which he culled from the crop because of his claim that they were too ripe and puffy for the market." So here, assuming the facts to be as found by the court, the appellant was obligated to take the oranges on or before the 25th day of December, 1916, and at such reasonable time as should be necessary to insure their good condition.

[2] Appellant contends that the evidence is not sufficient to support the finding that the portion of the fruit which was marketable on November 16th was easily and readily separable from that which had been frozen, and that the evidence is not sufficient to support the finding that the fruit for which compensation has been allowed was merchantable from November 16 to December 13, 1916. From the testimony of defendant's manager, Mr. Sparks, it appears that in November or December, 1916, the defendant procured for use in its packing house a machine called a separator, which was used for the purpose of separating frozen fruit from the better fruit. This machine was first put in operation by the defendant on the 18th day of December. It does not clearly appear from his testimony that the oranges which were run through the separator at that time were from the Miller orchard, nor was the time stated at which such fruit had been picked. He states that the result of the operation was that the fruit was so badly frozen that it was hard to separate the best from the worst of it; it was so badly frozen that they could not separate the fruit properly. Mr. Sparks states that the first frost occurred on November 16th, and the second, which was the disastrous frost, occurred on December 13th. There is no evi-



dence that fruit picked from the Miller orchard prior to December 13th could not have been successfully graded by means of this separator so as to pick out the frosted fruit from that which was not frosted. Frank Brann, horticultural commissioner, a county officer, who, in co-operation with an officer of the United States government, appears to have made examinations of the fruit in this packing house and exercised some authority over shipments, testified that all of the fruit from the Miller orchard that came into the defendant's packing house (although some of it was held up temporarily) was passed and certified as marketable before the 1st day of January. There was introduced in evidence an ordinance of the county of Tulare which prescribes a test of maturity of oranges, which is commonly known as the 8 to 1 test, and refers to the quantity of soluble solids in the orange as compared with the quantity of acid contained in the juice. The plaintiff testified that, on December 10th or 12th, he took from the orchard samples for testing, and had them tested by S. Kohnner, a tester employed in the packing house of the Randolph-Martin Fruit Company. Mr. Kohnner testified that the tests which he made of these samples were, on December 14th, 8.2 to 1, and on December 21st, 7.5 to 1. Mr. Sparks testified that the defendant caused some tests to be made by one B. G. Rooke about November 20th. The actual results of those tests were not given in evidence. Sparks says that they were "not satisfactory." Referring again to the same matter, he said:

"There was a difference in the fruit; some of the fruit on the outer side of the orchard gave a different test from trees inside the orchard."

In another place Mr. Sparks testified that none of it tested 8 to 1. It is to be observed here that there was a sharp contradiction between the testimony of plaintiff and the testimony of Sparks concerning certain conversations between them. It may be that the court, as was its right, placed the greater confidence in the testimony of the plaintiff as to those conversations, and for that reason discounted the testimony of Sparks on the subject of the 8 to 1 test and the other conditions of the fruit. The plaintiff testified that the fruit was, on the 20th of November, of fair size and color, and in good condition; that beginning on November 20th the defendant picked the fruit from the northern part of the grove, and all of that fruit was paid for; that the fruit was merchantable from November 20th to January 6th; that Mr. Sparks did not tell him at any time prior to December 25th that the fruit was frozen; that after December 25th, at a time when defendant had stopped picking from this orchard, plaintiff asked Mr. Sparks when

he expected to finish packing the fruit, and Sparks replied that he would pack it as fast as he could get to it—as fast as he could handle it he would take it; that the plaintiff used fruit daily from this orchard at his house from the time they commenced picking on November 20th until after January 1st, and it was in good condition. Answering the question, "Was it frozen?" he replied, "Not that I could tell." Plaintiff further testified that the fruit on the south portion of the orchard which was not picked was as good as that on the northern portion which was picked by the defendant; that it was practically the same.

From the foregoing summary of a part of the evidence our conclusion is that the evidence is sufficient to support the findings of fact to which we have referred and which are challenged by appellant. There is on several of these points evidence to the contrary of that which has been stated, but this is no more than sufficient to produce a conflict in the evidence. On such state of the record, under the well-established rule, the findings must be sustained.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(47 Cal. App, 678)

Ex parte PHILBROOK. (Cr. 906.)

(District Court of Appeal, First District, Division 2, California. May 22, 1920.)

1. Habeas corpus  $\S$  30(1)—Error in exercising jurisdiction not considered.

On habeas corpus, error in the exercise of jurisdiction cannot be considered.

2. Contempt  $\S$  34—Superior court may punish for contempt.

The superior court has power to punish for contempt under Code Civ. Proc.  $\S$  1209.

3. Contempt  $\S$  20—Refusal to obey lawful order of court in the court's presence.

A warrant of commitment, reciting that petitioner for habeas corpus in the presence of the court while in session refused to obey a court order to render a final account, that petitioner was by its order adjudged guilty of contempt therefore must be sustained, if at all, under Code Civ. Proc.  $\S$  1209, subd. 5, relating to disobedience of lawful judgment, order, or process of court.

4. Habeas corpus  $\S$  85(3)—Presumption that order was lawful in absence of counter showing.

Where petitioner for habeas corpus does not set forth the nature of his answer, nor state that in the answer there was any attempt either to render the account ordered or to show excusing facts or circumstances, it must be presumed that the court's order of commitment for contempt was in the lawful and proper exercise

of the judicial functions (Code Civ. Proc. § 1963, subds. 15 and 16).

**5. Habeas corpus §29—Record held to show ample grounds for commitment for contempt.**

On petition for habeas corpus by one committed for contempt of court for refusal to obey an order to render an accounting and as administrator of petitioner's deceased wife's estate in another state for which the deceased wife was administratrix, record held to show ample grounds for the issuance of the attachment and commitment, unless the court was without jurisdiction.

**6. Habeas corpus §53—Every essential fact must be pleaded.**

Every essential fact must be pleaded in a habeas corpus proceeding, as the allegation to the petition cannot be strengthened in opposition to the general presumption attaching to the regularity of judgments and orders of court.

**7. Executors and administrators §224—Right to accounting not barred by failure to demand within time.**

Proceedings under Code Civ. Proc. § 1639, take the place of a suit for an accounting in equity to compel an executrix's administrator to account in the former estate, and such are alternate remedies, and the statutory remedy is not barred by the expiration of time without a claim having been presented in the former estate.

**8. Habeas corpus §96—Proceeding held not appeal or error, and investigation confined to jurisdiction.**

A proceeding in habeas corpus by petitioner committed for contempt is not in the nature of an appeal or writ of error, and inquiry must be confined wholly to the jurisdiction.

**9. Executors and administrators §464—Where removed executrix died before accounting, her administrator must account.**

Where the letters of an executrix had been revoked during her lifetime, but she had made no accounting, her husband, as administrator of her estate, may be required to make the accounting, in view of Code Civ. Proc. §§ 1629, 1639.

Application by Horace W. Philbrook for writ of habeas corpus prayed to be directed to the Sheriff of Alameda County to secure release of petitioner from custody under a commitment for contempt of court. Writ discharged, and petitioner remanded.

Horace W. Philbrook, of San Francisco, in pro. per.

Ezra W. Decoto, Dist. Atty., and Fitzgerald, Abbott & Beardsley, all of Oakland, for respondent.

LANGDON, P. J. A writ of habeas corpus was granted by Mr. Justice Lawlor of the Supreme Court returnable to this court, the petitioner claiming that he was restrained of his liberty under an order of the superior court in Alameda county adjudging him guilty of contempt upon his refusal to ac-

count as the administrator of the estate of his deceased wife, Florence E. Philbrook, who had formerly been the administratrix with the will annexed of the estate of Humphrey A. Randall, ancillary administration of whose estate is pending in the superior court, the main estate having been administered, or being in the course of administration, in the state of Maine at the place of death of Randall.

In 1917 the letters of Florence E. Philbrook were revoked, and she was succeeded in her administration by Anne Bates Randall, the widow of Humphrey A. Randall. During her administration Mrs. Philbrook filed her first account, but did not file the final account of her administration. She died in November, 1918, and the petitioner herein was appointed and now is the administrator of her estate.

In December, 1919, Anne Bates Randall, the executrix of the Randall will, instituted proceedings under section 1639 of the Code of Civil Procedure, to compel the administrator of the estate of Florence E. Philbrook to render a final account of this intestate's administration of the Randall estate. He was cited to account, and his motion to dismiss the petition of the executrix and to quash the order of the court directing the issuance of the citation and the citation itself was denied. His demurrer to the petition for the citation was overruled, and he was granted leave to answer. The citation to account was continued from time to time until February 24, 1920. The court thereupon ordered the writ of attachment to issue, and Mr. Philbrook was arrested and brought into court on March 12, 1920. Upon his promise that he would appear in open court on March 22, 1920, and file a final account he was released upon his own recognizance. He failed to appear on March 22d and failed to file any final account. New attachment proceedings were instituted; Mr. Philbrook was again brought into court and directed to file his final account pursuant to the court's order, and upon his refusal so to do he was committed to the county jail until he should comply with the court's order.

The petitioner, in his lengthy briefs, set forth a great number of grounds to show that the commitment was without warrant of law.

[1] It is fundamental that on habeas corpus error in the exercise of jurisdiction cannot be considered. Ex parte Perkins, 18 Cal. 60; Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546; Ex parte McCullough, 35 Cal. 97; Ex parte Cottrell, 59 Cal. 421; Ex parte Sternes, 77 Cal. 156, 19 Pac. 275, 11 Am. St. Rep. 251; Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; Ex parte Joutsen, 154 Cal. 540, 98 Pac. 391; Matter of the Application of La Duc, 161 Cal. 663,

120 Pac. 13. While the writ was issued during the time the petitioner was under arrest under a writ of attachment, when it was served and he was released he was in custody not under the attachment but under a warrant of commitment. The return, however, shows that the order for the warrant of commitment and the warrant of commitment were but further steps in the same proceedings and upon the same facts as the arrest under the attachment under which the writ of habeas corpus was issued.

[2, 3] The superior court has power to punish for contempt. Code Civ. Proc. § 1209. The warrant of commitment recites that the petitioner in the immediate view, presence, and hearing of the court and while the court was in session, refused to obey the "order of the court that he render the said final account," and that the court at the same time by its order adjudged and declared the petitioner "had been guilty of a contempt of said court by his refusal to obey the said order of said court that he render said final account," so that the commitment must be sustained, if at all, under subdivision 5 of section 1209 of the Code of Civil Procedure as to disobedience of a lawful judgment, order, or process of the court.

[4] The particular contentions of the petitioner are three: (1) That the court was without general jurisdiction to require him to account as the administrator of his deceased wife's estate; (2) that if it ever had such jurisdiction, the right of Mrs. Randall to invoke it had been lost by her failure to present a claim against Mrs. Philbrook's estate and the lapse of time; and (3) that upon his answer to the citation the court was not empowered to make the order for the disobedience of which the commitment was made. These contentions will be considered in their inverse order.

If the court had jurisdiction of the proceeding and the right of the executrix of the Randall will had not been lost, there could be no question in regard to the propriety of the commitment. The original citation addressed to the petitioner was dated December 12, 1919. From the petition for the writ of habeas corpus it appears that the present petitioner appeared specially on December 30, 1919, and moved the court to dismiss the petition, and on January 9, 1920, he filed a demurrer to the original petition, which demurrer was overruled on January 20, 1920, time being granted to the petitioner here to answer, which was extended by successive orders until February 24, 1920, at which time the present petitioner filed his answer to the petition. The petitioner does not in any way set forth the nature of his answer, nor does he state that in the answer there was any attempt on his part either to render the account he was ordered to render or facts or circumstances shown to explain why the account was not rendered.

It is then alleged that on February 26, 1920, in his absence and without notice the superior court ordered the petitioner to be arrested on the ground that he had refused to obey the citation. The allegations of fact are interspersed with statements such as that the order was made "upon the utterly false and insolently impertinent ground that I have refused to obey the said citation." Such statements add nothing to the fact that the order of February 26, 1920, was made. In the absence of a showing of any facts concerning the contents of the answer filed by the petitioner, it must be presumed that the order of February 26th was in the lawful and proper exercise of the judicial function. Code Civ. Proc. § 1963, subds. 15, 16; *People v. Blackwell*, 27 Cal. 67.

[5] Attachment was issued on February 26, 1920, and the petitioner was arrested under the attachment and brought before the court on March 12, 1920. It appears from the copy of the order made on the last-mentioned day that it was ordered that Mr. Philbrook render and file the final account of the sums of money and other property of the Randall estate for which Florence E. Philbrook, deceased, as such administratrix, was chargeable and accountable to said estate. The order recites that "upon the stipulation and promise of the said Horace W. Philbrook, the said administrator appearing in propria persona, and upon the stipulation and promise of the said Lloyd M. Robbins, Esq., his said attorney, made in open court, that the said Horace W. Philbrook will, upon the 22d day of March, 1920, at 2 o'clock p. m. of said day, personally file said final account in open court, in department 4, by delivering the same to the clerk thereof, and the said Lloyd M. Robbins, Esq., his said attorney then and there waiving any irregularities growing out of said continuance and at the request of the said Horace W. Philbrook, said administrator, and of his said attorney said Lloyd M. Robbins, Esq.," it was ordered that the petitioner here be released on his own recognizance until March 22, 1920, at which time he was ordered to appear before the court to render and file the final account. It is contended by the petitioner here that the promise which he admits was made under duress, because he claims he was illegally under arrest. The claimed illegality of that arrest will be considered under the other two contentions of the petitioner. He did not appear on March 22d in accordance with his promise, and did not render the account he was then ordered to render. The attachment under which the petitioner was arrested for disobedience of the order of March 12, 1920, was issued on March 26, 1920, and the petitioner was arrested. The writ of habeas corpus was issued on March 24, 1920. The petitioner was arrested on

that day, and was taken before the court, and the order of commitment was made. The entire record shows ample ground for the issuance of the attachment and the commitment if the petitioner's contentions in regard to the two jurisdictional questions are not well taken.

[6] The petitioner alleges that Florence E. Philbrook died on November 17, 1918, and that the petitioner was duly appointed administrator of her estate and qualified as such administrator on January 9, 1919. There is no allegation that he ever published notice to creditors in said estate, but it is argued that it must be presumed that he did what he should have done, and therefore that the time for presentation of a claim on the part of the estate of Randall must have expired between the time of his qualification as administrator of the estate of Florence E. Philbrook and the issuance of the citation on December 12, 1919. It is a fundamental rule of law that every essential fact must be stated in a pleading, and this is true even in a habeas corpus proceeding. The allegations of the petition cannot be strengthened by this contention in opposition to the general presumption attaching to the regularity of judgments and orders of courts.

[7, 8] Even though it appeared that notice to creditors had been given in all respects as required by law in the estate of Philbrook, the petitioner would be in no better position on this branch of the case. He relies on *In re Smith*, 108 Cal. 115, 40 Pac. 1037, to support his proposition that if the time for presentation of claims expired without a claim having been presented on the part of the Randall estate, it is barred forever. Without making lengthy analysis of the opinion in *Re Smith*, it is sufficient to show that it does not sustain the petitioner's contention. In that opinion it was said that it was the duty of the surviving executor "to have presented a claim in his brother's estate, or to have compelled an accounting of his brother's trust in equity." In *re Smith*, 108 Cal. 121, 40 Pac. 1039. At that time section 1639 of the Code of Civil Procedure had not been adopted, but as was determined in *King v. Chase*, 159 Cal. 420, 115 Pac. 207, proceedings under that section take the place of the suit for accounting in equity. Under the decision in *Re Smith*, the executrix of the will in the Randall estate had open to her alternative remedies, and she is pursuing one of those remedies. Furthermore, the present proceeding in this court is not in the nature of an appeal or writ of error, but the investigation is confined solely to the question of jurisdiction.

[9] The principal contention of the peti-

tioner is that because the letters of administration originally granted to Mrs. Philbrook in the estate of Randall were revoked before her death, there is no jurisdiction in the superior court in the estate of Randall to require the personal representative of Mrs. Philbrook to account. Prior to 1905, the statutes of this state contained no provision authorizing the superior court sitting in probate to require or settle accounts. *King v. Chase*, supra. Under that case, the sole method of requiring such an account is under the provisions of section 1639 of the Code of Civil Procedure. It provides that if any executor, administrator, or guardian dies, upon petition of the successor of such deceased executor, administrator, or guardian, the court may compel the personal representative of the deceased executor, administrator, or guardian to render an account of the administration of their testator or intestate, and must settle such account as in other cases. Section 1629 of the Code of Civil Procedure provides that where the authority of the executor or administrator ceases or is revoked for any reason, he may be cited to account. After the revocation of the letters of Mrs. Philbrook, proceedings were instituted to require her to file her final account. These proceedings terminated by her death. The present proceedings are under section 1639, Code of Civil Procedure. The contention of the petitioner is that he is not the personal representative of a deceased administrator, for the reason that Mrs. Philbrook had ceased to be the administratrix of the estate of Randall prior to her death. While her letters had been revoked in her lifetime, and she had no further authority to act as administratrix, she had not rendered her final account, and had not been discharged as administratrix. The liability of Mrs. Philbrook was her liability as administratrix. It appears to this court that to construe section 1639, Code of Civil Procedure, in accordance with the petitioner's contentions would be extremely narrow, and the facts of this case as disclosed by the record support the construction placed upon the section by the superior court of Alameda county.

The multiplicity of other contentions made by the petitioner do not appear to require mention. They have been examined, and in the opinion of the court, none of them warrants the release of the petitioner on this proceeding.

It is ordered that the writ be discharged, and the petitioner remanded to the custody of the sheriff of Alameda county.

We concur: BRITTAIN, J.; NOURSE, J.

(47 Cal. App. 575)

KIBBE et al. v. GRAVES et al.

GRAVES v. McMAHAN et al.

(Civ. 3369.)

(District Court of Appeal, First District, Division 2, California. May 20, 1920.)

**1. Appeal and error §612(2)—Judge's certificate must be attached to transcript.**

Where the judge's certificate is not attached to transcript in accordance with the provisions of Code Civ. Proc. § 953a, only the certificate of the clerk being attached, the appeal must be considered merely as an appeal upon the judgment roll alone.

**2. Judgment §585(5)—Not res adjudicata under changed conditions.**

A judgment, in an action by one holding land in trust for benefit of certain creditors to enjoin sale of land under an execution issued on a judgment in an action against the debtor, denying such trustee an injunction, and stating that the sheriff could sell the debtor's beneficial interest therein, was not res adjudicata in an action by a purchaser for value from the trustee to quiet title and to restrain the sheriff from executing a deed to purchaser at the execution sale, for at the time of the first injunction suit, the debtor had a contingent beneficial interest, contingent upon the possibility that it would not be necessary for the trustee to sell all of the land to satisfy the debts set out in the trust agreement, and, by the trustee's sale of all the land, the debtor's beneficial interest in the land was wiped out.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Susie M. Kibbe and others against Amy Graves and another in which the named defendant filed a cross-complaint against Thomas T. McMahan and others. From a judgment for plaintiffs and orders denying new trial and refusing to vacate judgment, defendants and cross-complainant appeal. Affirmed.

Chas. M. Ackerman, of Los Angeles, for appellants.

O. Franklin Baxter and A. J. Mitchell, both of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment in favor of the plaintiffs in an action to quiet title to certain real estate in the county of Los Angeles, and also from orders denying a new trial and refusing to vacate the judgment.

[1] The respondent, at the outset, objects to a consideration of the reporter's transcript for the reason that the judge's certificate is not attached thereto, in accordance with the provisions of section 953a, Code of Civil Procedure. It is contended that as only the certificate of the clerk is attached to the transcript, and as the clerk is only qualified to

certify to the judgment roll, therefore this appeal must be considered by this court merely as an appeal upon the judgment roll alone. We think this objection is well taken, and that the appeal can be considered only upon the judgment roll. Christenson Lumber Co. v. Seawall, 157 Cal. 405, 108 Pac. 276; Knoch v. Halzlip, 163 Cal. 20, 124 Pac. 997; Lane v. Tanner, 156 Cal. 135, 103 Pac. 846. However, in the present case, as pointed out by the appellant, the consideration of the judgment roll involves a consideration of practically all the material evidence contained in the reporter's transcript. The transcript contains the judgment roll in the present action, and also a grant deed, judgment rolls in two prior actions, and a sheriff's return upon execution in yet another action between the parties. These documents are substantially set out, in their legal effect, in the pleadings, and the facts with reference to them were found by the court. The effect of judgments in cases Nos. B-38190 and B-40999 are pleaded, the grant deed from McMahan, trustee, to the plaintiffs is referred to in the pleadings, and is described therein, except as to the consideration stated in said deed. The recital of a consideration of \$36,641.85 in said deed (which deed is set out in the transcript) is the one point excluded from our consideration upon this appeal by the absence of the judge's certificate, which the appellant contends is material to her case. It may not be inappropriate for us to say, in passing, that we think a consideration even of this matter would not change our determination in any way for the reasons which shall appear hereinafter.

The facts of the case are complex. Many matters are set up in the pleadings which occurred in actions between the same parties previous to this action, and in the interest of clarity, we shall discuss the events as found by the court, in the order of their occurrence, and without regard to the order in which they are pleaded.

On August 21, 1915, one Florence E. Rickershauser was the owner of the real property involved in the present action. At that time she was insolvent, and executed a deed to one McMahan covering said property, which conveyance was duly recorded on December 3, 1915. On August 27, 1915, McMahan executed a declaration of trust with reference to said property, declaring that he held the same, not in his own right, but as trustee for certain creditors of the grantor, the names of the creditors and the amounts of their claims being set out in the declaration of trust; that he held the same for the benefit of said creditors with power to manage and sell said property and to apply the proceeds to the payment of said debts, and to pay the balance, if any, over to the grantor, Florence E. Rickershauser.

On May 18, 1916, defendant Amy Graves instituted an action (No. B-38190) against E. E. Denton and Florence E. Rickershauser, and recovered a judgment therein for \$3,474.24. On July 11, 1916, a writ of execution was issued upon said judgment, and the sheriff levied upon the property involved herein, as the property of Florence E. Rickershauser, and published a notice of sale to be held on August 31, 1916. On August 8, 1916, McMahan instituted an action (No. B-40999) against the sheriff to restrain him from selling said property, and alleged that the property was held by him in trust for the benefit of certain creditors of Florence E. Rickershauser, and that Florence E. Rickershauser had no right, title, or interest therein. In this action Amy Graves intervened, and by her complaint in intervention and the answer thereto there was put in issue the questions of the validity of the deed from Florence E. Rickershauser to McMahan, and the validity and purposes of the trust declared by him to attach to said property. It was adjudicated in that action that the conveyance from Rickershauser to McMahan was bona fide and not in fraud of creditors; that it was impressed with a trust in accordance with the trust declaration hereinbefore referred to; that Florence E. Rickershauser was entitled to whatever beneficial interest remained in the trust property after the payment of the claims enumerated in the trust declarations, and that McMahan was therefore not entitled to a permanent injunction against the sheriff to restrain him from selling whatever beneficial interest Florence E. Rickershauser had in the property.

Thereafter, in pursuance of the trust agreement, the property was sold by the trustee, McMahan, on July 30, 1917, and the sale confirmed by the court, and the purposes of the trust accomplished by the payment of the debts. On August 30, 1917, the sheriff proceeded with the execution sale to satisfy the judgment in said action No. B-38190, in accordance with the judgment in case No. B-40999. Amy Graves purchased at said sale, all the right, title, and interest of Florence E. Rickershauser in and to said property. A certificate evidencing said sale was issued to the purchaser by the sheriff, but a deed has not yet been executed by the sheriff conveying said interest so purchased. It will be observed from this statement of facts that before Amy Graves made her purchase at the sheriff's sale, the property had already been sold to the plaintiffs under the power given in the trust agreement, and the proceeds from said sale had been used in the extinguishment of the debts of Florence E. Rickershauser, the said sale under the trust deed had been confirmed by the court, and the trustee discharged, according to the allegations of the pleadings and the findings of the court. At the time Amy Graves purchased

the beneficial interest of Florence E. Rickershauser she had notice of the conveyance to plaintiffs made under the power contained in the trust agreement, as said conveyance to plaintiffs was duly recorded.

All of the above facts are preliminary to a discussion of the present suit, but they all appear from the pleadings and findings in the present action. In the present action the plaintiffs, who are the grantees of McMahan under the power given him in the trust agreement, seek to quiet title to the land against the defendant, and they also set out in their complaint the facts regarding the execution sale under which the right, title, and interest of Florence E. Rickershauser was sold to Amy Graves, and allege that the sheriff will execute a deed to said Amy Graves on August 30, 1918, in consummation of said sale, unless restrained by the court, and that such deed, if executed, will cloud the title of the plaintiffs to their property, and they ask that the sheriff be restrained from executing this deed. In other words, the plaintiffs seek to litigate the question of whether or not Florence E. Rickershauser had any beneficial interest in the land in controversy at the time of defendant's purchase, and to restrain the sheriff from executing the deed to defendant until such matter may be determined, so as to keep unclouded the title of the plaintiffs to the land. It is also alleged that the value of the property is something over \$30,000, and that the interest of Florence E. Rickershauser was sold at sheriff's sale for about \$2,600, and plaintiffs offer to redeem from said sale if it be adjudged that Florence E. Rickershauser had any beneficial interest in said property at the time of the purported sale to Amy Graves. It is also alleged that the plaintiffs purchased the property in good faith from Thomas T. McMahan, trustee, and paid therefor \$33,641.85. Amy Graves filed an answer, denying the title of plaintiff and setting up title in herself by virtue of the execution sale. She also makes various allegations in her answer and cross-complaint, as to matters decided in action B-40999 with reference to the fraud of Florence E. Rickershauser in conveying to McMahan, and the validity of McMahan's conveyance to plaintiffs, all of which we need not discuss here, as these questions were decided adversely to the defendant Amy Graves in said action No. B-40999, and such matters are res adjudicata as between these parties.

The trial court in the present action issued a permanent injunction restraining the sheriff from clouding the title of the plaintiffs by issuing the deed to the defendant.

[2] One of the main contentions of the appellant is that the injunction should not have been issued, because she asserts that it was decided in said action B-40999 that the sheriff might proceed with the sale and sell the beneficial interest of Florence E. Rickershauser

ser in the property. The facts bearing upon this question as they existed at the time of the determination in action B-40999 and as they exist in the present action are materially different, and therefore the question is not *res adjudicata* here. In action B-40999, McMahan was the plaintiff. He held the legal title then to the property in controversy, holding the same under specific trusts as found by the court, and Florence E. Rickershauser was a possible beneficiary under the trust. She had a contingent interest in the property, for at that time it had not yet been sold under the power given to the trustee. This possible beneficial interest of Florence E. Rickershauser was an asset, upon which it was proper for Amy Graves to levy at that time, and she could not be restrained from doing this. If it had been necessary to sell only a part of the property to satisfy the debts set out in the trust agreement, then the residue would have belonged to Florence E. Rickershauser under the terms of the trust agreement, and her contingent interest would have become vested. This contingent interest was something which could have been reached by the judgment creditor of said Florence E. Rickershauser. In the present action, however, the situation has changed. McMahan no longer holds the property under a trust in which Florence E. Rickershauser has any possible interest. The property has been sold. Plaintiffs have purchased the property at the trustee's sale. They allege and the court found that they paid value for it. There is no longer in existence any interest of Florence E. Rickershauser in the property, for it was necessary to sell all of the property to pay the debts. The error of the appellant is in assuming that, when McMahan sold under the trust deed to the plaintiffs in execution of the trust, the plaintiffs took only the legal title, subject to the beneficial interest of Florence E. Rickershauser. The plaintiffs took both the legal and equitable title—the full and complete title, discharged of all trusts. This being true, the interest of Florence E. Rickershauser in the property, became changed into an interest in the proceeds of the sale, provided any surplus existed after the purposes of the trust had been fulfilled. Whether there is such a surplus, and, if so, who is holding it, and whether or not Amy Graves may levy upon it, are questions not in issue here. We are dealing merely with the title to this real property. As it has been found that it was regularly and properly sold to the plaintiffs for value in execution of a valid instrument of trust, the interest of Florence E. Rickershauser in said property is forever wiped out, and there was nothing, at the time of the purported sale by the sheriff, to convey to the defendant Amy Graves. In other words, the issuance of the deed by the sheriff would be a meaningless proceeding, conveying nothing,

and merely involving the plaintiffs in lawsuits to clear the record. Whatever interest Florence E. Rickershauser may have had in the property was converted into an interest in the proceeds of the sale, if such proceeds were more than the amount necessary for the payment of the debts. Appellant, however, does not attempt to pursue this possible interest in the proceeds of the sale, but insists upon having the property. It is for this reason that it becomes immaterial to the appellant that we may not consider upon this appeal the recital in the deed from McMahan to plaintiffs of the consideration of \$36,641.85—\$3,000 more than the amount of the debts specified in the trust declaration. Even though it be conceded that the trustee received for the property more than the amount of the claims specified in the declaration of trust, and that, therefore, there was a balance due Florence E. Rickershauser, yet we are not concerned with that balance here, and we do not see how the injunction granted in the present case interferes in any way with defendant's right to pursue said money if it exists. The injunction restrains the sheriff "from executing a deed in favor of the said Amy Graves which if executed would purport to convey to her any beneficial interest of Florence E. Rickershauser in and to the land or any part thereof involved in this action."

One further point is argued by the appellant, which has reference to the descriptions of the property contained in the various instruments involved in this action. The point is made merely with reference to the last parcel of real property set out in the complaint, parcel G. This parcel of land when it was conveyed by Florence E. Rickershauser to McMahan, trustee, was described as follows:

"An undivided one-half interest in lots 1, 8, 9, 10, 11, 12, 13, 14, 16 and 24 in block 15 of the Breen tract, Wilmington."

This same description was used in the deed from McMahan to plaintiffs; it was also used in the complaint to quiet title herein. It was the description found by the court to cover the land in controversy, in its findings of fact and conclusions of law, and in its judgment herein. It is the description contained in the injunction against the sheriff, and he is enjoined from executing a deed to defendant Graves of land described in that manner.

However, in the cross-complaint of Amy Graves filed herein, in which she sought to quiet title to this land to have the deeds from Rickershauser to McMahan, and from McMahan to plaintiffs, declared void, this particular parcel of land is described as follows:

"An undivided one-half interest in lots 1, 8, 9, 10, 11, 12, 13, 14, 16 and 24 of the Breen

tract as per book fifteen, page forty-two of maps."

The execution in action No. B-38190 had been issued against this parcel described in this manner, and the sale by the sheriff was made to the defendant Graves under this description.

Because of this variation in the descriptions of the 10 lots in the Breen tract, appellant is taking the position that the property to which the plaintiffs are entitled under the deed from McMahan, and under the decree of the court quieting title, is not the same property under which execution was issued in action B-38190, and not the same property which defendant Graves purchased at the sheriff's sale. Therefore they contend that, regardless of the judgment quieting title according to the prayer of plaintiffs' complaint, defendant Graves is entitled to a deed to 10 lots in the Breen tract. There is nothing in the record from which this court can determine whether these certain 10 lots "in the Breen tract" and the 10 lots numbered the same "in block 15 of the Breen tract" are the same lots. If they are not, then obviously defendant may have her deed to the lots "in the Breen tract," while the plaintiffs have their title quieted to the lots "in block 15 of the Breen tract." But it requires no modification of the judgment to bring about such a result, because the injunction merely restrains the sheriff from executing a deed to these certain lots "in block 15 of the Breen tract." It in no way interferes with his action in executing to the defendant Graves a deed to any different lots "in the Breen tract," which she may have purchased.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

(47 Cal. App. 583)

**BUXTON v. INTERNATIONAL INDEMNITY CO. (Civ. 3366.)**

(District Court of Appeal, First District, Division 2, California. May 20, 1920. Hearing Denied by Supreme Court July 19, 1920.)

**1. Insurance §151(1) — Letters written by insurer held part of insurance contract.**

An agreement contained in a letter written by an insurance company as to what a policy against theft, robbery, or pilferage should cover, which was relied on by insured, held to become a part of each and every contract of insurance entered into between the parties after its date, unless expressly excluded.

**2. Contracts §9(1)—Technical terms not required.**

It is not necessary that parties to a contract should express themselves in the most technical and precise terms; it being sufficient if

their meaning clearly appears, in view of Civ. Code, § 3401.

**3. Insurance §425—Word "steal," in agreement as to theft policy, included conversion by conditional vendee.**

An insurance company's agreement that its policy should cover theft of automobile by vendee in possession under conditional sale held to include embezzlement or unlawful conversion by such a vendee; "stealing" being a larger term than robbery, and including unlawful appropriation of things which are not technically a subject of larceny.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Steal.]

**4. Action §38(2)—Complaint seeking to reform and to recover on contract states one cause of action.**

A complaint seeking to revise or reform a contract, and also to recover on or enforce the same, states but one cause of action.

**5. Insurance §635—In action on theft policy, allegation as to embezzlement sufficient.**

An allegation in an action on a theft policy that conditional vendee of an insured automobile removed the same from the state, and ever since has and does now conceal the same, with the intent to injure and defraud the plaintiff, was an allegation of sufficient facts to constitute embezzlement, under Pen. Code, § 504a.

**6. Pleading §68—Allegation on information or belief sufficient.**

An allegation of material facts on information or belief is a sufficient allegation, under Code Civ. Proc. § 446.

**7. Pleading §205(2)—Allegation on information or belief sufficient as against general demurrer.**

In a vendor's action on an insurance policy protecting his equity in an automobile, allegations that the purchaser without the knowledge or consent of plaintiff, removed the automobile from the state, and conceals the same with the intent to injure and defraud plaintiff, and that the purchaser had converted the automobile, though made on information and belief, were sufficient, where objection was by general demurrer.

**8. Insurance §559(1)—Insurer waived proof of loss by denying liability.**

Where insured notified insurer in writing of the loss or disappearance of an automobile, and within 60 days from the date of the loss the insurer denied liability on the policy on the ground that it did not cover embezzlement or wrongful conversion, proof of loss was waived, although insurer did not have in contemplation a letter of the company which modified the policy, so as to include conversion by a conditional vendee; the two instruments constituting one contract.

**9. Trial §396(3)—Finding as to intent of parties to contract held not outside issues.**

In an action under a policy against theft, etc., a finding of the trial court with relation to the intention of the parties to the contract



in using the word "steal" in a letter modifying the policy was not outside the issues, where the plaintiff alleged that defendant delivered a policy of insurance against all direct loss or damage which he might sustain, caused by the wrongful conversion of an automobile by a vendee under an executory contract; the court necessarily determining the meaning of such word when construing the contract.

**10. Insurance Ⓒ=665(4)—Evidence justifying finding that third party embezzled automobile.**

In action against an insurance company to recover under a policy by reason of embezzlement of an automobile by a conditional vendee, evidence held to justify a finding that the conditional vendee converted the automobile to his own use, and removed it from the state, and retained and concealed the same, with intent to injure and defraud the plaintiff.

**11. Insurance Ⓒ=665(1)—Insured required to prove case only by preponderance of evidence.**

An action to recover under a policy against theft is a civil action, and plaintiff is required to prove his case only by a preponderance of the evidence; the rule being the same as it is in civil cases generally.

**12. Insurance Ⓒ=506—Insured may recover expenses of attempting to recover stolen property.**

In an action under a policy of insurance against conversion of an automobile by a conditional vendee, plaintiff was entitled to recover money paid to a detective agency in attempting to recover the automobile, where the policy provided that any act of the assured in recovering, saving, and preserving the property should be considered as done for the benefit of all concerned, and all reasonable expenses should constitute a claim, etc.

**13. Insurance Ⓒ=503—Policy insuring dealer's equity in conditionally sold automobile entitled insured to interest on payments due.**

Under a policy of insurance undertaking to protect a dealer's equity in automobiles sold under conditional contract and embezzled by conditional vendees, insured was entitled, on conversion of a car by a vendee, to recover the unpaid installments, plus interest thereon, where the terms of the conditional contract of sale provided for the payment of interest on all deferred payments from the date of the contract.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Lynn C. Buxton against the International Indemnity Company. Judgment for plaintiff, and defendant appeals. Affirmed.

N. Blackstock, Edward M. Selby, and W. I. Gilbert, all of Los Angeles, for appellant.

John B. Yakey, of Los Angeles, Jack M. Hendrick, of Trinidad, Colo., for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment for the plaintiff in an action to recover upon a contract of in-

surance. The court found that the contract of insurance entered into between the parties to this action consisted of a written agreement in the form of a letter, dated June 8, 1916, signed by the secretary of the defendant company, and addressed to the plaintiff, and of a policy of insurance set out in the complaint.

Plaintiff was a dealer in automobiles, and entered into a contract with one Suttle, by which Suttle was to purchase a Stearns-Knight automobile for \$2,250; the purchase price to be paid in installments as provided in the contract, and the automobile to remain the property of the vendor until all payments had been made. Plaintiff applied to the defendant for insurance upon this automobile so contracted to be sold, and a policy was issued by the defendant on June 12, 1917. The insured named in the policy was "W. A. Suttle and/or N. R. Vall." According to the testimony and the findings, at the time of the issuance of the policy, the automobile covered thereby was the property of the plaintiff, and said N. R. Vall had no interest whatever therein; but his name was inserted in the policy at the suggestion of the defendant's agent, because plaintiff stated to said agent of the defendant that Vall would advance money upon this purchase contract. The premium upon the policy was paid by the plaintiff, and the policy was delivered to him. Vall for some reason did not advance money upon the contract, and on June 28, 1918, an indorsement was made on said policy by the defendant company that it had received notice that the interest of Vall in the policy had been assigned to plaintiff, and loss, if any, was payable to W. A. Suttle and/or Lynn C. Buxton, as their interests may appear. Later the policy was assigned by plaintiff to T. B. Newlin as collateral security, and this assignment was approved by the insurance company. After the loss of the automobile, Newlin assigned his interest in said policy to plaintiff.

The testimony upon which the findings of the trial court are based shows that prior to June 8, 1916, Mr. Hallenbeck, who was soliciting business for the defendant, had a conversation with the plaintiff regarding his insurance business. Hallenbeck was seeking plaintiff's business, and plaintiff complained to him about the technical defenses raised by insurance companies and the inadequate protection given by their policies, and told him that he desired to be fully protected in all cases of lease contracts. Hallenbeck promised that his company would fully protect the plaintiff if he would insure his automobiles with it, and stated, according to the plaintiff's testimony, that the policies of his company would be protection against "fire, theft, and wrongful conversion," and that he would have the company write to plaintiff to this effect. In accordance with this understand-

ing, on June 8, 1916, H. Perk, Jr., secretary of defendant company, wrote to the plaintiff as follows:

"I wish to advise you that the International Indemnity Company will from this date extend policies on all cars in which you may have an equity to cover any claims arising under the following conditions: \* \* \* Third. If the conditional buyer of an automobile, or any member of his immediate family, should steal any automobile insured under our policies, and thereby commit a felony, upon warrant being secured for the arrest of such party or parties, the company hereby agrees that your equity in any automobile insured by this company will be fully protected."

Plaintiff's secretary testified that reliance was placed upon this letter, and policies of insurance were ordered from the defendant company with this understanding. This instrument was never recalled, and plaintiff had received no notice, at the time the policy in suit here was issued, nor thereafter, that this communication was not in full force and effect.

[1] On or about September 15, 1917, Suttle, the vendee of the car, disappeared from Los Angeles, taking the car with him. The evidence regarding his alleged misconduct we shall discuss later. Our first consideration is the contention of the appellant that the evidence does not support the finding of the trial court that the two documents mentioned here—the letter of June 8, 1916, and the policy issued June 12, 1917—constitute one contract. We think it clearly appears from the testimony of the plaintiff and his secretary that the policy was taken out in reliance upon and in consideration of the agreement made in the letter of June 8, and that said letter became a part of each and every contract of insurance entered into between the parties after its date, unless expressly excluded from said contracts. The policy of insurance itself provides, among other things, insurance against—

"theft, robbery, or pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment whether the theft, robbery, or pilferage occur during the hours of such service or employment or not, and *excepting also the wrongful conversion or secretion by a mortgagor or vendee in possession under mortgage, conditional sale, or lease agreement.* \* \* \*"

[2] It was the contention of the plaintiff upon the trial that the language hereinbefore quoted from the letter of June 8 was intended to obviate the exception italicized above with reference to wrongful conversion or secretion by vendee in possession under conditional sale; and that the language of said letter, "If the conditional buyer \* \* \* should steal any automobile insured under our policies, \* \* \* your equity will be fully protected," was intended by the parties and

understood by them to cover wrongful conversion by said conditional buyer; that the word "steal" is used in its broad, general sense, and not in the technical sense of larceny. Plaintiff asked that the portion of the contract of insurance appearing in the letter be reformed to express the true intent and understanding of the parties. The court found that the word "steal" was used by the parties to express the idea of wrongful conversion, and reformed the contract accordingly.

The matter could have been disposed of, as pointed out by respondent, under the power of the court to interpret contracts, for it appears from the testimony of the plaintiff's witnesses that the word "steal" must have been used by the parties in its broad and colloquial sense. It is unlikely that the plaintiff would have cared for an extension of insurance to cover a contingency which is almost impossible of occurrence. If appellant's view be taken, the defendant assumed practically no risk at all in guaranteeing the plaintiff against larceny by a conditional vendee of an automobile covered by his contract of purchase. The conditional vendee would have lawful possession of the car, and his misappropriation thereof would be embezzlement or wrongful conversion. It is difficult to imagine how he could commit larceny in connection therewith, for this offense involves unlawfulness in taking possession. Appellant enlightens us upon this point by arguing that, if the contract of purchase was entered into for the purpose of stealing the car, then the original possession would be unlawful, and the act would be larceny. It seems unlikely that the plaintiff desired insurance against a situation such as this. The necessary elements of such an offense, to bring it within the terms of such a policy, would be most difficult of proof. Furthermore, the direct testimony of the plaintiff is that he desired, and was assured that he would receive, protection against wrongful conversion by his vendee. It is not surprising that a layman, upon reading the letter of June 8, would think its language covered this situation. It is also not necessary that parties to a contract should express themselves in the most technical and precise terms; it is sufficient if their meaning clearly appears.

[3] Section 3401, Civil Code, provides that in revising a written instrument the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be. Section 504a, Penal Code, provides that every person who shall fraudulently remove, conceal, or dispose of any personal property or effects of another, in his possession under a contract of purchase not yet fulfilled, is guilty of embezzle-

ment. Although the word "steal" ordinarily imports larceny, it may be shown to import a charge of embezzlement. *Taylor v. Short*, 40 Ind. 511. The word "steal" can be shown, in the connection in which it is used, not to import larceny. 26 Am. & Eng. Ency. of Law (2d. Ed.) 770; *Dunnell v. Fiske*, 52 Mass. (11 Metc.) 551, 554.

"The term 'steal' is commonly used in indictments, for larceny, and denotes a commission of theft; but, in a popular usage, 'stealing' is a wider term than larceny, inasmuch as it may include unlawful appropriation of things which are not technically a subject of larceny." *Black's Law Dictionary*.

It is said in *Darling v. Clement*, 69 Vt. 292, 297, 37 Atl. 779, that the natural and obvious meaning of the word "steal" is a felonious taking of property by larceny, but it may be qualified by accompanying words, so as to show that such was not the meaning. In the present case, we think that, when the word "steal" was accompanied by the qualifying words, "by a conditional buyer," these qualifying words clearly extended the word "steal," so as to make it include embezzlement, a crime which is consistent with the legal right of possession in the vendee under a conditional contract of purchase.

Furthermore, if the contract contained in said letter be construed as appellant desires, merely to cover a technical theft by a conditional purchaser, or, as stated by the appellant, "only to cover a case where there was a felonious intent at the time that the automobile purchaser acquired possession," then the owner was already protected against such a situation by the policy proper, and without the addition of the letter of June 8, and therefore the portion of the contract contained in the letter is meaningless and useless; for the policy itself provides against theft by any and every one, excepting only persons in the assured's household or employment. There is no exception made as to theft by one having a conditional contract of purchase, and, if we concede the possibility of such an offense, then no exception is made of it in the policy. The only thing that is excepted with regard to the conditional purchaser is "wrongful conversion." Therefore it appears that, if the letter of June 8 added any protection against the actions of the conditional purchaser, it must have been by making inoperative this exception against wrongful conversion. We therefore agree with the trial court in its holding that the contract was intended by the parties to cover unlawful conversion by the vendee.

It may be appropriate to point out here, in answer to certain arguments made by appellant, that the finding of the trial court is that, in drawing the contract between the parties to this action, it was the intention of the parties that this contract should cover and fully protect the plaintiff against the

embezzlement or wrongful conversion of any automobile covered by any insurance policy issued by the defendant, and that said letter or contract of June 8, 1916, was given by defendant company to the plaintiff for the purpose and with the intention to protect the said plaintiff against wrongful conversion or embezzlement of any automobile so sold by plaintiff under conditional sales contract. This finding is sufficient to sustain the judgment, and it is immaterial whether or not the other portion of the finding, to the effect that by inadvertence and mistake the word "steal" was used, instead of the words "wrongful conversion and embezzlement," is technically sustained by the evidence or not. If the parties intended that the word "steal" should be used in its broad and colloquial sense, and cover certain risks out of which this loss grew, that is sufficient, and it is unnecessary that the record show the parties actually intended to use the express words "wrongful conversion," but by mistake used the word "steal."

[4] Many of the other objections of the appellant are technical ones, and we shall discuss them briefly. Appellant contends that its demurrer should have been sustained, because the complaint contains two causes of action, which were not separately stated. The court found, contrary to appellant's premise upon this argument, that the letter and contract constituted one and the same contract. As before stated, we are in accord with this conclusion. A complaint seeking to revise or reform a contract, and also to recover upon or enforce the same, states but one cause of action. *Messer v. Hibernian Savings & Loan Society*, 149 Cal. 122, 84 Pac. 835.

[5-7] Appellant also contends that the complaint does not sufficiently allege the conversion of the automobile by Suttle, and therefore fails to allege loss. The complaint alleges:

"As this plaintiff is informed and believes, and therefore alleges the fact to be, the said W. A. Suttle, without the knowledge or consent of this plaintiff, removed from Los Angeles, and the state of California, the said automobile, and ever since has and does now conceal the same, with the intent to injure and defraud this plaintiff."

This is an allegation upon information and belief of sufficient facts to constitute embezzlement under our code. And it is further alleged in the complaint, upon information and belief, that the said Suttle "embezzled said automobile and wrongfully converted the same to his own use." An allegation of material facts upon information or belief is a sufficient allegation. Section 446, Code Civ. Proc.; *McDermont v. Anaheim, etc., Water Co.*, 124 Cal. 112, 115, 56 Pac. 779. The objection to this allegation was taken by

general demurrer, and the allegations of the complaint, we think, are sufficient against such attack.

[8] Appellant also contends that the complaint is insufficient because no proof of loss is pleaded. Plaintiff pleaded facts which constitute a waiver of proof of loss, and these facts were not denied by the defendant. Plaintiff alleged that on September 24, 1917, he notified the defendant in writing of the loss or disappearance of the automobile, and that within 60 days from the date of the loss the defendant denied liability upon the policy, upon the ground that the policy did not cover embezzlement or wrongful conversion. Appellant seeks to avoid the effect of this waiver by asserting that its denial of liability was under the policy alone, and it did not have in contemplation the letter of June 8, 1916, which was held by the trial court to be a part of the policy; that therefore they never denied liability under the contract recovered upon here, and therefore never waived proof of loss. The answer to this contention is that the defendant was aware of all the facts and is presumed to know the law. Since the court has held that the two instruments constituted one contract, defendant's denial of liability under the contract was a denial of liability under both instruments.

[9] Another objection of appellant is that the finding of the trial court with relation to the intention of the parties to the contract in using the word "steal" is outside of the issues made by the pleadings. This argument is made because the complaint alleged, among other things, that the defendant had contracted and agreed with the plaintiff, in consideration of the plaintiff purchasing insurance from the defendant, to attach to each and every policy then in existence held by plaintiff, or that might thereafter be issued, a rider or agreement protecting the plaintiff against wrongful conversion by purchasers under conditional contracts of sale. It is true that the trial court found against this allegation of the complaint, and plaintiff did not recover upon this theory of the case. But it is not true that the complaint contained no allegations sufficient to place in issue the question of the meaning of the word "steal" as contained in the letter of June 8, 1916. Upon examination of the complaint, we find an allegation that the defendant, in consideration of the payment of a certain premium, "executed and delivered to the plaintiff a policy of insurance \* \* \* against all direct loss or damage which he might sustain caused by the wrongful conversion of said automobile by the vendee under said executory contract." This is pleading the contract according to its legal effect, and these allegations were denied by the defendant. In determining the legal effect of this contract, which was found to be made up of the policy and letter of June 8, 1916, the court necessa-

rially determined the meaning of the language used in the light of the intention of the parties to the contract. This portion of finding 4 was therefore in issue, and it is the basis of the judgment.

[10, 11] The only other objection of the appellant which we find it necessary to discuss here is that the evidence does not justify the finding that Suttle converted the automobile to his own use, and removed the same from the state of California, and does now retain and conceal the same, with intent to injure and defraud the plaintiff. The evidence in the case shows (and there is no evidence to the contrary) that Suttle took the automobile out of this state without the consent or knowledge of the plaintiff; that he concealed the same, so that the plaintiff is unable to locate it, although he employed detectives, who followed Suttle about to several cities and endeavored to locate the car; that plaintiff demanded of Suttle either payment of the installments due or possession of the car, and this demand has not been complied with; that the payment due on September 15, 1917, the day when the automobile was taken from the state, has not been made, and no subsequent payment has been made, although several months elapsed between the time of its disappearance and the institution of this action. It is apparent from this testimony that Suttle exercised dominion over the automobile which was inconsistent with the rights of the true owner. *Fitzgerald v. State*, 50 N. J. Law, 475, 477, 14 Atl. 746; *People v. Goodrich*, 142 Cal. 220, 75 Pac. 796. An action to recover under a policy of automobile insurance against theft is a civil action, and plaintiff is required to prove his case only by a preponderance of the evidence; the rule being the same as it is in civil cases generally.

[12, 13] The objection that the plaintiff should not have recovered the \$126.26 paid to the detective agency in attempting to recover the automobile is met by the express terms of the policy that any act of the assured in recovering, saving, and preserving the property, in case of loss or damage, shall be "considered as done for the benefit of all concerned, \* \* \* and all reasonable expenses thus incurred shall constitute a claim under this policy." The portion of the contract contained in the letter of June 8 provides for the protection of plaintiff's equity in the car. Plaintiff's equity in the car was the amount of the unpaid installments, plus interest thereon, for the terms of the conditional contract of sale provided for the payment of interest upon all deferred payments from the date of the contract. Appellant may not, therefore, object to the allowance of such interest in the judgment.

The judgment is affirmed.

We concur: BRITAIN, J.; NOURSE, J.

(47 Cal. App. 717)

McCORD et al. v. MARTIN et al. (Civ. 2159.)

(District Court of Appeal, Third District, California. May 24, 1920. Hearing Denied by Supreme Court July 23, 1920.)

1. Corporations  $\S$ 187—Stockholder pooling stock could not fraudulently sell pool above agreed price and retain difference.

If a stockholder falsely represented to other stockholders that if they would pool their stock they could sell to a certain purchaser for \$5 a share, and such stockholders acted upon such representation, whereas the former knew that the stock would be sold for \$8, and had an agreement to that effect, and did actually consummate the sale for that price and retained the difference of \$3, which the purchaser paid direct to him, the other stockholders could recover from him the \$3 per share which he fraudulently obtained.

2. Pleading  $\S$ 387—Plaintiff must recover on case made by pleadings.

The plaintiff must recover, if at all, upon the case made by the pleadings, and not upon the case which may be developed by the proofs.

3. Pleading  $\S$ 430(2)—No complaint that fact was not in issue after judgment.

Where a cause is tried on the theory that a certain fact is in issue, and evidence is received thereon without objections, it is too late after judgment to complain that no such issue was presented by the pleadings.

4. Appeal and error  $\S$ 907(2)—Presumption in favor of regularity of proceedings below.

On appeal, in the absence of the evidence, it must be presumed that a finding of fact not within the issues made by the pleadings was treated as a fact in issue; the presumption being in favor of the regularity of the proceedings below.

5. Corporations  $\S$ 187—Secretary receiving more than other stockholders for stock in pool not liable to other stockholders.

Where secretary of a corporation was offered \$15 per share for his stock if other stockholders would sell at \$5, to the extent that the purchaser might secure 20,000 shares, and the other stockholders, uninfluenced by the secretary, were willing and agreed to sell at the lower price, and the sale was carried out, such other stockholders have no claim upon the additional price or bonus thereafter received by the secretary, the secretary not sustaining to the others any relation of confidence which made it his duty to disclose his prospect of a larger price, under Civ. Code, § 1710, subd. 3.

6. Joint adventures  $\S$ 1—Stockholders selling stock in pool not joint adventurers.

Stockholders of a corporation pooling their shares to sell them to a purchaser at a certain price were not joint adventurers; the reason for the pool being that the purchaser did not care to purchase unless he obtained a certain number of shares.

7. Judgment  $\S$ 570(6)—Dismissal by stipulation bar to another suit.

Where the parties to an action stipulate in open court for the dismissal of the action and

the payment of their respective costs, a judgment of dismissal entered thereon is a bar to another suit upon the same cause of action.

8. Judgment  $\S$ 525—Recitals conclusive in absence of other evidence.

Recitals in a judgment of dismissal of a prior action, that it was entered upon stipulation of the parties for the dismissal and the payment of their respective costs is conclusive upon the parties, in the absence of evidence to the contrary.

9. Courts  $\S$ 97(6)—Interpretation of state statute by federal court not binding.

The interpretation by the federal courts of a state statute is not binding upon the state courts.

10. Judgment  $\S$ 570(6)—Dismissal upon stipulation when judgment on merits.

Where the parties appear in open court and stipulate for a dismissal, the situation is not covered by Code Civ. Proc. § 581, but a judgment entered thereon is a judgment on the merits as contemplated by section 582.

11. Appeal and error  $\S$ 1175(7)—On reversal, judgment directed for defendant where facts require it.

On appeal from a judgment for plaintiffs, where the findings do not support a finding for plaintiff, but require a conclusion in favor of defendant, the proper proceeding is to direct a judgment for the defendant, under Code Civ. Proc. § 53.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Sarah McCord, administratrix, etc., against J. D. Martin and William Lindemann. From an adverse judgment the last-named defendant appeals. Reversed.

Lamberson & Lamberson, of Visalia, for appellant.

Bradley & Bradley and W. B. Wallace, all of Visalia, for respondents.

BURNETT, J. The action was begun in the superior court of the county of Santa Clara on the 22d of December, 1913. On the 8th day of October, 1914, an amendment to the complaint was filed, to which the defendant, William Lindemann, filed a demurrer. The demurrer was sustained without leave to amend on the 28th day of December, 1914, and thereafter, on the 18th day of January, 1915, judgment was entered in favor of defendant Lindemann. An appeal from such judgment was thereafter taken by the plaintiffs, and the judgment was reversed by the District Court of Appeal of the First District. McCord v. Martin, 34 Cal. App. 129, 166 Pac. 1014. The remittitur was filed in the court below on the 6th day of August, 1917, and thereafter an order was made by said superior court that the defendant answer within 10 days after notice of said order. Within time the answer was filed, and

thereafter, on motion of plaintiffs, the action was transferred for trial to the superior court of Kings county. On January 15, 1918, the plaintiffs gave notice of a motion to strike out portions of the answer of defendant Lindemann, including paragraph 16 thereof, which set up as *res judicata* a judgment of dismissal in an action between the same parties, entered by the superior court of the city and county of San Francisco on the 16th day of May, 1913, as follows:

"It appearing to the court from the stipulation filed herein on the 12th day of May, 1913, signed by the attorneys of record of all of the respective parties in interest, that plaintiffs (naming them), through their attorneys, Messrs. Bradley & Bradley and F. H. Gould, and that defendant and cross-complainant J. D. Martin, through his attorneys, Messrs. Morrison, Dunne & Brobeck, and that defendant William Lindemann, through his attorney Alfred Daggett, and that cross-defendants (naming them), through their attorneys, Messrs. Bradley & Bradley and F. H. Gould, have, and each of them has, stipulated that the above-entitled action and every part thereof shall be dismissed as against each and all of the parties to the above-entitled action, and that all of said parties have further stipulated that each and all of the parties to said action shall pay their costs of suit incurred by them respectively; and each and all of the above-named parties, through their said respective attorneys having stipulated in open court on the 12th day of May, 1913, that said action and every part thereof shall be dismissed pursuant to the terms of the aforesaid stipulation on file herein, and good cause appearing therefor.

"Now therefore, it is ordered that the above-entitled action and every part thereof be, and the same is hereby, dismissed as to all the parties to said action.

"It is further ordered that each and all of the above-named plaintiffs, and each of said defendants and said cross-complainant and each and all of said cross-defendants pay his or their own costs incurred by him or them respectively in said action.

"It is further ordered that this judgment of dismissal be duly entered by the clerk."

Paragraph 17 of said answer, to the effect that said judgment has never been reversed, modified, or appealed from, and has become final, and that the cause of action therein was the same as the action admitted to be set up by the complaint herein, was also stricken out.

The plaintiff J. W. McCord having died, his administratrix was substituted by order of said court. The cause was tried without a jury, and on the 1st day of March, 1919, the court filed its findings of fact and conclusions of law, and judgment was entered thereon in favor of plaintiffs as against William Lindemann on the 11th day of March, 1919. Two days later the defendant Lindemann gave notice of a motion to enter a different judgment, which motion was denied on the 24th day of March, 1919. The proceedings upon this motion have been preserv-

ed in a bill of exceptions. Defendant Lindemann has appealed from said judgment and said order denying his said motion.

The first point made by appellant worthy of serious consideration is stated as follows:

"The findings of fact are not responsive to the issues made by the complaint and answer, and are outside the pleadings, and if the findings justify any judgment at all against appellant it is for a cause of action wholly different from that stated in the complaint."

The theory of the complaint is that defendant Martin knew that one George T. Cameron, of San Francisco, desired to purchase at least 20,000 shares of the stock of the Lost Hills Mining Company, belonging to the assignors of plaintiffs, and was willing to pay therefor "a large sum of money in excess of \$5 per share"; that thereafter said Martin devised a scheme to induce said stockholders to pool their stock to sell in one block to an undisclosed purchaser for \$5 per share; that to enable Martin to carry out said scheme he sought the aid of Lindemann, and paid the latter a large sum of money for his assistance; that thereafter defendants represented to said joint stockholders that they knew a man, whose name they did not disclose, who would buy all of the stock of said Lost Hills Mining Company, but not less than 20,000 shares, for \$5 per share, and no more; that it was worth no more than \$5 per share, and could not be sold for more; "that it would be necessary to pool said stock and place it in escrow in a bank to the amount of at least 20,000 shares, in order to induce said proposed purchaser to come to Hanford and buy the same; that defendants and said E. L. Lindemann would join with said joint stockholders in pooling their said shares and placing them in escrow to be sold in one lot at the price of \$5 per share"; that said representations were false, but were believed and relied upon by said joint stockholders, and they did thereupon so pool their stock and placed it in escrow with the First National Bank of Hanford to be delivered in one block to a purchaser to be produced by defendant Martin, upon the payment of \$5 per share therefor; "that thereafter said proposed purchaser, who was said Cameron, upon being notified by defendants that said stock had been placed in escrow as alleged, went to Hanford, and in accordance with a secret agreement with defendants bought all the said stock so placed in escrow, for \$8 per share, of which he placed \$5 per share in said bank for all thereof, and paid the balance of the aggregate value thereof at \$8 per share to defendants; that the value of said stock as so pooled to be sold in one block, was, at the time it was so pooled and sold, \$8 per share."

[1] Being stated concisely, then, the only cause of action appearing in the complaint rested upon these facts: Both defendants

(191 F.)

Martin and Lindemann, falsely represented to other stockholders that if they would pool their shares of stock they could sell to a certain purchaser for \$5 per share; said stockholders believed and acted upon said representations; whereas, said Martin and Lindemann knew that the stock could be sold for \$8 per share, and had an agreement to that effect, and did actually consummate the sale for that price, but the other stockholders in accordance with the terms of said pooling arrangement received only the sum of \$5 per share, said Martin and Lindemann appropriating to their own use the balance of some \$91,000. If these facts had been shown and found, it could hardly be seriously argued that plaintiffs were not entitled to a judgment against defendants. The proper legal characterization of the transaction might be in some doubt, but at any rate the principles of equity as formulated in the Code and administered by the courts are ample to reach and defeat such iniquitous conduct. But the trouble is, the trial court found that Cameron agreed with Martin "to purchase not less than 20,000 shares for a price not exceeding \$5 per share; that Martin then communicated to a few of plaintiff's assignors the information, and they in turn conveyed it to the other stockholders; that defendants did not devise any scheme for effecting a sale of the interest of said Martin & Dudley in said mining claims and said Lake Shore Oil Company stock and the stock of Lost Hills Mining Company to Cameron, and Lindemann at no time knew of the plans or expectations of the firm of Martin & Dudley to sell the interest of said Martin & Dudley in said claims to Cameron." It is further found in reference to a certain sum of money that was paid by Martin to Lindemann that it "was paid to Lindemann not in pursuance of the scheme alleged in paragraph 7 of the complaint, but was paid to Lindemann in order to remove Lindemann's opposition to the sale by him of his stock and that of his wife in the Lost Hills Mining Company, and that said Lindemann might not oppose the sale by plaintiff's assignors of their stock owned by them respectively in said Lost Hills Mining Company. \* \* \* Lindemann did not have any agreement with defendant Martin or with the firm of Martin & Dudley for a share, nor did Lindemann receive from defendant Martin or from the firm of Martin & Dudley any share in any profits which were made by defendant Martin or by the firm of Martin & Dudley in the sale to Cameron, \* \* \* nor did Lindemann agree with defendant Martin to aid and abet, or aid or abet, nor did he in fact aid and abet, or aid or abet, defendant Martin in carrying into effect the scheme alleged in paragraph 7 of the complaint," said scheme contemplating, as we have seen, the fraudulent claim and sale of the stock for \$5 per share. It is thus ap-

parent that the findings negative every material allegation of the complaint upon which a judgment against Lindemann could possibly be justified. In fact, he is expressly acquitted of any improper or reprehensible conduct within the scope and intent of the attempted cause of action. The judgment would necessarily, therefore, have been in favor of Lindemann (as it was actually in favor of Martin), had not the trial court gone outside the pleadings and determined certain facts to which the issues were not addressed. Appellant states the gist of these findings substantially as follows: About a week prior to March 20, 1911 (the latter date being the time when the so-called escrow agreement was signed), appellant received a letter from the Mercantile Trust Company of San Francisco, representing that if a certain client whom they represented purchased at least a majority of the stock of the Lost Hills Mining Company at the price of \$5 per share, their client would pay Mr. Lindemann \$15 per share for his stock. On March 20th following the said escrow agreement was signed and delivered, authorizing said First National Bank of Hanford to deliver the stock to the purchaser for \$5 per share. Up to this time appellant did not know who the purchaser was, or whether said offer was genuine. After said escrow agreement was made appellant ascertained who was the prospective purchaser. Subsequently on March 30 Mr. Cameron came to Hanford and bought at \$5 per share the stock of several of plaintiffs' assignors who had signed the escrow agreement; also appellant's stock at \$15 per share; and also the stock at \$5 per share of several others of plaintiffs' assignors, who brought their stock to the bank. Lindemann was secretary of the company, and the court's reason for imposing upon him this liability is disclosed in the finding that he "owed a duty to the other stockholders of said corporation to inform them as to the reception of said letter, and of his interview with the said Cameron, and of his reception of \$15 per share for said stock, and that it was fraudulent on his part to sign the said escrow agreement, whereby he had promised to sell his stock for \$5 per share, when, in fact, he had received said letter, and expected to receive \$15 per share for said stock, and it was fraudulent on his part to conceal the fact that he had received said letter."

[2] It is quite apparent that thus is presented an entirely different story from that set forth in the complaint. It is sufficient to say that the so-called fraud herein does not at all involve any fraudulent representation to induce the other stockholders to pool their stock, nor the actual sale of said stock, for a price in excess of \$5 per share—the two essential elements that characterized the cause of action as set forth. But it is

well settled by a long line of decisions in this state that—

"The plaintiff must recover, if at all, upon the case made by the pleadings, and not upon a case which may be developed by the proofs." *Kredo v. Phelps*, 145 Cal. 526, 78 Pac. 1044.

[3] This principle would be fatal to the judgment were it not for the well-recognized rule of practice that, where a cause is tried upon the theory that a certain fact is in issue, and evidence thereon is received without objection, it is too late thereafter to complain that no such issue was presented. *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90; *Howard v. Hobson Co.*, 38 Cal. App. 445, 176 Pac. 715.

[4] In the absence of the evidence at the trial and in view of said finding of the court, the presumption being in favor of the regularity of the proceedings, we must assume that such was the action of the parties.

[5] The question then occurs whether sufficient facts are found to justify a judgment against appellant for fraud. In relation thereto the first thing that challenges attention is that the other stockholders in their agreement to sell their stock were not influenced by any representations of appellant. He did not deceive them in any way, and he made no effort to persuade or induce them to pool their stock for the purpose of sale at the price of \$5 per share. The proposition was presented to them by Martin, who was interested in the transaction primarily for the reason that he hoped to sell to said vendee other interests closely connected with the property of the Lost Hills Mining Company. The court finds specifically that Lindemann did not know of the plans or expectations of Martin, and did not aid or abet any scheme that the latter may have had in view. The situation then is simply this: L. is offered \$15 per share for his stock in a certain corporation if other stockholders will sell at \$5 to the extent that the purchaser may secure 20,000 shares. The other stockholders, uninfluenced by L., are willing and agree to sell at the lower price. The question is whether they have any claim upon the additional price or bonus thereafter received by L. The answer to this question depends, of course, upon the consideration whether L. sustained to the others any relation of confidence which made it his duty to disclose his prospect of a larger price. Since any active or positive fraud is negated by the findings of the court, there remains only the possible operation of the principle of fraudulent deceit consisting of "the suppression of a fact, by one who is bound to disclose it." Section 1710, subd. 3, Civ. Code. But we have not been cited to any authority to the effect that, either as stockholder or secretary, Lindemann was under any legal obligation to disclose to the others the fact that

he had received such letter from the Mercantile Trust Company, or that he afterward obtained \$15 per share for his stock. It may be admitted that some men of a fine sense of honor would have done such a gracious and altruistic act, but we are simply to inquire what the law demands in a situation of this kind.

In *Ryder v. Bamberger*, 172 Cal. 791, 158 Pac. 753, it was held that even "directors and officers of a corporation have the right to purchase the shares of the stock of other stockholders, where the transaction is free from fraud; and they are not bound to acquaint a stockholder willing to sell his stock with facts which would enhance the price of the stock, as they are only trustees for the stockholders as to the management of the corporation, and not in their private dealings." Manifestly, there is less reason for holding that the secretary, who is a mere ministerial officer of the corporation, holds such relation of trust and confidence to the other stockholders as to require a disclosure of any information that he may have received in his individual capacity as stockholder.

*Hallidie v. First Federal Trust Co.*, 177 Cal. 600, 171 Pac. 431, involved an action "to compel an accounting of dividends and other proceeds realized by the purchaser, on the ground that the sale had been induced by fraudulent misrepresentations made by Enginger to Hallidie, who was acting in the transaction for California Wire Works." It was contended by appellant that, even if there was no active misrepresentation by Enginger, he was chargeable with constructive fraud because of his failure to disclose all the facts within his knowledge. The Supreme Court, however, said:

"But the evidence did not show any such relation between the parties as to impose upon Enginger the stringent obligations of a trustee. While Enginger was a director and general manager of the Wire Cloth Company, it must be remembered that Hallidie himself was not only a director, but the president of the corporation. In negotiating for the stock, the two stood on equal terms, and neither owed the other any special duty of a fiduciary nature. This being the relation between the parties, the fact, if it be a fact, that the stock was, at the time of the purchase, worth very much more than the price paid, does not furnish a ground for setting the transaction aside."

Other cases cited announcing a similar doctrine are *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384; *Hooker v. Midland Steel Co.*, 74 N. E. 445, 106 Am. St. Rep. 170; *Tippecanoe County Commissioners v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245; *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 408.

[6] Nor do we think that appellant is liable upon the theory that all signing the escrow agreement were joint adventurers. In 23 Cyc. 453, it is said:



"A joint adventure does not exist where property is pooled by the several owners to be sold at a particular price, and each contributor is to receive the proceeds of the property contributed by him."

The stockholders at all times owned their respective shares of stock severally and individually, and at no time was there a joint interest either in the stock or the proceeds thereof.

The cases cited by respondents in view of their respective facts do not, in our judgment, satisfactorily meet the situation. Detailed consideration of only one of these, *Cole v. Bacon*, 63 Cal. 571, is invited by respondents as they seem to think it is "very similar to the case at bar"; but appellant aptly calls attention to the fact that therein Bacon was the avowed agent of the plaintiffs, who were stockholders in a certain corporation, and as such agent he undertook to sell the stock of plaintiffs for the highest price obtainable. He did sell said stock for \$250,000, of which he secretly retained all except \$47,700, and he falsely represented to plaintiffs that this sum was the price actually paid. The action was brought to recover the balance, and a judgment in favor of plaintiffs was sustained by the Supreme Court. That an agent could thus defraud his principal without rendering himself legally liable to an accounting would, of course, not be urged by any one familiar with the law. It may be added that the case here as presented by the complaint is "very similar" to *Cole v. Bacon*, supra, but the case as presented by the findings is quite dissimilar.

[7, 8] We think, also, that the court erred in striking out the defense of *res judicata*. It is stated by appellant that at the trial the facts were stipulated to be as alleged in said defense.

In *Merritt v. Campbell*, 47 Cal. 542, it was held that—

"A judgment of dismissal, rendered upon the oral agreement of the parties in open court, with a stipulation that each party pay his own costs, is a bar to another suit, afterward brought upon the same cause of action."

Such dismissal was declared to be equivalent to *retrahit* as known at common law, which, being "an open and voluntary renunciation of his suit in court," the plaintiff was

not at liberty to renew. Respondents, however, claim that said decision is not controlling, because therein "the parties appeared in court by their attorneys, and orally agreed to a dismissal, each party to pay his own costs." Appellant rejoins:

"Respondents evidently overlook the fact that in the case at bar the parties did stipulate in open court for the dismissal of the action and the payment of their respective costs, the same as was done in *Merritt v. Campbell*."

The terms of said judgment do, indeed, accord with appellant's statement, and, of course, the recitals in said judgment in the absence of evidence to the contrary are conclusive upon the parties. *Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38.

[9] As to *Rincon, etc., Co. v. Anaheim Union Water Co.* (C. C.) 115 Fed. 543, cited by respondents, appellant is justified in his comment that: First, the interpretation by a federal court of a state statute is not binding upon the state courts (*People v. Linda Vista Irr. Dist.*, 128 Cal. 477, 61 Pac. 86); and, second, that the dismissal therein was not made in open court by stipulation of the attorneys of both parties, but only on motion of defendant's counsel, and the court based its ruling upon subdivision 2 of section 581, and not upon section 582 of the Code of Civil Procedure, as was done in the *Merritt Case*.

[10] Where the parties appear in open court and stipulate for a dismissal the situation is not covered by said section 581, but a judgment entered thereon is a judgment on the merits as contemplated by said section 582.

[11] Some other questions are discussed by counsel, but we deem it unnecessary to notice them specifically. As we view the matter, the findings do not support a judgment for plaintiffs, but require a conclusion in favor of defendant *Lindemann*. When such is the case, the proper proceeding is to direct judgment for the defendant. *Dargle v. Patterson*, 176 Cal. 714, 169 Pac. 360; section 53, Code Civ. Proc.

The judgment is reversed, with direction to enter judgment upon the findings for defendant *Lindemann* for his costs.

We concur: NICOL, Presiding Judge, pro tem.; HART, J.

(68 Colo. 360)

**THOMAS v. SELKREGG et al.** (No. 9501.)(Supreme Court of Colorado. May 3, 1920.  
Rehearing Denied July 6, 1920.)**1. Appeal and error** ⇨1213—Decision on appeal as to pleadings and evidence law of case.

Where appellate court determined on appeal that the pleadings and evidence were sufficient, and that plaintiff made out a prima facie case, trial court erred on a second trial in directing a verdict for defendant, where the facts on the second trial made out a better case for plaintiff.

**2. Executors and administrators** ⇨440—Discharge does not affect rights of litigants in pending proceeding.

Discharge of executors while plaintiff was taking steps toward suing out a writ of error in an action against them did not affect plaintiff's right to proceed with the litigation.

**3. Compromise and settlement** ⇨2—Party not estopped to proceed with litigation after accepting payment of item as to which judgment was affirmed.

Where plaintiff sued for \$3,000, and recovered judgment for \$1,000, and appealed, and the appellate court treated action as being for two items based on separate transactions, and affirmed the judgment as to the \$1,000, but reversed as to the other item of \$2,000, *held*, that the plaintiff was not estopped from continuing the litigation by reason of his accepting payment of the \$1,000.

**Department 3.**

Error to District Court, City and County of Denver; A. Watson McHendrie, Judge.

Action by William R. Thomas, Jr., against E. M. Selkregg and George E. Pierce, as executors, etc. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

John T. Bottom, of Denver, for plaintiff in error.

L. J. Stark, of Denver, for defendants in error.

**ALLEN, J.** This is an action *ex contractu* for money had and received, and was brought to recover the sum of \$3,000, which, it is admitted, was paid by the plaintiff to the testator of the defendants.

The first trial of this cause resulted in a judgment on a verdict for \$1,000 in favor of the plaintiff, and an instruction to the jury that the plaintiff could not recover the remaining \$2,000 of the amount sued for. The case was then taken to the Court of Appeals, which, on review of the same, affirmed the judgment as to the recovery of the \$1,000, and remanded the cause for further proceedings as to the \$2,000. *Selkregg v. Thomas*, 27 Colo. App. 259, 149 Pac. 273. Thereafter a second trial, as to the \$2,000 in question, was had, at which, and at the

conclusion of the evidence for the plaintiff, the defendant moved for a directed verdict upon the ground, as stated in the motion, "that the plaintiff has not in a number of respects made out the case that is alleged in his complaint." The motion was sustained by the trial court. Judgment was rendered accordingly, and the plaintiff brings the cause here for review.

[1] It is the contention of the plaintiff in error, plaintiff below, that the trial court, upon the second trial, did not follow the "law of the case" as announced by the Court of Appeals, and therefore erred in directing a verdict for the defendants.

The trial court directed the verdict upon the theory that a cause of action for money had and received was neither pleaded nor proven. The Court of Appeals, however, held that such a cause of action was pleaded, and that the evidence for the plaintiff upon the first trial made out a plain prima facie case for the plaintiff, and therefore reversed the trial court's action in denying plaintiff a recovery of the \$2,000, and remanded the case for further proceedings as to such sum. Upon the second trial, the facts in favor of the plaintiff were not only substantially the same as those shown upon the first trial, but the evidence made out even a better case. The defendants contend that the evidence was insufficient, but under the rules relating to the law of the case this point cannot be now urged. In 4 C. J. 1217, it is said:

" \* \* \* Where the facts shown on the second trial are substantially the same as on the first trial, the decision of the appellate court is binding on the lower court, and it may and should in conformity with the decision of the appellate court, submit the case or certain issues to the jury, \* \* \* or direct a verdict for plaintiff. \* \* \* Where the appellate court has decided that the facts proved raised a question for the jury, it is error for the lower court on a second trial in which the same, or practically the same, facts are developed, to \* \* \* direct a verdict \* \* \* on the same ground on which it directed a verdict at the first trial."

See, also, 2 R. O. L. 227, § 191.

It was clearly error for the trial court to direct a verdict for the defendants.

[2, 3] The defendants in error contend to the effect that a correct result was reached by the judgment below, or that the trial court would have been warranted in sustaining their motion, made at the beginning of the trial, to dismiss the case on the ground, as stated in the motion, "that the judgment was paid and satisfied," and that the defendants, who are sued as executors, have been discharged as executors, and the estate of their testator closed by the probate court. We find no merit in this contention. At the time the executors were discharged,

the litigation was still pending in the sense that steps were being taken toward suing out a writ of error to review the proceedings had upon the first trial. The executors themselves afterwards brought the case to the Court of Appeals. The mere fact that the executors were discharged did not and does not affect plaintiff's right to proceed with litigation pending and unsettled at the time of such discharge. *Smiley v. Cockrell*, 92 Mo. 105, 4 S. W. 443; 18 Cyc. 1192. As to the payment of the judgment for \$1,000, that fact does not, under the circumstances existing in this case, estop the plaintiff from continuing the litigation as to the \$2,000. It was insisted by the defendants themselves in their reply brief filed on the former review of this case that plaintiff's right to recover the \$1,000 was based on a transaction separate and distinct from that involved in his claim of the remaining \$2,000 sued for. The Court of Appeals treated plaintiff's entire claim as one consisting of two separate items, one of \$1,000, and one of \$2,000. It is not admitted in the pleadings that the settlement of the \$1,000 judgment was an unconditional settlement of the whole litigation. Without detailing the facts involved in the contention now being considered, it is sufficient to say that the admitted facts relied on do not sustain such contention.

The judgment is reversed, and the cause is remanded, with directions to the trial court to enter judgment for plaintiff in the sum of \$2,000, with interest thereon at 8 per cent. per annum from November 9, 1909. Reversed and remanded.

GARRIGUES, C. J., and BAILEY, J., concur.

(33 Colo. 519)

SMITH et al. v. CAMPBELL. (No. 9831.)

(Supreme Court of Colorado. June 7, 1920.  
Rehearing Denied July 6, 1920.)

Landlord and tenant §330(1)—Application of chattels on indebtedness to landlord left tenant nothing to assign.

Where a tenant's mortgage to his landlord covered beets grown under a shore lease and which were applied on his indebtedness to the landlord, as evidenced by a bill of sale describing the property as all goods and chattels covered by the mortgage, which in fact covered the beets, the whole became the property of landlord mortgagee, and tenant had nothing to assign to a third person, and not even right to receive from landlord amount which she had received from a sugar company as additional payment for beets sold by her to it.

Department 1.

Error to District Court, Adams County;  
Clarence J. Morley, Judge.

Action by Sam Smith and N. Lehrman against Ella Campbell. To review judgment for defendant, plaintiffs bring error and ask for a supersedeas. Affirmed.

Harry Behm, of Brighton, for plaintiffs in error.

J. Paul Hill, of Brighton, for defendant in error.

BURKE, J. To review a judgment for defendant in error, plaintiffs in error have sued out this writ. They also ask the issuance of a supersedeas. The case is fully briefed, and, both sides so requesting, we will determine it on this application.

The record consists only of complaint and answer, judgment and assignment of errors, and a stipulation of facts.

For convenience we will treat defendant in error, who as to a portion of the transaction comes here as the successor in interest of her deceased husband, as the principal throughout. For the same reason the fund in question, represented by a certain check deposited in the registry of the court, we will consider as cash.

Smith was indebted to Campbell. He leased ground from her for the season of 1919, and raised sugar beets thereon. The beets were contracted by Campbell to the Great Western Sugar Company at \$10 per ton. Smith's indebtedness to Campbell was secured by chattel mortgage which included his interest in the sugar beets. Under the terms of the lease the landlord took one-third of the crop, and the tenant two-thirds. During the farming season Campbell made additional advances to Smith, and after the crop was marketed they had a settlement in full, by the terms of which all the property covered by the mortgage was turned over to Campbell and credited on Smith's indebtedness. This transfer was evidenced by a bill of sale which described the property as "all the goods and chattels" covered by the mortgage. There still remained due to Campbell from Smith, \$2,100, for which amount he gave his note. Thereafter the Great Western Sugar Company paid an additional sum equal to \$1 per ton on the beets grown under the Campbell contract and covered by the chattel mortgage. It is this additional payment of \$602.09, now in the registry of the court, which is in dispute. Smith, having assigned his interest to Lehrman, now disclaims. Lehrman claims two-thirds of the fund under his assignment. Campbell claims one-third of the fund in her own right, and the other two-thirds to be credited on the \$2,100 note. The judgment below upheld Campbell's position.

Campbell says this money is part of the payment for beets. Lehrman says it is a gift from the sugar company. The stipulation before us settles the question:

"Thereafter \* \* \* the Great Western Sugar Company \* \* \* paid the additional sum of \$1 per ton for beets. \* \* \* The \* \* \* \$602.09 herein tendered into court is the additional payment for beets."

Smith's mortgage to Campbell covered these beets. They were applied on Smith's indebtedness, as evidenced by the bill of sale. The whole had become the property of Campbell prior to the pretended assignment to Lehman, and Smith had nothing to assign. The intention of the parties is beyond doubt. Not knowing that the full purchase price had not been paid by the sugar company, Smith failed to obtain, in his settlement with Campbell, the total credit to which he was entitled. Campbell takes the entire \$602.09, but must correct the error in settlement by crediting two-thirds of this amount on the Smith note.

The supersedeas is denied, and the judgment affirmed.

GARRIGUES, C. J., and TELLER, J., concur.

(68 Colo. 562)

**BAGOT v. BAGOT. (No. 9849.)**

(Supreme Court of Colorado. July 6, 1920.)

1. Appeal and error  $\Leftrightarrow$  70( $\frac{1}{2}$ )—Order awarding temporary alimony and suit money appealable.

An action for separate maintenance, temporary alimony, and suit money is an intermediary proceeding, and order awarding plaintiff relief therein is a final order, and is therefore appealable.

2. Husband and wife  $\Leftrightarrow$  295—Merits not considered on application for temporary alimony.

In separate maintenance action on wife's application for temporary alimony and suit money, court cannot consider the merits of the case.

3. Husband and wife  $\Leftrightarrow$  295—Nature of temporary alimony and suit money stated.

Temporary alimony and suit money are allowed wife suing husband for separate maintenance to put her on equality with him so that she may prosecute her action and have means of living while so doing.

4. Husband and wife  $\Leftrightarrow$  295—Record in prior action showing cruelty to husband does not preclude wife's recovery of temporary alimony and suit money.

Record in previous action, showing husband and wife to have been guilty of cruelty toward each other, does not preclude wife from recovering temporary alimony and suit money in subsequent action for separate maintenance, on theory that she does not come into court with clean hands, since on such application by the wife the court will not consider the merits of the case.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by Anna Kathleen Bagot against William Sidney Bagot. Judgment for plaintiff, awarding her temporary alimony and suit money, and defendant brings error. Affirmed.

Charles H. Pierce, of Denver, for plaintiff in error.

Henry H. May, of Denver, for defendant in error.

TELLER, J. This cause is before us on error to the district court to review a judgment awarding the defendant in error, plaintiff in an action for separate maintenance, temporary alimony and suit money pendente lite.

[1] To a petition for said allowance an answer was filed, setting up the record of a cause in the district court, between the same parties, in which each was adjudged guilty of cruelty toward the other. This record, it is contended, constitutes a bar to the allowing of suit money or temporary alimony, since it shows, as counsel says, that the plaintiff does not come into court with clean hands, a prerequisite to a standing in a court of equity. The brief of plaintiff in error contains numerous citations from opinions rendered in divorce actions, but fails to notice the difference between the right to alimony generally and the right to temporary alimony and suit money pending the trial of the cause. The distinction is fundamental. The order or judgment under review was in "an intermediary proceeding" in which the pleadings seek relief distinct from that for which the main suit was brought. It is for this reason held to be final, in such a sense as makes it an appealable order. *Daniels v. Daniels*, 9 Colo. 133, 10 Pac. 657.

[2, 3] Manifestly, then, in determining this question, the court cannot consider the merits of the case. Temporary alimony and suit money are allowed a wife, who is suing her husband, to put her on equality with him so that she may prosecute her action, and have means of living while so doing.

In *Daniels v. Daniels*, supra, this court, in discussing this proceeding said:

"The rule in all cases is based upon the existence of the marriage relation, the ability of the husband, and the destitute circumstances of the wife. If the wife presents such a case against her husband as prima facie entitles her to relief, the rule is that she should be supplied with the necessary means to prosecute her suit on an equal footing with her husband; also, if she be destitute of the means of subsistence, and the husband is possessed of means to relieve her necessities, it is the duty of the court, when called upon, to award a reasonable allowance for this purpose. A proper showing should be made by the wife to entitle her to

such an order. Her petition praying for such temporary alimony should be verified and supported by affidavits; but the merits of the original or main controversy cannot be inquired into. The essential facts to be established are, as before stated, the existing marriage relation of the parties, the present destitution of the wife, and the financial ability of the husband. If the wife is in fact destitute of the means of support, it is immaterial, so far as the application for temporary alimony is concerned, what brought about her destitute condition. The only question upon which the husband can be heard are his own means and the means of the wife."

[4] Were the theory of plaintiff in error correct, the wife would be called upon to litigate the case on its merits in a proceeding in which she sought to obtain from her husband the means to carry on such litigation, and without which, the hypothesis is, she cannot litigate at all. The record establishes the fact that the plaintiff in the action has no means, and that the amount allowed is not excessive in view of the admitted financial ability of the defendant. The judgment is accordingly affirmed.

GARRIGUES, C. J., and BURKE, J., concur.

(68 Colo. 407)

**BALCOM v. MICHAEL. (No. 9668.)**

(Supreme Court of Colorado. May 3, 1920.  
Rehearing Denied July 6, 1920.)

1. Appeal and error  $\Leftrightarrow$  831(3)—Supreme Court must presume finding in support of judgment.

The Supreme Court is bound by the trial court's finding on conflicting evidence, which it must presume, in support of judgment for plaintiff, was made in his favor.

2. Sales  $\Leftrightarrow$  75—Contract for sale of seed beans not effectual guaranty of higher price.

Where farmer contracted to raise beans for seedman at 8 cents per pound, he could not recover 2 cents per pound more, on showing another seedhouse paid 10 cents a pound, because the written proposition to contract, presented by the seedman's agent and stating there were no agreements other than stated "above," below stated that prices as much as any other house were guaranteed; such guaranty having been written by the agent.

Garrigues, C. J., dissenting.

En Banc.

Error to District Court, Weld County; George H. Bradfield, Judge.

Action by John M. Michael against W. D. Balcom, doing business as the Balcom Seed Company. To review judgment for plaintiff, defendant brings error. Reversed, with directions to modify.

William R. Kelly, of Greeley, and Worth Allen, of Chicago, Ill., for plaintiff in error.  
James W. Gault, of Greeley, for defendant in error.

TELLER, J. Defendant in error had judgment in an action against plaintiff in error, to recover an alleged balance for seed beans sold and delivered to the latter. That judgment is now before us on error. The parties will be designated as in the trial court. It appears that the defendant, a dealer in seeds, made a contract with the plaintiff, a farmer, to raise for and deliver to defendant a quantity of seed beans. The controversy turns upon the construction of that contract. One Williams, an agent of the defendant, called upon plaintiff, and presented to him a printed proposition, directed to defendant, specifying the manner in which the seeds were to be planted, cultivated, threshed, and cleaned, all in detail, but with blanks for the insertion of the acreage and price to be paid, on delivery of the seeds, at Greeley. The final paragraph of the proposition was as follows:

"There are no agreements or understandings regarding the subject-matter of this letter other than expressed above."

The letter was signed by plaintiff, and below his signature is the acceptance of the defendant, "By Collie Williams." Below that is the following: "Guarantee prices as much as any other house."

Plaintiff was paid at the rate stated in the proposition, and then sued for an additional two cents per pound.

On the trial to the court, it was shown that another seedhouse paid \$10 per hundred pounds for the same kind of beans, and the court gave judgment for the amount claimed, together with some small items not contested. No findings of fact or of law were made.

[1] It is clearly shown that the agent, Williams, was not authorized to contract for beans at a price greater than \$8 per hundred. Plaintiff's theory is that defendant ratified the act of his agent in writing the memorandum on the letter, by not repudiating it. Defendant introduced testimony showing repudiation; but, there being a conflict of evidence on that point, we are bound by the court's finding on it which, in support of the judgment, we must presume he made in favor of the plaintiff.

The case must therefore be determined on a consideration of other features of the case.

The presenting of the letter to plaintiff for signature constituted, in effect, an offer by defendant to contract for the raising of beans on the terms therein stated. When it was signed by plaintiff and delivered to defendant's agent, and accepted by him, it became a bilateral contract, made by parties having full authority to make it in that

form. The memorandum below the signatures was, by the final paragraph of the letter, expressly excluded from the contract. To treat it otherwise is to contradict plaintiff's written statement.

The memorandum amounts to an independent proposition by plaintiff to defendant to modify the contract into which the parties had entered. It was for the plaintiff to show that his proposition was accepted by defendant, as it is clear that the agent had no authority in the premises. Unless defendant consented to it either by word, or by some act which plaintiff was justified in considering an acceptance of his proposition, the original contract controls.

Counsel urges that the silence of defendant must be treated as a ratification of the act of his agent in writing the memorandum on the letter. If, however, the writing was a proposition from the plaintiff, silence on the part of defendant cannot be held to make the memorandum a part of the contract. A principal ratifies the unauthorized act of his agent; but the memorandum was an offer by the plaintiff, and the agent of defendant acted only as plaintiff's amanuensis in writing it on the document. The agent testified that he told plaintiff that defendant's acceptance of it was necessary if it was to have any force.

This is not denied, but is corroborated by one of plaintiff's witnesses, his son-in-law, who testified that Williams said he would make the memorandum, "so if Mr. Michael got it though he would get the benefit of it."

[2] On the evidence, as it appears in writing, and on testimony which is not disputed, we are of the opinion that there was nothing in defendant's action which amounts to an acceptance of the memorandum proposition by plaintiff. It must therefore be held that plaintiff had no right to recover for the two cents per pound claimed.

The judgment is accordingly reversed, with directions, to modify the judgment in accordance with the views herein expressed.

GARRIGUES, C. J., dissenting.

(68 Colo. 554)

KING COPPER CO. et al. v. DREHER.  
(No. 9842.)

(Supreme Court of Colorado. July 6, 1920.)

Corporations  $\S$  659—Officer sued by foreign corporation can invoke defense that corporation has not complied with statute.

Officer of foreign corporation, being sued by the corporation, is not estopped from invoking the defense that the corporation has not complied with Rev. St. 1908,  $\S$  904, requiring foreign corporations to pay certain fee to entitle

them to prosecute or defend in any suit in the state.

Department 3.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Suit by the King Copper Company and another against W. F. Dreher. Judgment of dismissal, and plaintiffs bring error and apply for a supersedeas. Application for supersedeas denied, and judgment affirmed.

Henry Howard, Jr., of Denver, for plaintiffs in error.

A. E. McGlashan, of Trinidad, for defendant in error.

ALLEN, J. This is a suit in mandamus brought by the King Copper Company, an Arizona corporation, and C. E. Welch, as its general manager, secretary and treasurer, against W. F. Dreher, who is alleged to have been such officer of the corporation, and a writ is sought to compel the respondent to deliver to the petitioners, or either of them, certain books and papers.

The court below sustained a motion of the respondent for judgment on the pleadings, and the cause was dismissed. The petitioners have sued out this writ of error, and have applied for a supersedeas.

The principal question presented by the record, and the only one necessary to be considered upon this review, relates to the right of the petitioners to maintain this suit. It is admitted in the pleadings that the King Copper Company is a foreign corporation, and has never complied with the laws of Colorado, entitling it to do business in this state, and that it has never paid the fees, charges, and taxes prescribed and provided by the law of the state of Colorado to be paid to the secretary of state. The respondent therefore contends that the petitioners are, by section 904, R. S. 1908, barred from prosecuting this action.

Section 904, R. S. 1908 (section 1044, M. A. S. 1912; S. L. 1911, p. 255) after prescribing what fee shall be paid "to the secretary of state, for the use of the state" by every foreign corporation, provides, among other things, that—

"No such corporation \* \* \* shall \* \* \* be permitted to \* \* \* prosecute or defend in any suit in this state until the said fee shall have been paid."

The petitioners contend that this statute cannot be invoked by the respondent for the reason that he is sued as an officer or agent of the corporation, and therefore estopped to plead the statute as a defense. We cannot sustain this contention, but must hold that the statute is applicable, and bars the petitioners from prosecuting this suit. In *Watson v. Empire Cream Separator Co.*, 180

Pac. 635, it was said that until a foreign corporation complies with the law "it has no capacity to sue." In *Western Electric Co. v. Pickett*, 51 Colo. 415, 422, 118 Pac. 988, 38 L. R. A. (N. S.) 702, Ann. Cas. 1913A, 132, this court said that—

"The most efficient way to compel obedience to this statute is to enforce it as it reads, and not amend it by judicial construction."

The defense of noncompliance with the statute is available to an officer or agent of a foreign corporation, or to a person standing in a relation of trust to such corporation. In other words, the defense may be raised by any defendant. In *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N. W. 989, the court, among other things, said:

"It is expressly provided that 'no corporation which shall fail to comply with the provisions of this act can maintain any suit or action, \* \* \* in any of the courts of this state.' \* \* \* No limitations are expressed, and no exceptions can be implied. The corporation must comply with the law, or the courts of the state are closed to it. The statute expresses a clearly defined public policy."

And in considering the right of an agent to rely upon the statute, the court says that his rights and obligations are matters of secondary importance in the face of the statute and that "the doctrine of estoppel cannot be applied to enable a person or corporation to do what is forbidden by law."

The rule laid down by the Minnesota case above cited was adopted by the Court of Civil Appeals in *Texas in Billingslea Grain Co. v. Howell*, 205 S. W. 671. To the same effect is *Boston Tow Boat Co. v. Seamon Co.*, 64 Wash. 375, 116 Pac. 1083.

Under the language of our statute, and the authorities hereinbefore mentioned, the trial court committed no error in dismissing the suit. The application for a supersedeas is denied, and the judgment is affirmed.

Affirmed.

GARRIGUES, C. J., and BAILEY, J., concur.

(68 Colo. 373)

EMERY v. WARD et al. (No. 9537.)

(Supreme Court of Colorado. May 3, 1920.  
Rehearing Denied July 6, 1920.)

1. Mortgages  $\Leftrightarrow$  158—Purchase-money mortgage takes precedence over judgment.

A purchase-money mortgage takes precedence over a judgment against the mortgagor.

2. Mortgages  $\Leftrightarrow$  158 — Purchase-money mortgage prior to judgment, though of different date than deed.

As far as priority between a purchase-money mortgage and a judgment are concerned,

it is immaterial that deed of conveyance and mortgage do not bear the same date, provided they are parts of one continuous transaction.

3. Mortgages  $\Leftrightarrow$  158—Purchase-money mortgage recorded before deed has priority over antecedent judgment.

A purchase-money mortgage dated and recorded several months before date and recording, respectively, of the deed of conveyance, has priority over an antecedent judgment against the mortgagor, public records, so far as notice is concerned, having no bearing upon rights of antecedent claimants.

Error to District Court, Moffat County; John T. Shumate, Judge.

Suit by Lucy Ward Emery against Thomas Ward and others. From a judgment for part of the relief prayed for, plaintiff brings error. Reversed and remanded, with directions.

A. M. Gooding, of Steamboat Springs, for plaintiff in error.

W. B. Wiley, of Craig, for defendants in error.

BAILEY, J. Plaintiff below, plaintiff in error here, brought suit against Thomas Ward on a note for \$250.00, and to foreclose a trust deed given to secure its payment, on certain land in Moffat County. The Public Trustee and the Citizens' Bank of Craig were joined as defendants. The bank claims an interest in the land based upon levy and execution sale thereof under a judgment against Ward. The deed of trust was foreclosed, but the right of plaintiff was made subject to that of the bank. That judgment is now here for review on error.

The essential facts are that in 1910 plaintiff, Lucy Ward Emery, sold the land in question to Ward. She was at that time a resident of Kansas, and the transaction was carried out through one Templeton. The purchase price was agreed upon at \$400.00, of which Ward paid \$150.00 in cash some time in December, 1910. The balance was to be evidenced by note, the payment thereof to be secured by a trust deed on the land, which is the basis of the foreclosure suit. On January 24, 1911, Templeton, as agent for Emery, prepared the note, the trust deed and the warranty deed. The warranty deed was sent for signature to Emery, but upon its return to Templeton he discovered an error in the description, drew another warranty deed, but bearing date of April 25, 1911, and forwarded it to his principal for execution. On June 15, 1911, the warranty deed was delivered to Ward, and the note and trust deed to Emery. The trust deed was recorded on the 17th of June, 1911, but the warranty deed was not put on record until August 1, 1911.

The judgment relied upon by the bank was secured against Ward in a justice court, and

on March 20, 1909, a transcript was filed with the Clerk of the District Court, and on the same day a certified copy thereof was duly lodged with the clerk and recorder of the proper county. On August 14, 1911, execution was levied upon the land in question, which was sold thereunder, and on July 19, 1912, a deed by the sheriff therefor was made to the bank.

On August 24, 1914, this action was brought to foreclose the deed of trust. A disclaimer was filed by the Public Trustee and the bank failed to answer. Judgment by default was entered against Ward on March 30, 1915. The default as to the bank was later set aside and it answered. At the trial the facts were found to be substantially as stated above.

The question then is whether the evidence shows that the trust deed was given as security for the balance of the purchase price. Upon the whole record, and particularly from the fact of the simultaneous delivery of the warranty and trust deeds, and from oral testimony introduced, it is plainly apparent that such indebtedness was for a balance of the purchase price of the land, and constituted a vendor's lien thereon. Indeed, that such is in fact the case is practically undisputed.

[1] It is well settled both on principle and authority that a purchase money mortgage takes precedence over a judgment against the mortgagor. The rule is stated in 27 Cyc. 1180, in the following terms:

"A mortgage given for the unpaid balance of purchase money on the sale of land simultaneously with the deed to the same, and as part of the same transaction, takes precedence of prior judgments and all other existing and subsequent claims and liens of every kind against the mortgagor to the extent of the land sold, thus outranking a mortgage previously given by the same mortgagor before he took title to the property but expressed to cover after-acquired property."

In discussing the question in *Curtis v. Root*, 20 Ill. 53, it was said:

"It is a principle of law too familiar to justify a reference to the authorities, that a mortgage given for the purchase money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during this instantaneous passage the judgment lien cannot attach to the title. This is

the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor might be supposed to have for the purchase money."

[2] It is argued, however, that the warranty deed and the trust deed bear different dates, that the trust deed was recorded first, and therefore there is nothing of record to put the bank upon notice that the two papers were parts of the same transaction. As to the first contention, that the deeds bear different dates, the general rule is as stated in 19 R. C. L. 416, as follows:

"It is a general rule, to which there is little dissent, that a mortgage on land executed by the purchaser of the land contemporaneously with the acquirement of the legal title thereto, or afterwards, but as a part of the same transaction, is a purchase money mortgage, and entitled to preference as such over all other claims or liens arising through the mortgagor though they are prior in point of time; and this is true without reference to whether the mortgage was executed to the vendor or to a third person. The reason for the rule most frequently given is that the execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands, and without stopping, vests in the mortgagee, and during such instantaneous passage no lien of any character can attach to the title. The deed and mortgage need not be executed at the same time, nor even on the same day, to make them contemporaneous, provided they are parts of one continuous transaction, and so intended to be, so that the two instruments should be given contemporaneous operation in order to promote the intent of the parties."

[3] The argument that the bank is entitled to rely upon the record as to title, and the incumbrances on the land, has no force because its judgment against Ward was secured long prior to the time when the latter took title. The bank parted with nothing upon the strength of what was upon the record as to the title. What rights it had it still has. It is firmly established that public records so far as notice be concerned have no bearing upon rights of antecedent claimants.

The judgment of the trial court is reversed and the cause remanded with directions to enter judgment for the plaintiff making her lien upon the land paramount to any right of the bank therein.

Judgment reversed and cause remanded with directions.

GARRIGUES, C. J., and ALLEN, J., concur.



(68 Colo. 337)

**MACK v. TOWN OF CRAIG. (No. 9491.)**

(Supreme Court of Colorado. May 3, 1920.  
Rehearing Denied July 6, 1920.)

**1. Eminent domain §9—Power to construct does not give power to condemn.**

The power given a municipality to construct an improvement does not carry with it the power to condemn private property to that end.

**2. Eminent domain §7—No power to condemn property outside limits.**

A municipality has no power to condemn property outside city limits, unless the power has been specifically given.

**3. Eminent domain §9—No implied power to condemn property outside city limits for outlet to sewer.**

Rev. St. 1908, §§ 5359, 5361, 6525, relative to public improvements does not impliedly give the power to condemn land outside city limits for outlet for sewage, in view of express provisions of acts giving that power in specified cases, as Legislature in such case is presumed to have withheld the power.

**4. Municipal corporations §838—No inherent power to pollute stream by discharge of sewage.**

In view of Rev. St. 1908, § 1817, making it an offense for an individual to pollute a stream, a municipality has no inherent power to discharge its sewage into public waters of the state, and the power given it to construct a sewer would not give it that right.

**5. Eminent domain §2(10), 46—Pollution of stream taking of waters.**

Neither the public waters nor the beds or channels of public streams can be taken under eminent domain, and pollution of a stream is in effect such taking.

Garrigues, O. J., dissenting.

En Banc.

Error to District Court, Moffat County;  
John T. Shumate, Judge.

Condemnation proceeding by The Town of Craig against John Mack. From a judgment of condemnation, defendant brings error. Reversed and remanded, with directions to dismiss.

A. M. Gooding, of Steamboat Springs, and George A. Pughe, of Craig, for plaintiff in error.

W. B. Wiley, of Craig, for defendant in error.

BAILEY, J. Plaintiff in error brings the cause here to review a judgment of the District Court of Moffat County whereby certain of his land was awarded the town of Craig in condemnation proceedings, as an outlet for its sewage into the Yampa or Bear river. It was and is the purpose of the town to empty its raw and unpurified sewage into

that stream, at a point bounded on both sides by lands of the plaintiff, and to carry it for a distance of about a mile through his property, which he uses mainly for dairy business. Numerous errors have been assigned, but for the purposes of this decision it will be necessary to consider only such as go, first, to the question of the authority of the town to condemn and take land beyond its corporate limits, and, second, as to its right to pollute a public stream by emptying raw sewage therein.

[1-3] The town relies upon section 6525, R. S. 1908, in which the right is given to towns and incorporated cities to keep in repair sewers, culverts, drains and the like, and also power of eminent domain. There appears to be nothing, however, either in that section or in section 5359, R. S. 1908, which empowers cities and towns to assess the costs of such improvements to its inhabitants, or in section 5361, which specifies what class of improvements can be made, that either directly or by fair intendment authorizes such municipalities to exercise the power of eminent domain beyond their corporate limits. It is well settled that the power to construct such improvements does not carry with it the right to condemn private property to that end.

In Lewis on Eminent Domain, section 371 (3d Ed.), it is said:

"The authority to condemn must be expressly given or necessarily implied. The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist. There must be no effort to prove the existence of such high corporate right, else it is in doubt; and if so, the State has not granted it." If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property should be acquired by contract. \* \* \* As a rule, a municipal corporation cannot condemn property beyond its limits, unless authority to do so is expressly given."

Upon the proposition that a municipality has no power to condemn property outside its corporate limits, unless authority so to do is specifically given, as stated above, 28 Cyc. at page 605, has this to say:

"As a rule a municipal corporation has no power to purchase and hold land for a park, highway, or other municipal purpose beyond its territorial limits, unless the power has been specifically conferred upon it by the legislature; and such power is not conferred by a general grant of power to purchase, hold and convey such property, real or personal, as may be necessary for its public uses and purposes. The legislature, however, may confer such

power, either in express terms or by necessary implication, and there are cases in which, without any special grant of such power, it has been implied as necessary in order to carry out powers granted."

So far as we are able to ascertain this general rule has been followed and approved with practical unanimity. In *Warner v. Gunnison*, 2 Colo. App. that court expressed its view of the rule at page 432, 31 Pac. 238, in the following language:

"The jurisdiction of municipal authorities is usually limited to the territory occupied by the corporation. For this reason proceedings in condemnation cannot ordinarily be instituted as to property outside the corporate limits."

Also in *Healy v. City of Delta*, 59 Colo. 124, at page 125, 147 Pac. at page 662, in discussing the right of a municipality to condemn the bed of a public stream for sewer purposes, it is said:

"It is assigned as error that the court was without jurisdiction to enter the judgment which in effect condemns the waters of the river, and makes it a part of the sewer system. This is the only question necessary to be considered. Municipal corporations can exercise the right of eminent domain only to the extent to which power has been conferred upon them by statute.

"Not only must the authority to municipal corporations, or other legislative agents, to take private property, be expressly conferred, and the use for which it is to be taken specified, but the power, with all its constitutional limitations and directions for its exercise, must be strictly pursued." *Dillon, Mun. Corps.* (5th Ed. § 1040. See, also, *Lewis on Eminent Domain*, § 240; *Allen v. Jones*, 47 Ind. 438."

Thus from our own decisions it appears clear that, unless expressly empowered by statute, the town of Craig has no authority to condemn land outside its corporate limits for sewer purposes. The bare right of the town to construct and maintain sewers can not be held to include the right to condemn property beyond its corporate limits in connection therewith. 15 Cyc. 569; *Riley v. Rochester*, 9 N. Y. 64; *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130; *Wise v. Yazoo City*, 96 Miss. 507, 51 South. 453, 26 L. R. A. (N. S.) 1130, Ann. Cas. 1912B, 377; *Currier v. Railroad Co.*, 11 Ohio St. 228; *Lewis on Eminent Domain*, § 240; *Minnesota C. & P. Co. v. Koochiching Co.*, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182.

It is not disputed that the statute confers no direct or specific power upon municipalities to go beyond their corporate limits to condemn property for sewer purposes, but it is earnestly contended, however, that such power is given by necessary implication. A careful reading of the sections relied upon

discloses no evidence of any such legislative intent. Since, under the authorities it is evident that the giving of the right to construct sewers does not also grant authority to subject outside lands to the operation of eminent domain, such power is not implied because there is nothing in our statutes to even indicate, much less imply, such purpose. In reaching the conclusion that authority to condemn outside lands for sewer purposes does not exist in towns and incorporated cities, and that it was not the legislative intent to confer such power, we find strong support in the fact that the statutes do expressly confer power upon such entities to condemn land outside their corporate limits for the purpose of securing a water supply. Section 6815, R. S. 1908. And also from the fact that by the provisions of the Charter of the City and County of Denver the legislature has expressly conferred power upon that particular municipality to condemn lands outside its limits in connection with the construction of sewers. By specifically thus granting extra-territorial powers of condemnation the legislature must be conclusively presumed to have elsewhere intentionally withheld such power, and the argument that it exists by implication is, under such circumstances, not tenable, as there is no warrant of law for such conclusion.

[4] In consideration of the question as to whether municipalities have a right to pollute state public streams it is to be noted that section 1817, R. S. 1908, expressly makes the pollution of such public waters by discharging sewage or any other obnoxious substance therein a criminal offense. There is nothing inherent in a municipality which gives it any greater right so to do than that which a natural person has.

Section 65 of *Lewis on Eminent Domain* declares that:

"No case appears to have arisen in which the pollution of a stream has been accomplished for a public purpose in the exercise of the eminent domain power."

In *Mining Co. v. Mining Co.*, 9 Colo. App. 407, at page 418, 48 Pac. 828, at page 832, it was said:

"We live in a region not blessed with rains, and where all our industries, whether agricultural, manufacturing, or mining, are dependent absolutely on the waters of our streams, as to those purposes for which water is a necessity. It is therefore quite consonant with the apparent purposes, and declared will of the people, to subject the rights of the appropriators of the public waters of the state to such limitations as shall tend not only to conserve the property interests which the appropriators may acquire, but to preserve the remaining unappropriated waters in their original condition for the use and benefit of late comers, who by their labors and industry may further develop our interests and resources."

And in *Humphreys Co. v. Frank*, 46 Colo. 524, at page 531, 105 Pac. 1093, at page 1096, this court said:

"The fact that defendant in operating the mill uses waters which are not a part of the natural flow of a stream does not give it the absolute right to discharge into that stream the waste water mixed with hurtful slimes, or absolve it from liability for resulting injuries to third persons who have lawfully acquired prior rights to use the waters thereof, for any beneficial purpose."

In *Winchell v. City of Waukesha*, 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902, which was an injunction suit to restrain the City of Waukesha from emptying its sewage into the Fox river, the court says:

"The right of the riparian owner to the natural flow of water substantially unimpaired in volume and purity is one of great value, and which the law nowhere has more persistently recognized and jealously protected than in Wisconsin. Not alone the strictly private right, but important public interests, would be seriously jeopardized by permissious pollution of our streams and lakes. Considerations of aesthetic attractiveness \* \* \* are involved. Amid this conflict of important rights, we cannot believe that the legislature concealed, in words merely authorizing municipalities to raise and expend money for the construction of sewers, a declaration of policy that each municipality might, in its discretion, without liability to individuals, take practical possession of the nearest stream \* \* \* for the transportation of its sewage in crude and deleterious condition."

That court in the above case also announced the rule that legislative authority to merely construct a sewer carried with it no implication of a right to create a nuisance by the discharge of raw sewage into a stream, and that a city had no greater right in this respect than the individual.

Plainly the town of Craig by its acts is not only injuring a valuable property right of defendant, but is guilty of an invasion of the sovereign rights of the state, and is, under pretense of necessity, doing that which, if done by an individual, he would be punished criminally. Cities and towns, in the absence of direct legislative permission to that end, have no right to befoul and contaminate our public streams by discharging raw and unpurified sewage therein. Indeed, it is highly questionable, whether, in view of Article XVI of section 5 of our Constitution, any such legislative permission could be lawfully given.

[5] It is the law of this jurisdiction that neither the public waters, nor the beds or channels of public streams, can be condemned and taken under eminent domain. *Healy v. Delta*, supra. It is contended that no such attempt is here being made. However, it is to be noted that the authorities hold that a

pollution of a public stream is in effect such taking. 15 Cyc. 660, and *Lewis on Eminent Domain*, § 84. It is manifest that no one should be permitted thus to indirectly accomplish that which can not be legally done by virtue of eminent domain proceedings. The situation is one preeminently for legislative consideration.

The judgment of the trial court is reversed, and the cause remanded, with directions to dismiss it.

GARRIGUES, C. J., dissents.

(68 Colo. 400)

McPHAIL v. SEERIE BROS. CONST. CO.  
et al. (No. 9620.)

(Supreme Court of Colorado. May 3, 1920.  
Rehearing Denied July 6, 1920.)

Municipal corporations — 808(2) — Building contractor fencing as required not liable for injuries to bicycle rider in excavation opened by another.

Contractor to erect a building, who, in compliance with ordinance, erected a tight-board fence on the streets where the building was under construction, was not liable for injuries to a bicycle rider who fell into an excavation made by a telegraph company located near where the street was partially obstructed by the fence.

Department 3.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by Duncan McPhail against the Seerie Brothers Construction Company and others. To review judgment for the named defendant, plaintiff brings error. Affirmed.

Duncan McPhail, of Denver, in pro. per.

Bartels & Blood, of Denver, for defendant in error, Seerie Bros. Const. Co.

ALLEN, J. This is an action for damages for personal injuries. A judgment on the pleadings was rendered in favor of the Seerie Brothers Construction Company, one of the defendants. To review such judgment, plaintiff brings error.

In our opinion the facts admitted in the pleadings are sufficient to warrant the judgment of the trial court. The above-named defendant, at the time of the injuries complained of, was engaged in the construction of a building on Seventeenth and Champa streets, in the city of Denver, and, in compliance with an ordinance, erected and maintained a tight-board fence upon such streets, along the building under construction. No facts are alleged in the complaint showing that the fence was maintained for an unreasonable length of time, or that it was not properly situated; but the contrary appears

from the admitted facts. It appears to be conceded that the defendant, under the circumstances, had the right to construct and maintain the fence. The plaintiff was injured while riding a bicycle on Seventeenth street and falling into an excavation located near the place where the street was partially obstructed by the fence. The excavation had been made by the Western Union Telegraph Company. We fail to find any material issues framed by the pleadings which, if found for the plaintiff, would render the construction company liable.

The judgment is affirmed.

Affirmed.

GARRIGUES, C. J., and BAILEY, J.,  
concur.

(88 Colo. 547)

JOHNSON v. RYCRAFT. (No. 9729.)

(Supreme Court of Colorado. July 6, 1920.)

1. Judgment  $\Leftrightarrow$  335(1)—Leave of court when necessary to file bill of review.

It is not necessary to obtain leave of court to file a bill of review to correct an error of law apparent on the face of the record; but such leave is necessary when the bill is founded on new matter, or newly discovered evidence, or where brought for error of law, and is also based on newly discovered matter.

2. Judgment  $\Leftrightarrow$  335(2)—Error shown by records in office of county treasurer not error apparent of record.

Error, alleged in bill of review to be shown by "the records in the office of the treasurer," or, in other words, by evidence, was not error apparent of record, so that the bill could be filed without leave of court; evidence being no part of the record.

3. Judgment  $\Leftrightarrow$  335(2)—Bill of review cannot be based on errors of fact.

A bill of review cannot be based on errors of fact, nor for errors resulting from a wrong conclusion from the evidence.

4. Judgment  $\Leftrightarrow$  335(1)—Bill of review based partly on newly discovered evidence requiring leave of court.

A bill of review, containing an allegation, in effect, that by search and inquiry of the records in the office of the said county treasurer the evidence, showing that the decree was erroneous, was discovered and that it was discovered after the rendition of the decree, was based, in part at least, on newly discovered evidence, and could not be filed without leave of court.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by Mary Johnson against Joseph B. Rycraft. Judgment for defendant, and plaintiff brings error. Affirmed.

J. C. Murray, C. A. Roberts, and Leslie M. Roberts, all of Denver, for plaintiff in error.  
H. L. Shattuck, of Denver, for defendant in error.

ALLEN, J. This is a suit wherein relief is prayed for by a bill of review. It was sought, in the court below, by this action, to reverse the decree in each of two certain cases in which the plaintiff in the instant case was the defendant and the defendant here was the plaintiff. The bill, as first filed, appeared to be based, at least in part, on newly discovered evidence, and on motion of the defendant was stricken from the files upon the ground that it was filed without leave of court. Thereafter the plaintiff moved to amend and to reinstate the bill, as amended. This motion was denied by the court. The plaintiff complains of this ruling, and to have the same reviewed has sued out this writ of error.

[1] The record does not show that leave of court for filing the bill had either been requested or obtained. It is not necessary to obtain leave of the court to file a bill of review to correct an error of law apparent on the face of the record; but such leave is necessary when the bill is founded on new matter, or newly discovered evidence. 16 Cyc. 523. Though a bill is brought for error of law it cannot be filed without leave if the application is also based on newly discovered matter. 4 Standard Enc. of Proc. 420; Ricker v. Powell, 100 U. S. 104, 25 L. Ed. 527.

It is not disputed that if the bill is other than one based solely on errors apparent, leave of court should have been first obtained, and that the striking of the bill, or the refusal to reinstate same after amendment, was not error. The plaintiff contends, however, that the bill as amended, or if amended as proposed, is one "based entirely upon error apparent upon the face of such judgments and decrees," which are sought to be reversed in this suit. The validity of this contention is the only matter necessary to be now considered.

The plaintiff's bill of review, considered with or without the proposed amendment, shows that in the former trials or proceedings, and in the decrees in question, the court adjudged a certain tax deed to be void, and that the decrees in this respect were based on the finding that:

"The publisher of the newspaper in which the list of property and notice of sale for delinquent taxes for the year 1908 was published failed to transmit to the county treasurer within 14 days after the said notice was published a sufficient affidavit of said publication and because the amount for which the premises were sold, at the sale of November of the year A. D. 1908 included the amount of the publisher's fee for said publication."

It is alleged in the bill that the publisher did in fact transmit a proper affidavit to the county treasurer within 14 days after the last publication, as required by section 5709, R. S. 1908 (section 6422, M. A. S. 1912). In other words, it is claimed in the bill that the court committed an error in its finding, above mentioned, and that had it not been for such finding the tax deed would not have been held void.

Other allegations of the bill are to the effect that the error complained of may be shown "by the records in the office of the treasurer," which would prove, it is claimed, that the court was mistaken in its finding of fact concerning the transmission to the county treasurer of the publisher's affidavit.

[2] It appears from the allegations of the bill, above referred to, that the alleged error complained of, assuming that it is an error of law, would be shown and made to appear, not by the pleadings and the decree, but by "the records in the office of the treasurer," or, in other words, by evidence. It is therefore not an error apparent on the face of the record. In 4 Standard Enc. Proc. 436, 439, it is said:

"The error of law must appear upon the record itself, which consists, for this purpose, only of the pleadings and the decree passed in the cause. \* \* \* The evidence is no part of the record."

[3] The error complained of is really an error of fact. A bill cannot be based on errors of fact, nor for errors resulting from a wrong conclusion from the evidence. 16 Cyc. 527, 528. In 10 R. C. L. 571, § 380, it is stated in the text:

"On a bill of review for error apparent, the court will not consider any error resulting from an erroneous inference of fact or conclusion from the evidence. The only questions open for examination in such a case are such questions of law as arise on the pleadings, proceedings, and decree exclusive of the evidence."

See, also, 16 Cyc. 528, 529.

Under the authorities above cited, the error complained of in the bill is not such an error as is reviewable as an error apparent of record. The plaintiff was not therefore prejudiced by the court's sustaining the motion to strike.

[4] Furthermore, the bill contains matter which makes it one based, in part at least, on newly discovered evidence, since it is alleged, in effect, that by "search and inquiry of the records in the office of the said county treasurer" the evidence, showing that the decrees were erroneous, was discovered, and that it was discovered after the rendition of the decrees. The plaintiff's contention that it is a bill based solely on error apparent cannot therefore be sustained.

In Ricker v. Powell, supra, it was stated

"that the right to file a bill of review without leave exists only when the bill is brought for error of law alone." Under this rule, there was no error in striking the bill from the files, or in refusing to reinstate it with the proposed amendment.

The judgment is affirmed.  
Affirmed.

GARRIGUES, C. J., and BAILEY, J., concur.

(68 Colo. 411)  
RICHARDSON v. CORNELL. (No. 9793.)

(Supreme Court of Colorado. May 8, 1920.  
Rehearing Denied July 8, 1920.)

Joint adventures ⇨5(2)—Complaint in action between adventurers held not to state cause of action.

In action between parties to a joint speculation, in which speculation plaintiff made no investment except the deposit of his bonds as collateral for defendant's note, the note having been paid and the bonds returned to plaintiff, the complaint held to state no cause of action.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by John E. Richardson against H. W. Cornell. Judgment for defendant, and plaintiff brings error and applies for supersedeas. Application for supersedeas denied, and judgment affirmed.

Perry D. Rose, of Denver, for plaintiff in error.

James C. Starkweather, of Denver, for defendant in error.

SCOTT, J. The complaint in this case alleged the following contract between the plaintiff, defendant, and one William J. Candlish:

"January 7, 1918.

"In consideration of J. E. Richardson lending certain bonds of the English government to be used as collateral security in securing the money necessary to take up the option held by H. W. Cornell on 35,000 shares of the Shiloh Oil & Refining Company at \$.12 per share, the undersigned have agreed as follows:

"(1) Said Shiloh stock, together with 10,000 shares of the Red Bank Oil Company and 100,000 shares of the Colorado Oil & Development Company shall stand as collateral security in said transaction, and for the protection of J. E. Richardson against any loss whatever.

"(2) It is contemplated that this transaction shall be consummated by the resale of all or part of said Shiloh stock within ten days from this date; that in any event sufficient of such stock shall be sold to repay such loan and restore said bonds and collateral stock to the parties depositing them; that the concurring judgment of two of the undersigned, shall determine the time and price at which said Shiloh

stock shall be sold to repay such loan, all the proceeds of such sales to be applied to such loan until the same is fully paid.

"(3) All the profits of said transaction, including stock remaining after repayment of said loan, are to be divided by the undersigned, share and share alike, that is to say, one-third to each.

"In witness whereof the undersigned have affixed their signatures this 7th day of January, 1918.

William J. Candlish.

"J. M. Richardson.

"H. W. Cornell."

It is then alleged that the defendant purchased the Shiloh shares at the price agreed and deposited the same with the plaintiff, together with the 10,000 shares of the Red Bank stock and 90,000 shares of the Colorado Oil & Development Company in the manner agreed, and that the plaintiff delivered certain English bonds to defendant which were deposited with the Colorado National Bank by defendant and Candlish to secure the payment of their joint promissory note, the proceeds of which was applied to the payment of the purchase of the 35,000 shares of Shiloh stock as agreed.

It is further alleged that this note was afterward paid and the English bonds released from their use as collateral and returned to the plaintiff as agreed. In other words, the contract was fully performed by the defendant, except it was not performed within the time agreed. The charge in this particular is that the stocks were sold by defendant with permission of plaintiff as agreed in the contract, but that the proceeds of such sale were not promptly applied to the payment of the note to the bank, thereby causing delay in a return to plaintiff of his securities.

The prayer of the complaint is not for damages for loss, or division of profits in the transaction. It is, however, alleged that the defendant failed to pay all of the sums received from the sales of stocks from time to time as such sales were made, but that a part of these sums were reinvested by the defendant in other oil stocks and oil leases of uncertain and indefinite description in the complaint, either as to the number of shares of such stocks or of the leases, or value as to either.

The sole relief prayed for is that the defendant be enjoined from the sale of any such stocks or interests in leases, and that plaintiff be subrogated to the rights and interests of defendant therein.

A demurrer was sustained to the complaint as being insufficient to state a cause of action. An amended complaint was ordered to be stricken from the files as being in substance but a repetition of the original complaint.

The plaintiff brings error and presents his application for a supersedeas.

It seems to be clear from the pleading that, if plaintiff has a cause of action against the defendant, it must be for damages for delay in returning his securities, which were agreed to be and were deposited as security for defendant's note to the bank. But this is not sufficiently pleaded, nor is any such damage demanded. The contract discloses a joint speculation by the parties in which the plaintiff made no investment and took no chances, except the deposit of his bonds as collateral to secure payment of the defendant's note, and which have been returned to him.

A mere statement of the facts discloses the correct conclusion of the court in the premises.

The application for a supersedeas is denied, and the judgment is affirmed.

GARRIGUES, C. J., and DENISON, J., concur.

(68 Colo. 556)

# IN RE MACKY'S ESTATE.

REGENTS OF STATE UNIVERSITY OF COLORADO v. ANDREW.

(No. 9473.)

(Supreme Court of Colorado. April 5, 1920.  
Rehearing Denied July 6, 1920.)

## 1. Executors and administrators $\S$ 97—Employment of attorney authorized.

Executor's employment of attorney for assistance in obtaining possession of a fund, suspected to belong to the estate, before the will was probated, *held* authorized by Rev. St. 1906,  $\S$  7138, despite section 7103.

## 2. Executors and administrators $\S$ 97—Employment of attorney to conserve interest in company authorized.

Executor *held* justified in employing attorney for assistance in conserving estate's interest in gas company, step not involving carrying on of a business by executor.

## 3. Executors and administrators $\S$ 256(6)—Presumption court allowed attorney's fees directly, not to executor.

All fees for legal services being chargeable as expense of administration, where matter of attorney's fees was determined by county court before determining allowance to executor for services, it is to be presumed that the court, knowing the facts, allowed the attorney compensation directly, instead of adding it to allowance of executor.

En Banc.

Error to District Court, Boulder County;  
J. C. Wiley, Judge.

In the matter of the Estate of Andrew J. Macky, deceased, wherein Henry O. Andrew demanded compensation for services as an

attorney, being opposed by the Regents of the State University of Colorado. To review an allowance to the attorney, the Regents bring error. Reversed and remanded, with directions.

Victor E. Keyes, Atty. Gen., and Edwin H. Park, of Denver, for plaintiffs in error.

T. J. O'Donnell and J. W. Graham, both of Denver (G. W. Musser, of Denver, of counsel), for defendant in error.

**TELLER, J.** This case involves the compensation of the defendant in error for legal services rendered to the executor of the above-mentioned estate during its administration.

From the statement of facts by the plaintiffs in error, it appears that:

"Before the filing of the executor's final report, it was the desire of the county judge at Boulder to have the question of the executor's fees and the executor's attorney's fees settled as independent questions. Complying therewith, the executor and the attorney therefore each filed a statement of their claims, the attorney demanding the sum of \$20,000 in payment of services rendered. Instead of the executor making his final report, including therein the payment of attorney's fees and then having it allowed by the court, the above method was followed, which on the face of the record would appear to be a direct claim of the attorney against the estate rather than the allowance of the claim in favor of the executor, which in effect it is."

Upon the hearing in the county court an allowance of \$11,000 was made to the attorney. An appeal was taken to the district court, where there was a trial to a jury, and verdict and judgment for \$17,000. It is this judgment which we are to review. It is stated that the value of the estate was about \$400,000.

It appears that defendant in error did not present an itemized claim, but upon his cross-examination he stated the various services for which he claimed compensation. Several prominent lawyers testified as to the value of the services to which defendant in error testified, their estimates ranging from \$15,000 to \$30,000. Plaintiffs in error offered defendant in error \$7,500 in full settlement of his claim, which offer was rejected. They now object that many of the services for which compensation is claimed were not chargeable to the estate. Since the verdict is general, we are unable to determine what the jury included in their verdict as matters for which compensation should be allowed. Inasmuch, however, as both sides have submitted the case to this court with a request that we fix the amount, we do not deem it necessary to examine all the items of service in detail.

It is sufficient to say that at least two of the charges, each of considerable amount, are not subject to the objections made. One of

these charges was for assisting Wilson, who was named in the will as executor, in obtaining possession of a fund of \$116,420.03, before the will was probated. This sum was on deposit to the credit of "Snow & Macky" in a bank of which Macky had been president. It appears that no one knew of a firm of Snow & Macky, and Wilson had good reason to believe that the fund in fact belonged to the Macky estate. Acting upon this belief, under the advice and with the assistance of defendant in error, he procured from Mrs. Snow, a sister of decedent, a check in the name of Snow & Macky for said fund, and a disclaimer by her of any interest therein.

[1] It is contended that Wilson had no right to take control of the fund pending the probate of the will, and that, in any event, he had no authority to employ an attorney in the matter. In support of these positions, counsel cite sections 7103 and 7138, Revised Statutes 1908. The first of these sections authorizes the employment of counsel in case of a contest over a will offered for probate. This counsel assume excludes employment of counsel in any other case. We see no reason for so construing it. Such construction is not required to protect the estate, since the matter of fees to an executor, including his charges for legal assistance, is under the control of the county court. If an executor has a duty to perform, in behalf of the estate, which requires legal advice, it would be unreasonable to deny it to him. The second named section provides that pending the probate of a will the power of the executor "shall extend to the burial of the deceased, the payment of necessary funeral charges, and the taking care of the estate." This is followed by a provision that, if the will be rejected, and the executor never qualify, he shall not "be liable as an executor of his own wrong, unless upon refusal to deliver up the estate," etc. We are of the opinion that the action of Wilson under the facts in this case was authorized by the statute. He was taking care of the estate in a very important matter.

[2] Objection is made also to the attorney's charge for assistance to the executor in conserving the estate's interest in a gas company at Boulder. It appears that the estate held something like two-thirds of the capital stock of the company, and some of its bonds. Counsel for plaintiffs in error urge that these services in relation to the gas company are not to be considered, because, they say, an executor has no right to carry on a business. But in this case the executor did not carry on a business. The gas company carried it on, and all that the executor appears to have done was to exert himself in behalf of the estate, under circumstances of considerable difficulty, to preserve the gas company, and so conserve the interests of the estate. If legal advice was necessary to

that end, the executor was justified in securing it.

[3] Inasmuch as all fees for necessary legal services are chargeable as an expense of administration, and as the matter of these fees was determined by the county court, before determining the allowance to the executor for his personal services, it must be presumed that the court, which has a large discretion in these matters, knowing all the facts as to the attorney's services, allowed him compensation directly, instead of adding it to the allowance to the executor. In other words, the executor's allowance was cut down by the amount to which the court found the defendant in error was entitled.

Acting upon the request of both parties that we fix the amount for which judgment should be entered, we reverse the judgment of the district court, and remand the cause, with directions to enter a judgment for \$10,000 in favor of defendant in error.

Reversed and remanded, with directions.

(68 Colo. 531)

**HOEHNE DITCH CO. v. JOHN FLOOD DITCH CO. (No. 9508.)**

(Supreme Court of Colorado. March 1, 1920.  
Rehearing Denied July 6, 1920.)

**1. Specific performance §121(4) — Verbal contract to carry water of ditch company established by evidence.**

In suit for specific performance, evidence held sufficient to establish a verbal contract between ditch companies whereby defendant company agreed to carry the waters of plaintiff through its ditch.

**2. Specific performance §41—Verbal contract to carry water through ditch for 99 years taken out of statute of frauds by performance for one year.**

A verbal contract to carry waters of plaintiff ditch company through defendant ditch for 99 years, fully performed for one irrigation year, was taken out of statute of frauds relative to contracts for more than a year, so as to authorize specific performance thereof in view of Mills' Ann. St. 1912, § 3063, giving equity power to grant specific performance in case of part performance and in view of general irrigation act 1887, embodying principle that others than owner have right to use ditch where one ditch can answer the purpose.

**3. Waters and water courses §157—Verbal contract to carry waters in ditch held to constitute irrevocable license.**

A verbal contract to carry waters of plaintiff ditch company through defendant's ditch for 99 years, fully performed for one irrigation year, held to constitute irrevocable license in view of conduct of parties in reference thereto.

**4. Specific performance §12 — That ditch might have to be enlarged held no defense to performance of verbal contract to carry waters of plaintiff.**

Where verbal contract to carry waters of plaintiff through defendant's ditch for 99 years was fully executed by performance for one year, that ditch might have to be enlarged held no defense to suit for specific performance.

Error to District Court, Las Animas County; Harry S. Class, Judge.

Action by the Hoehne Ditch Company against the John Flood Ditch Company. Judgment for defendant dismissing complaint without prejudice after sustaining demurrer to plaintiff's evidence, and plaintiff brings error. Reversed, and cause remanded.

Forrest C. Northcutt, and Jesse G. Northcutt, both of Denver, for plaintiff in error.

Henry Hunter, of Trinidad, and Fred A. Sabin, of La Junta, for defendant in error.

SCOTT, J. The plaintiff in error, plaintiff below, for many years prior to the institution of this suit, owned and operated the Hoehne ditch, irrigating lands thereunder, and diverting water from the Purgatoire, or Las Animas river, in Las Animas county, having its headgate a few miles below the town of El Moro.

In the year 1909, the headgate of plaintiff's ditch was destroyed by flood, whereupon the plaintiff entered into a contract with the Model Land & Irrigation Company, which owned and operated a ditch diverting water from the same stream at a point above plaintiff's headgate, wherein the Model Company, for a consideration, agreed to carry the waters to which the plaintiff was entitled to a point designated, for a period of 99 years.

This contract was in operation and the water to which plaintiff was entitled was carried through the Model ditch until June 4, 1918.

The defendant ditch company, before and during the period above stated, had a ditch through which it diverted water from the same stream at a point between the point of diversion of the Model ditch and the old point of diversion by plaintiff. Controversy arose between the Model Company and the plaintiff, and the plaintiff sought to make a contract with the defendant ditch company whereby its waters might be carried through defendant's ditch.

The complaint alleges the consummation of such a contract between the plaintiff and the defendant, the John Flood Ditch Company, whereby the latter agreed to carry the waters of plaintiff through defendant's ditch at the agreed price of \$1,000 per year for a period of 99 years.

It is alleged that this contract was verbal,



but intended by the parties to be reduced to writing and executed; that after the said agreement was made, and with the knowledge and encouragement of defendant, the plaintiff instituted suit in the district court of Las Animas county to cancel its contract with the Model Company, in which action the Model Company filed its written consent to such cancellation, and a decree was entered cancelling such contract.

It is further alleged that thereafter and with the consent, advice, and encouragement of the defendant company, and in pursuance of their said agreement, a division box was placed by the plaintiff in the defendant's ditch, and on about June 9, 1918, the water to which plaintiff was entitled under its decrees was thereafter turned in by plaintiff and carried by defendant according to the terms of the agreement until September 26, 1918.

It is further alleged that with the mutual understanding of the requirements of law, and in accordance with the desire of both parties, after a discussion of the matter between them, and for the purpose of making effective the terms of the contract and in compliance with law, the plaintiff, on the 18th day of June, 1918, filed its petition in the district court of Las Animas county for a decree changing the point of diversion of its waters from the headgate of the Model Company to the headgate of the ditch of the defendant, which decree was entered on the 31st day of August, 1918, granting the change. Also, that prior to obtaining this decree, so changing the point of diversion, and prior to the institution of such suit and in accordance with the consent and agreement of the parties, the plaintiff sought and obtained from the division superintendent leave to change the point of diversion under a joint arrangement, and under the theory of having loaned its waters to defendant, but in fact and with the knowledge of the parties, including the division superintendent, this was for the purpose of enabling the parties to carry out their contract until such time as the decree to change the point of diversion might be finally entered.

The complaint then alleges in substance that notwithstanding the plaintiff and defendant through their respective officers and agents met from time to time for the purpose of crystallising their agreement theretofore made into a written contract, no controversy arose and there was no suggestion of a change in any of the stipulations theretofore agreed to; but that finally the defendant denied ever having entered into a contract, and repudiated any obligation to the plaintiff, declining to carry its water, ordering the same shut out of the division box, and finally, on the day after the summons and notice of application in this case were served, tore out the division box.

The defendant answered in substance:

"(1) That it never entered into any contract, orally or otherwise, with the plaintiff to carry its water.

"(2) That what it did do in the way of carrying water for the plaintiff was without charge, and purely as an accommodation.

"(3) That whatever contract was attempted to be entered into, if any, was not made with the authority and under the direction and with the consent of the stockholders or board of directors of the defendant company; that such attempt, if ever made, was with the president and secretary of the company only; and that the subject-matter thereof was ultra vires, both as to the corporation and as to the power of the officers.

"(4) That the contract, if ever verbally agreed to, was not to be performed under the terms thereof within one year, and was therefore void under the statute of frauds, and unenforceable."

The defendant demurred to the evidence of plaintiff, which demurrer was sustained by the court, and judgment rendered dismissing the complaint and suit without prejudice.

The defendant offered no testimony, and therefore there is no conflicting evidence in the case.

The plaintiff seems to have proven clearly the allegations of fact set forth in its complaint, and the only questions to be determined are as to conclusions of law, raised by the fourth proposition as above set forth.

As we see from the record, it appears that the only directors of the defendant company were Mary John, president; William John, her brother, secretary; and their mother.

The circumstances under which the agreement was made were that there had been much discussion and for some time among the persons connected with both plaintiff and defendant corporations, concerning the differences between plaintiff and the Model Company, and the desire of the plaintiff to be relieved of its agreement with that company.

Mr. Jeffreys, who seems to have been the manager for the plaintiff, testifies in substance that—

"In the early part of May, I spoke to her (Mary John) and told her that probably we would find it necessary to endeavor to cancel our contract with the Model ditch, and I asked her about carrying the water. She said that they would carry the water. That was all she said at the time. Shortly prior to instituting the suit (meaning the suit to cancel the Model contract), we had another conversation. I said, 'Miss John, I understand from one of our people in the ditch that you will carry the Hoehne water?' and she said, 'Yes.' She understood from the other party what the consideration was, and I told her what I understood from him, that the water would be carried for \$1,000 a year, and she said that was 'all right.' We held our meeting (meaning the meeting of the plaintiff's directors), and, after

holding the meeting, Miss John came to my office, and I said to her, 'Miss John, we are going to institute a suit to cancel the contract with the Model people, and I would not enter this suit, except that I know that you are going to carry the water for the Hoehne ditch as agreed with the other party.'

"Q. What did she say? A. Well, I think that she said, 'That is fine.'"

It seems that at this time Will John was absent from the state, and it was agreed that they should wait for his return before executing the written agreement. In the meantime, the plaintiff had secured the cancellation of the Model contract and proceeded as before stated with the matter of securing the decree changing the point of diversion.

It also appears that there were two brothers owners of water rights, and that their supply was carried through defendant's ditch, and who objected to the agreement between plaintiff and defendant on the ground that it might interfere with the service to them. They made their protest to Mary John, president of defendant corporation, who assured them that it would not impair their service, and that they were too late in any event, for the reason that the agreement had been entered into.

It also appears that the parties plaintiff and defendant, at a time after Will John had returned, met at the office of Mr. Coil, an attorney acting for both parties, for the purpose of drafting and executing the contract; that at this time they had the Model contract before them, and all agreed that this contract should be followed in form and substance, except as to names and consideration, with some other changes not material here.

This form contained a provision as to the time for which the contract was to run, of 99 years. However, there arose at this meeting the question as to whether or not the agreement would under the law make the defendant a common carrier and thereby cause an increased tax upon defendant's property. By reason of this question only, the agreement was not drafted and executed at the time, and it was agreed that the parties should seek advice of Miles G. Saunders, an attorney at Pueblo, upon the question thus raised.

This was later done, and Mr. Saunders apparently did not determine the legal question, but suggested it might be avoided by the process of loaning water, which was adopted and followed in the manner heretofore suggested.

[1] Under this state of facts, there can be no question but that the minds of the parties had met in agreement, and we have only to determine whether or not such an agreement is valid and binding in the sense that it may be specifically enforced.

[2] The contention of the defendant, which apparently was sustained by the court, is:

"(1) That the contract in being incapable of performance within one year from its date, and not in writing, is within our statute of frauds, and void, and that part performance does not take it out of the statute of frauds."

As against this, it is contended by the plaintiff in substance that —

"The contract is one relating to real property, and that part performance thereof takes it out of the statute of frauds, or rather estops the defaulting party from pleading the statute of frauds, and becomes enforceable at the suit of the aggrieved party upon such part performance.

"Second. That even if not a contract for an interest in real estate, but such as held by the court, viz., a contract for service, it is nevertheless under our statute removed from the statute of frauds, and is subject to specific performance upon the part performance being established by proof.

"Third. Even though the contract for its legality may have required the authority of the board of directors, yet being entered into by the president and secretary of the company who likewise constitute a majority of the board of directors, and its benefits being accepted and retained by the corporation, with knowledge of the facts, it is estopped from ascertaining the illegality."

It is not disputed that payment of the consideration due was tendered to and refused by defendant. So that in all particulars it appears that the plaintiff had fully complied with all the provisions of its agreement.

It is contended that the agreement being one which was not to be fully performed within one year is void under the statute of frauds, and here arises the serious question of the case.

The very nature of this case as appears from the above statement of facts necessarily involves a public policy as indicated by the Constitution and statutes and as construed by our courts. There is more than a private interest involved.

It appears to us that the principle involved in this question has in effect been determined by our courts in our very early history and consistently followed.

The case of Yunker v. Nichols, 1 Colo. 551, involved the precise question of whether or not a verbal contract relating to the carrying of water was within the statute of frauds.

It is argued here by the plaintiff that the contract is one involving an interest in real property and that for such reason may be enforced under the rule of part performance, which takes it out of the statute of frauds; and, on the contrary, it is contended that it is purely personal in its nature and is within the statute.

We think that this distinction is not material here and discussion of the question not important nor necessary.

The Yunker Case was determined by a court consisting of three of our pioneer

(191 P.)

Judges, very much revered, and the great ability of each will forever remain unquestioned. They did much to formulate the now fixed principles concerning the great industries of mining and irrigation. In the case cited, Justice Hallett wrote the opinion of the court; Justices Belford and Wells each wrote a learned and exhaustive opinion. These three opinions are well worthy of the careful examination and consideration of lawyers.

Yunker and others constructed a ditch which all were to use for the irrigation of their respective lands. This was under a verbal agreement. After construction and use, the defendant Nichols, whose lands were above those of Yunker, diverted the water and thus deprived Yunker of the use of his claimed water. The case turned upon the question of whether or not the verbal agreement between the parties was within the statute of frauds. It was there held that such a verbal contract was not within the statute of frauds, and further that it involved a right that may be acquired under the laws of the state independent of consent or contract.

In this case the contract cannot be said to be but partly performed in the ordinary sense, for it was as completely performed for the first irrigation year as it could have been in any one of the succeeding 98 years.

In the case of *McLure v. Koen*, 25 Colo. 284, 53 Pac. 1058, a verbal contract between the parties provided that Koen should have the use of water through the canal for a specific tract of land, in consideration for his assistance in the construction and maintenance of the canal. After compliance with the agreement and use of the water for some years, Koen was denied this right. Under that agreement, it must be construed to intend the perpetual use, and not limited to any number of years as in this case. In an action to compel the enforcement of that contract, the court said:

"It is further insisted, however, that the evidence having disclosed that the agreement relied on is an oral one, the statute of frauds may be invoked to defeat its enforcement; and, furthermore, that the right sought to be established being an easement in the ditch and an interest in realty, it is not transferable except by deed; and therefore that this agreement is ineffectual to vest title in the plaintiff. A sufficient answer to this contention is that the undisputed evidence clearly establishes the agreement, and a complete performance of its conditions upon the part of plaintiff and his grantor, possession taken thereunder and a user of the water for several years.

"It is well settled in this jurisdiction that, although an oral contract relating to realty is within the statute, where a consideration has passed, and it has been fully performed by both parties and possession taken in pursuance thereof, the bar of the statute is removed, and equity will enforce the right thus acquired.

*Schilling v. Rominger*, 4 Colo. 100; *Lipscomb v. Nichols*, 6 Colo. 290; *Tynon v. Despain*, supra [22 Colo. 240].

"Under this rule the plaintiff established his right to an interest in the ditch that equity will recognize and protect; and a decision as to whether or not such interest is ordinarily transferable otherwise than by deed is unnecessary to the determination of the case."

Certainly that agreement for the perpetual use was not to be completely performed within one year, and its performance for a few years was there held to be sufficient performance of the contract to take it out of the statute.

In such cases the courts generally treat such contracts as executed rather than executory in their nature, in the application of the doctrine of part performance. It will be noted that our statute recognizes this doctrine of the equity powers of the court, by declaring in express terms that—

"Nothing in this chapter contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreement." 1 Mills, § 3063, p. 1367.

It will be seen that the language of the statute makes this qualification apply to all provisions contained in the chapter relating to frauds and perjuries, and does not limit it to contracts involving an interest in real estate alone.

The general rule relating to this subject as applied in the western states is stated by Mr. Kinney, in his work on Irrigation, to be:

"As is the case with the acquisition of rights of way and other interest in land, rights to the use of water, or water rights, may be acquired without a formal deed of conveyance. One of the exceptions mentioned to the general rule in a previous section is by a parol contract, for a good consideration, all or a portion of which contract has been executed, and of such a character that a court of equity will enforce a specific performance. An agreement of this nature takes the case out of the statute of frauds and is valid as against the original grantor and as against all parties having notice thereof. It was also held in a recent Oregon case that a parol sale of land and appurtenant water rights for a consideration and a surrender of possession thereof to the purchaser created an equitable estate in the water rights which a court of equity was bound to protect. Therefore the grantor cannot revoke such a contract after the grantee or licensee has expended money in making valuable improvements upon the strength of the contract, in order to conduct the water to the place of use. So, under this principle it is held that a parol agreement between parties who have settled upon lands near a certain stream as to the amount of water which each may take from the stream, if acted upon for a time by the parties, will be enforced in a court of equity. But to successfully rely upon contracts of this nature it is held that it must be made for a consideration, and must either be executed in full

or partly executed, and the grantee must be able and willing to fully execute the contract upon his part." Kinney on Irrigation and Water Rights (2d Ed.) § 998.

The principle above stated is sustained in *Graybill v. Corlett*, 60 Colo. 551, 154 Pac. 730.

It is indeed a generally prevailing state policy in those states dependent upon irrigation largely for successful agriculture, both in the interest of economy and to prevent any unnecessary waste of land in the construction and use of ditches, that, where one ditch can answer the purpose of more, the right to use the same ditch is granted to others than the owners.

This principle was enacted into our general irrigation act of 1881, and the reason for it is well stated by Mr. Justice Hayt in *Downing v. More*, 12 Colo. 316, 20 Pac. 766, in the following language:

"So long as the state remained but sparsely settled, and mining and stock raising were the chief industries, no particular hardship resulted from such a law; but, with the increase of settlement, the growth of the agricultural interests and the rise in the value of farming lands, a change in the law became imperative, and in obedience to this demand the statute of 1881 was passed. It will be noticed that in the first section of the act provision is made against burdening improved or occupied lands with two or more ditches for the purpose of conveying water through such lands without the owner's consent; while by section 2 the route to be selected through such lands is designated. The third section is to give effect to the first and second sections by prohibiting a party who has constructed a ditch to convey water through such lands to lands adjoining and beyond from preventing other parties from enlarging and using such ditch when necessary for the purpose of conveying water through the same lands."

While the ditch there involved, by reason of its private character, was held not to be within the statute, yet it is not contended that the defendant's ditch is of that character, and it must be therefore held to be within the provisions of the statute.

[3] Here, as was said in the *Graybill* case, the verbal contract and the acts and conduct of the parties under it constituted an irrevocable license.

[4] Some objection is made under a claim that the ditch must be enlarged in order to carry out the agreement. That may be so as time advances, but it was not discussed or considered in the making of the agreement, and, besides, others supplied by defendant's ditch were assured that the ditch would carry the plaintiff's water without interfering with such rights.

But the fact remains that the ditch did carry plaintiff's water for one irrigation season and, so far as appears here, did so carry it without inconvenience or complaint, either

from the defendant or from others whom it served.

The judgment is reversed and the cause remanded.

Reversed.

GARRIGUES, C. J., and DENISON, J., concur.

(68 Colo. 550)

**EMPLOYERS' MUT. INS. CO. v. INDUSTRIAL COMMISSION OF COLORADO et al. (No. 9386.)**

(Supreme Court of Colorado. April 5, 1920. Rehearing Denied July 6, 1920.)

**Insurance** § 360(4)—Premiums on policy insuring payment of workmen's compensation held not paid by antedated check returned.

Premiums on policy issued by employer's insurer held not paid before the accident to an employé, so as to prevent lapse; it appearing that employer's fraudulently antedated check, drawn after the accident, sent to insurer and deposited by mistake, was returned when investigation revealed the accident, and it also appearing that the check, which was intended to pay only one of two premium payments due, was not big enough to pay both, as the policy required.

**Department 2.**

Error to District Court, City and County of Denver; Neil F. Graham, Judge.

Proceeding by Rosie La Salle and others under the Workmen's Compensation Act for death of one La Salle, opposed by the Big Lake Fuel Company, the employer, and the Employers' Mutual Insurance Company, the insurer. Compensation was awarded by the Industrial Commission, and the insurer sued to review its findings. To review judgment sustaining the findings, the insurer brings error. Reversed, with directions to vacate findings and award as to the insurer.

L. Ward Bannister, Leroy McWhinney, Samuel M. January, Hughes & Dorsey, and W. M. Bond, Jr., all of Denver, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for defendant in error Industrial Commission.

Edmund J. Churchill, of Denver, for defendant in error Big Lake Fuel Co.

Edward Affolter, of Louisville, for defendants in error La Salle and others.

DENISON, J. The plaintiff in error brought suit in the district court under sections 78-82 of chapter 179, S. L. 1915, to review the findings of the Industrial Commission against plaintiff in error upon a claim for the death of one La Salle, who was killed by accident while in the employ of defendant the Big Lake Fuel Company. The judgment was for defendant, thus sustaining the commission's finding.

The sole question before the commission and the court was whether a certain policy issued by the insurance company was in force at the time of the accident. The commission decided that it was in force. The commission's findings of fact are full and detailed. We are of the opinion that they do not justify the deduction that the policy was in force at the time of the accident, but compel the opposite conclusion.

The policy was dated June 28, 1916, and by its terms was to take effect from that date. It required a cash deposit at its issue, which was made; also another on July 1st. These deposits were to secure the payment of premiums. The policy required the first premium to be paid not until August 1st, because the amount thereof could not be ascertained until the pay roll of the employer for July, upon which the premium was computed, had been reported, and this premium paid for insurance for past time. By the terms of the policy, if payment of a deposit or premium was not made within 10 days after its maturity the policy ipso facto lapsed, as of midnight of the last day of the calendar month before such maturity, without notice to anybody. These provisions seem to have been necessary to prevent delay of premiums until after an accident. Neither the deposit due July 1st nor the premium due August 1st had been paid when the accident occurred.

La Salle was killed about 2 p. m., Friday, August 11, 1916. Afterwards, on the same day, the employer company drew a check falsely dated August 10th, on a Lafayette bank, for \$40, the amount of the required deposit, and mailed it to the Ralph W. Smith Agency Company, the insurance company's underwriting manager, who received it about 11 a. m.; Saturday, August 12th, and immediately sent it to the treasurer of the insurance company. The practice of the company and the treasurer was to hold delinquent checks till an investigation showed that there had been no accident during delinquency. One Small, the treasurer's clerk, intending to follow this custom, nevertheless by mistake sent the check with other items to the Denver National Bank for deposit before noon on Saturday and did not discover the mistake till Monday morning. The bank gave the insurance company credit for the check. Monday morning, however, before the bank opened for business, Small, having discovered the error and learned of the accident, withdrew the check, and the bank charged back the amount to the insurance company. The check was then returned to the employer company which drew it.

Having found the facts substantially as above, the commission finds:

"That the receipt of the check and the deposit of said check in the bank constituted payment under the policy of the amount due there-

under and that the said policy was thereby continued in full force and effect."

The conclusion is impossible, in view of the previous findings, for several reasons:

1. The check was never accepted as payment. It was held pending investigation. The deposit in the bank was, according to the findings, a mistake, i. e., an involuntary act, which did not affect the situation one way or the other. The company did not intend to accept the check, if the investigation should reveal an accident during delinquency; it did reveal it, and the company returned the check.

2. The check is found by the commission to have been drawn to pay the second deposit. The premium due August 1st has never been paid. The payment of both is required by the policy. One is as important as the other. The failure to pay either automatically cancels the policy. The check cannot be regarded as a payment of both, as the commission seems to have thought, because it was not big enough, and was not so intended.

3. The check was fraudulent, drawn after the accident, antedated with intent to deceive, and sent in the hope that the company would accept it before it learned of the accident, and so subject itself to the loss. Justice cannot sanction such a proceeding by giving the perpetrator the fruits of it.

Something has been suggested about waiver and estoppel, but the action of the insurance company could not amount to waiver, because it was done in ignorance of the accident and of the fact that the check had been drawn thereafter, nor to estoppel, because the employer did not rely on it, or even know of it.

There was some evidence of an oral variation of the policy, giving till July 28th to make the second deposit; but, if true, we do not think it competent, and, even though both true and competent, it would not affect the result, because in any event the second deposit was delinquent when the check was drawn.

There is also some claim that, since the first deposit was not made till July 7th and the binding receipt not issued till then, the effect of the provisions of the policy must be calculated from that day, instead of from June 28th. Such claim is contrary to the policy itself, and ignores the undisputed evidence that the employer especially requested and insisted that the policy become effective as of June 28th, and that the binding receipt so reads.

The judgment should be reversed, with directions to the district court to vacate, so far as the insurance company is concerned, the findings and award of the commission, and to direct the commission to dismiss the proceedings as to that company.

(68 Colo. 414)

**MORGAN v. W. A. HOWARD REALTY CO.**  
(No. 9794.)(Supreme Court of Colorado. May 8, 1920.  
Rehearing Denied July 6, 1920.)

1. Brokers  $\S$ 57(2), 63(1)—Commission not defeated by contracting on different terms or by refusing to make or enforce contract.

That owner himself closed a contract with broker's client on terms slightly different from those quoted the broker, or that he failed to contract, or to enforce his rights under a contract in fact executed, will not defeat broker's claim for commission where the parties are brought together, and the trade is effected by the agency of the broker.

2. Brokers  $\S$ 81(2)—Listing contract held to include leasehold interest in view of owner's agreement to furnish a "proper abstract of title."

A leasehold interest held included in listing contract of land for sale claimed to be conditional on owner's procuring leasehold interest, where such intent was not excluded, and where owner agreed to furnish a "proper abstract of title," which must be held to be an abstract showing a marketable title.

3. Evidence  $\S$ 444(4)—Oral agreement making contract for sale of land conditional inadmissible.

In a broker's action for commission defended on ground that sale of land by oral agreement was made conditional on owner's procuring leasehold interest, evidence tending to show such agreement was inadmissible, being contrary to the written agreement.

Error to District Court, Bent County; A. F. Hollenbeck, Judge.

Action by the W. A. Howard Realty Company against John Morgan. Judgment for plaintiff, and defendant brings error, and appeals for a supersedeas. Affirmed.

The parties will hereinafter be designated as in the court below, where the realty company was plaintiff, and the plaintiff in error was defendant.

The plaintiff was a copartnership engaged in the business of selling real estate on commission. On September 6, 1917, defendant entered into a contract with plaintiff by which it was authorized "to sell the following described premises, the same to remain exclusively in their hands for sale," with an agreement to pay 5 per cent. commission on the price agreed upon. The contract further provided that the commission would be paid "if the sale is effected during said period [i. e., the period for which it was listed]. \* \* \* Proper abstract of title will be furnished the buyer by me. \* \* \* Incumbrance on the property, \$3,000. Price, \$90. Terms, cash \$2,500." October 10, 1917, defendant and one Paul Albert Guder entered

into a contract of sale of the premises in question by which defendant agreed "to convey to said party of the second part, in fee simple, by good and sufficient warranty deed," the property in question, \* \* \* "said premises to be free and clear of all liens, incumbrances, and taxes." The purchase price mentioned in the contract was \$13,600, of which \$20 was paid down, \$5,000 to be paid on or before November 10, 1917, \$8,580 on or before six years from date. The contract recited that Guder "has given three promissory notes," for the deferred payments. This contract makes no provision for any election or forfeiture by the purchaser, but it does provide that in case he fails to comply with any of its terms it "shall be forfeited and determined at the election of said party of the first part."

Plaintiff alleges that it fully complied with the terms of the listing contract and asks judgment for its commission, \$680. Defendant alleges that the sale was a conditional one, the conditions being that the \$5,000 payment should be made on November 10, 1917, and security for the balance delivered on that date, and that one Stephens, a tenant, under a lease expiring March 1, 1919, would consent to deliver up possession of the land upon consummation of the contract; that the tenant refused to so surrender, whereupon Guder failed and refused to consummate the agreement and it was abandoned. The new matter in the answer is denied by replication. The cause was tried to a jury, which returned a verdict for plaintiff for \$680. Motion for new trial having been filed and overruled, judgment was entered on the verdict. From that judgment defendant brings error, and the cause is now before us on his application for a supersedeas.

Allen M. Lambricht, of Las Animas, for plaintiff in error.

H. G. Bell, of Las Animas, and Allyn Cole, of Lamar, for defendant in error.

BURKE, J. (after stating the facts as above). That the purchaser, Guder, was plaintiff's client is established by the evidence, and there is neither proof nor offer of proof to the contrary. That he was ready, willing, and able to buy upon terms satisfactory to the owner is established by the fact that they entered into a contract of sale which could only be avoided by the default or consent of defendant himself.

Two defenses only are urged against this claim for commission which require our consideration. The first is that the contract made by plaintiff with the purchaser was not the contract which he was authorized to make; the second that the contract of sale was conditional and that the conditions were never met.

"When property is put into the hands of a real estate agent for sale and he directly negotiates one, or is the moving cause by which one is effected, either by him or the owner, the authorities agree that he is entitled to his commission." *Leonard v. Roberts*, 20 Colo. 88, 91, 36 Pac. 880, 881.

The same is true "although no sale was in fact concluded, if the failure to effect one was the fault of the principal." *Perkins v. Russell*, 56 Colo. 120, 126, 137 Pac. 907, 910.

[1] It will not defeat the claim for commission that the owner himself closed a contract with the broker's client upon terms slightly differing from those quoted the broker, or that he failed to contract, or to enforce his rights under a contract in fact executed, where the parties are brought together and the trade effected by the agency of the broker. *Finnerty et al. v. Fritz*, 5 Colo. 174, 179; *Howe v. Werner*, 7 Colo. App. 530, 44 Pac. 511.

"It is sufficient if the party desiring to trade his property for another solicits the services of a broker who finds a person willing and able to make the exchange and brings the parties together who thereupon enter into negotiations which they ultimately conclude though on terms somewhat varying from those expressed in the original proposition. The broker thereby earns his compensation." *Knowles v. Harvey*, 10 Colo. App. 9, 11, 52 Pac. 46, 47.

[2] Defendant's contention that the execution and delivery of the contract of sale was conditional cannot in the face of this record be maintained. If there was in fact outstanding a leasehold interest in the property in question, that leasehold interest was included in the listing contract; First, because it was not excluded; and, second, because defendant thereby agreed to furnish a "proper abstract of title", which must be held to be an abstract showing a marketable title. Such leasehold interest was also included in the Guder contract of sale; the title to be conveyed thereunder being one "in fee simple, by good and sufficient warranty deed, \* \* \* free and clear from all liens, incumbrances and taxes." Defendant sought to show that prior to the execution and delivery of this contract of sale it was orally understood and agreed that such a title should be transferred by defendant only in the event he could procure the leasehold interest.

"All oral negotiations \* \* \* between the parties which preceded or accompanied the execution of the instrument are to be regarded as merged in it." *Randolph et al. v. Helps et al.*, 9 Colo. 29, 33, 10 Pac. 245, 248.

[3] If such an oral agreement was in fact made, it was contrary to the written agreement and the offer of evidence to support it was properly excluded.

"The language of a contract is the agreed repository of the intention of the parties, and from it, when free from ambiguity, they cannot be allowed to appeal to the less certain testimony of witnesses." *Randolph v. Helps*, supra.

In addition to the foregoing, it might be observed that under the listing contract the presumption was that the seller would deliver possession. That contract was exclusive, and, without terminating it as therein provided, the owner could not negotiate a sale on other terms and defeat the broker of his commission. Under the terms of the contract of sale defendant could have enforced it by an action for specific performance. He could not therefore by his election to forfeit the contract avoid payment of the commission.

For the reasons above stated, the superse-deas is denied, and the judgment affirmed.

GARRIGUES, C. J., and TELLER, J., concur.

(68 Colo. 308)

JASPER et ux. v. BICKNELL. (No. 9755.)

(Supreme Court of Colorado. April 5, 1920. Rehearing Denied July 6, 1920.)

1. Witnesses ⇨52(8) — Husband and wife held exempt under statute from testifying on adverse party cross-examination.

In an equitable action against a husband and wife in aid of execution to subject the husband's realty recorded in the wife's name to the judgment, it was error to allow the husband and wife to be cross-examined by plaintiff under Rev. St. 1908, § 7284, providing for an adverse party examination as against an objection that the husband and wife were exempt from such examination under section 7274, par. 1, relating to testimony by or against a husband and wife.

2. Witnesses ⇨275(8) — Refusal to allow counsel to examine clients after adverse party examination held error.

Where, in an equitable action in aid of execution, it was sought to subject realty recorded in a wife's name to her husband's debts, and both the husband and wife had been subject to party examination under Rev. St. 1908, § 7284, it was error at the close of such cross-examination to refuse to allow counsel for defendants to interrogate his clients, since a witness thus called may be examined by both sides.

3. Witnesses ⇨393(1) — Unauthenticated transcript of testimony before referee held incompetent in impeachment.

In an equitable action in aid of execution, to subject realty recorded in wife's name to her husband's debts, a transcript of testimony previously taken before a referee in bankruptcy was incompetent to impeach the husband where not authenticated.

**4. Homestead §47—Wife's record of homestead entry under statute held valid as to husband's creditors.**

In an equitable action in aid of execution to subject realty recorded in the wife's name to her husband's debts, where it appeared that the wife had caused a homestead entry to be made on her record title to such lands, under Rev. St. 1908, §§ 2950, 2951, it was error to require the wife to quitclaim for the benefit of her husband's creditors, since under no circumstances could plaintiff be decreed relief as to real estate to which he would not have been entitled had the property in fact stood in the husband's name.

**5. Limitation of actions §180(5), 182(3)—Manner of interposing bar of statute stated.**

An objection that an action is barred by the three-year statute of limitations, Rev. St. 1908, § 4072, cannot be raised by general demurrer, nor is it available under a general denial, but must be specially pleaded in the answer, or it must appear on the face of the complaint that the action is barred, in which case it may be pleaded by special demurrer.

**Department 1.**

Error to District Court, Jefferson County; Samuel W. Johnson, Judge.

Action by Amanda Olin Bicknell against Henry Jasper and wife. Judgment for plaintiff, and defendants bring error. On application for supersedeas. Reversed and remanded.

This was an equitable action in aid of execution and was brought by defendant in error against plaintiffs in error who are husband and wife. The parties are hereinafter designated as in the court below.

Plaintiff had obtained a judgment against defendant Henry Jasper and caused a transcript of the docket entry thereof to be filed in the office of the county clerk and recorder. Execution was issued and levy made upon the interest of Henry Jasper in the real estate here in question, consisting of 28 acres, standing of record in the name of the wife. The amended complaint alleges that Henry Jasper was the owner of this property, the title to which he had caused to be placed in the name of his wife with the intent on the part of both to hinder, delay, and defraud creditors, and particularly the plaintiff; that the transaction was without consideration; and that Henry Jasper was at the time insolvent. Defendants demurred on the grounds that the complaint was ambiguous, unintelligible, and uncertain, and did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and defendants answered denying the material allegations of the complaint. Trial was had to the court and judgment entered for plaintiff. The real estate was decreed to be the property of Henry Jasper and subject to the lien of plaintiff's judgment. It was further ordered that Minnie

Jasper deposit with the clerk of the court a deed quitclaiming all her interest in said property to her husband. To review this judgment defendants sued out a writ of error, and the cause is now before us on their application for a supersedeas.

George B. Campbell, of Denver, for plaintiffs in error.

Quaintance, King & Quaintance and John T. Maley, all of Denver, for defendant in error.

BURKE, J. (after stating the facts as above). Numerous alleged errors are assigned, but we find it necessary to consider only those going to the competency of the evidence, assuming that that evidence, if properly before the court, was sufficient to support the judgment.

Section 7284, R. S. 1908, provides:

"A party to the record of any civil action or proceeding, \* \* \* may be examined upon the trial thereof, as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify. \* \* \*

Each of the defendants was called under this statute, and each objected to such examination, claiming exemption therefrom under the provisions of paragraph 1, § 7274, R. S. 1908, which reads:

"A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor shall either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during the marriage."

[1] This objection was overruled, and that ruling constitutes reversible error. *Frankenthal et al. v. Solomonson*, 20 Wash. 460, 55 Pac. 754, 44 L. R. A. 311, 72 Am. St. Rep. 116; *In re Jefferson (D. C.)* 96 Fed. 826.

[2] At the close of this cross-examination under the statute, counsel for defendants sought to interrogate his clients, and the court sustained an objection thereto. This was error. *Merritt v. Hummer*, 21 Colo. App. 568, 122 Pac. 816. In that case the error was held not prejudicial for the reason:

"That defendant was later called to the stand and examined fully by his counsel upon the matters brought out by counsel for plaintiff when he was first examined."

The record before us does not disclose such an examination. The rule laid down by the Court of Appeals in the *Merritt Case* was recognized by this court in *Western Investment & Land Co. v. First Nat. Bank of Denver* (No. 8232, decided March 4, 1918) 172 Pac. 6, 8, wherein it is said: "Under our practice a



witness thus called may be examined by both sides."

[3] An important part of the statutory cross-examination of defendant Henry Jasper related to testimony presumably theretofore given by him before a referee in bankruptcy, and the examination was conducted from an alleged transcript of that testimony. This transcript was afterwards admitted in evidence over the objection of defendant and with the avowed purpose of impeaching him. That there had been such a bankruptcy proceeding in which defendant testified was undisputed, but no evidence was adduced of the identity or authenticity of the exhibit. It was therefore entirely incompetent and must have been prejudicial.

Minnie Jasper obtained title to 18 acres of the land in question by deed from Maude Moore, and to the remaining 10 acres by deed from Mary Fitzpatrick. Upon the margin of her record title to each tract she had caused a "homestead" entry to be made.

"Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars, exempt from execution and attachment, arising from any debt, contract or civil obligation, entered into or incurred after the first day of February, in the year of our Lord one thousand eight hundred and sixty-eight." Section 2950, R. S. 1908.

"To entitle any person to the benefit of this act, he shall cause the word 'homestead' to be entered in the margin of his record title to the same, which marginal entry shall be signed by the owner making such entry. \* \* \* In case the husband is the owner of said homestead, the wife may cause such entry to be made and recorded, and the signature of said entry by the wife shall have the same effect as if entered by the husband, the owner of the property." Section 2961, R. S. 1908.

[4] The making of this "homestead" entry, and the fact that since obtaining title to the property she and her husband had resided thereon, were set up in the answer of defendants, were not denied by the plaintiff, and are established by the evidence. Under no circumstances could plaintiff be decreed relief as to the real estate in question to which she would not have been entitled had the property in fact stood in the name of Henry Jasper. Under such circumstances the homestead entry of the wife would have reserved the same from sale under execution to the extent of the valuation provided in section 2950, supra, and that reservation the court could not oblige her to relinquish by quitclaim for the benefit of the creditors of her husband.

In view of the possible retrial of this cause, it seems advisable to notice an additional assignment. It was contended by defendants below, and is urged here, that recovery by

plaintiff is precluded under the provisions of our three-year statute of limitations.

"Bills for relief, on the ground of fraud, shall be filed within three years after the discovery by the aggrieved party, of the facts constituting such fraud, and not afterwards." Section 4072, R. S. 1908.

[5] Defendants have filed no pleading in this cause under which they may take advantage of this statute.

"The objection that an action is barred by the statute of limitations cannot be raised by general demurrer, nor is it available under a general denial. It must be specially pleaded in the answer, or when it appears on the face of the complaint that the action is barred it may be pleaded by special demurrer. If it is not pleaded one way or the other, it is deemed waived." *Yost v. Irwin*, 53 Colo. 269, 270, 125 Pac. 526.

The bar of the statute does not appear on the face of the complaint. It could not therefore be raised by demurrer, and was not specially pleaded in the answer. It is true that the statute of limitations under consideration in the *Yost* Case was not the statute here in question, but the language is the same, and no reason appears why the construction of the one should not be applied to the other. A careful examination of the Colorado authorities construing section 4072, supra, discloses nothing in derogation of the application of this rule.

For the errors heretofore noted, the judgment is reversed, and the cause remanded.

GARRIGUES, C. J., and TELLER, J., concur.

(68 Colo. 376)

GALVIN v. STOKES et al. (No. 9551.)

(Supreme Court of Colorado. May 3, 1920.  
Rehearing Denied July 6, 1920.)

1. Escrows  $\S$  14(1)—Money from securities wrongfully delivered by escrow holder in void escrow may be recovered.

Where securities were placed in escrow by plaintiff to secure amount embezzled by his associate in business from defendant, and escrow holder in violation of condition of escrow that the prosecution for the embezzlement be dropped delivered the securities and defendant realized on them, plaintiff may recover the proceeds as the doctrine of parties in pari delicto did not apply.

2. Evidence  $\S$  148 — Void escrow agreement held usable to establish right to recover money paid thereunder.

In suit to recover proceeds of securities wrongfully delivered by escrow holder in violation of condition that prosecution be discontinued, that escrow agreement was invalid would not prevent the agreement being used as evidence to establish its terms.

**3. Escrows §14(1) — No title passes by wrongful delivery.**

An escrow given to the grantees or obligees by the depository before compliance with conditions or happening of event stipulated passes no title and gives no rights to obligee.

**4. Payment §87(2)—Money secured by duress may be recovered back regardless of invalid agreement.**

Where, to protect his business, plaintiff gave securities in escrow on demand of defendant from whom plaintiff's associate in business had embezzled and defendant realized thereon, plaintiff may recover the proceeds regardless of the validity of the escrow agreement, since duress was used preventing a voluntary payment.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by Maud Galvin against Charles A. Stokes and another. Judgment for defendants after sustaining of demurrer to complaint, and plaintiff brings error. Reversed.

S. J. Sackett and C. A. Irwin, both of Denver, for plaintiff in error.

Archibald A. Lee, of Denver, for defendants in error.

SCOTT, J. The complaint in this case, in so far as is important to consider, alleged that plaintiff and one Fred C. Bartle were the sole owners of the capital stock of the Merchant's Transportation Company, engaged in business in the city of Denver, and that Bartle was the general manager of said corporation, and that his personal services were necessary to the success of the business of the corporation; that the defendant the Denver Transit & Warehouse Company represented to plaintiff that Bartle, while in the employ of said company, had embezzled \$5,000 of its money, and threatened to prosecute Bartle criminally and to levy attachments on the property and business of said Merchant's Transportation Company and thereby destroy its business, unless the plaintiff should deliver to the defendant Charles A. Stokes, attorney for the defendant company, her certified check drawn on a Denver bank, for \$2,000, and unless the said Bartle should secure an additional sum of \$3,000; that under such circumstances she did deliver to said Stokes her certified check for \$2,000 in escrow and received therefor the following escrow receipt:

"This is to certify that I have received from Fred C. Bartle a note for \$3,000 secured by a mortgage upon land in Jefferson county, Colorado, and I have also received from Maud Galvin a certified check for \$2,000, which note, mortgage and certified check are deposited with me upon the following conditions, viz.:

"That the said Fred C. Bartle is indebted to the Denver Transit and Warehouse Company

in the sum of \$5,000 and criminal proceedings have been instituted against him through the office of the district attorney and are now under his control.

"Now if the said district attorney is willing to dismiss the said proceedings, the foregoing note, mortgage and certified check are to be turned over to, and delivered to, the Denver Transit and Warehouse Company in settlement of, and in full satisfaction of, their claim against the said Bartle; but if the said district attorney refuses to dismiss said proceedings, then the said note, mortgage and certified check shall be returned to Fred C. Bartle and Maud Galvin.

"Dated at Denver, Colorado, this 16th day of October, A. D. 1913.

"[Signed]

Charles A. Stokes."

The complaint further alleges that the criminal prosecution was not dismissed and the said certified check was wrongfully delivered to and cashed by the defendant company.

Prayer was for judgment for the amount of said check with interest.

The defendants filed their demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against the defendants.

The demurrer was sustained by the court, and the plaintiff, electing to stand upon her complaint, brings the case here on error.

This matter was before the court on the petition of Bartle and his wife to cancel their note and mortgage given by them in the same transaction. *Bartle v. Bond*, 176 Pac. 832. The court there said:

"It is clear that said instruments were executed at the demand of the defendant company, and in accordance with an agreement evidenced by said escrow receipt. In determining what was the consideration of such agreement, it is wholly immaterial whether or not the sum claimed by the company was due. An agreement to give security for a debt is a matter quite apart from the transaction in which the debt was incurred.

"An agreement to give security may be void, and the debt continue as a legal obligation.

"From the escrow agreement it is plain that the dismissal of a criminal prosecution was the condition upon which the papers were to be delivered by Stokes; and the agreement to dismiss was the inducement—the consideration—for their execution and deposit with him.

"The agreement was contrary to public policy, and void.

"The plaintiff was therefore entitled to have the note and trust deed canceled, and the court erred in rendering judgment against him."

[1] A proper interpretation of the opinion in that case makes it controlling in the case at bar.

It is not claimed that the plaintiff in this case was indebted to the defendant company in any sense, or had knowledge of the alleged embezzlement of Bartle except as claimed

by the defendant company at the time of this transaction. It would therefore be a singular sort of justice for this court to cancel the obligation of the alleged debtor and wrongdoer and to permit the defendant company to retain the money of the plaintiff. We find no principle of law by which such latter holding may be sustained.

Counsel for defendant bases his argument upon the following proposition:

"The case as now presented to this court in plaintiff in error's opening brief is a plain case of attempted recovery of money paid to compound a felony."

If this were a correct statement of the facts in this case, an entirely different proposition would be presented. But the admitted fact in this case is that the plaintiff did not pay to the defendants money to compound a felony, nor for any other purpose, nor at all.

Assuming such incorrect premise, counsel then proceed to invoke the doctrine of "In pari delicto potior est conditio defendentis," so frequently considered by this court and the Court of Appeals.

The doctrine is expressed in different form in the several cases, but in substance it is the same in all. Counsel for defendant cite it and rely on the expression in *Branham v. Stallings*, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213, as follows:

"In pari delicto potior est conditio defendentis"—"In equal guilt, the stronger is the situation of the defendant"—is a maxim of the law, or, as it is sometimes expressed, 'Where misconduct is mutual the law will not lend its aid to either party.' This rule was not adopted for the benefit of defendants, but simply upon the grounds of public policy. Subject to a few well-known exceptions, the law is well established that where such a contract is executory the law will not aid either party to enforce its execution, and where it has been executed, or money paid in pursuance thereof, the law will not aid the party to recover back the amounts paid."

It will be noticed in that case, as in all similar cases cited, the money or consideration was voluntarily paid or delivered, and the action was to recover back that which was so voluntarily and actually delivered, or to enforce an executory contract.

In this case the check was not delivered in accordance with the agreement, but in violation of it; therefore without any authority at all, and without the knowledge or consent of the plaintiff, and in direct violation of the express pledge of the escrow holder, who was for such purpose the joint trustee of the parties.

How can it be said, then, that the delivery of the check was a voluntary delivery or a voluntary payment, so vital in the application of the doctrine relied on? It can be no different in principle than if the check had

been stolen from the possession of the plaintiff and delivered by the thief to the defendant corporation, which then cashed it. Such circumstance would have constituted an equally voluntary payment as under the facts in the case at bar.

[2] It is contended that, the escrow agreement being void as in contravention of public policy, the plaintiff may not rely upon its terms to establish the status of the parties showing the absence of the delivery of the check in question. While the escrow receipt is void and nonenforceable, it is of itself the best evidence of that fact and is likewise the best evidence of the acts, intent, and purposes of the parties, and, in the absence of contrary evidence, is conclusive evidence of the fact that the check was not to be delivered to the defendant except upon the happening of a certain contingency, which the admitted allegations of the complaint show never happened.

Hence the check in this case was not lawfully delivered and therefore not authorized by plaintiff to be delivered or paid. Therefore, the doctrine of, "In pari delicto potior est conditio defendentis," cannot apply.

Our negotiable instrument law expressly provides that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument, for the purpose of giving effect thereto. This was likewise the rule at common law.

[3] It is a settled principle of the law that, until the performance of the condition of an escrow agreement, the title to land to be conveyed remains in the grantor, and further that, if the grantor dies before the happening of the certain event of performance of the condition, the title descends to his heirs subject only to the purchaser's interest. It follows therefore that an escrow given to the grantee or obligee by the depository before the compliance with the conditions or before the happening of the event stipulated passes no title and gives no right to the obligee. 16 Cyc. 578, 579.

This doctrine was announced in *Wolcott v. Johns*, 7 Colo. App. 360, 375, 44 Pac. 675, 681, and it was there said:

"The deed to the property, and the notes for its price, were placed in the hands of Mr. Butler to be held by him until the performance of a certain condition by Johns. Upon the performance of that condition Butler was to deliver the deed to Wolcott and Henderson, and the notes to Johns, and in the event of the refusal or impossibility of performance, it would have been his duty to return the papers to the parties respectively from whom he received them. Until performance the instruments were entirely ineffective for any purpose; there was no conveyance, and there was no obligation upon the notes; the estate with all its incidents remained in Johns; if he had died in the meantime it would have descended to his heirs; it was subject to attachment for his debts, and

a creditor levying upon it would hold it in preference to the grantees named in the deed."

If we follow the rule that if, in a case where parties enter into a forbidden contract, the law will leave the parties where it found them, then in this case it found the plaintiff's check in the hands of an escrow holder, undelivered and without authority to deliver, and therefore not lawfully cashed or paid.

The delivery and cashing of the check was solely through the unauthorized and willful wrong of the defendants; hence the plaintiff is entitled to recover from them for these wrongful acts. The law will not permit them to so take advantage of their own fraud.

It is true that the plaintiff placed herself in a position where she could be imposed on by another, but in such case the doctrine of in pari delicto has been expressly held by this court not to apply. *Branham v. Stallings*, supra, where it is said:

"The exceptions cover cases of usurious contracts, marriage brokerage contracts, and the like, where the transactions are prohibited for the sake of protecting one set of men from another, the one from their condition or situation being liable to be imposed upon by the other as in such cases the parties are not in pari delicto, and it is assumed that public policy will best be advanced by granting relief. 2 Pomeroy's Eq. Jur. § 941, and cases cited in note."

[4] But we are also convinced that the complaint alleges facts sufficient to constitute a charge that the check was obtained by duress, and was therefore without consideration and void.

The judgment is reversed, with instruction to proceed in accordance with the views herein expressed.

GARRIGUES, C. J., and DENISON, J., concur.

DENISON, J. (concurring specially). Whether the check was delivered by the trustee in accordance with the contract seems to me immaterial, because, since the contract was void, such delivery was without authority whether according to the contract or not.

The question before us, however, has nothing to do with the delivery or nondelivery of the check by the trustee. The question is whether the delivery of the check to the trustee on the terms of the contract was such an unlawful act as to place plaintiff in pari delicto with the trustee and the Denver Transit & Warehouse Company. If it was, she cannot recover; if not, she can, and the case should be reversed.

It is true that the parties to an unlawful agreement are ordinarily in pari delicto;

but, where one of them is brought into the delict by duress by the other, the entry is not voluntary, and so they are not in pari delicto, and the maxim potior est conditio defendentis does not apply in favor of him who is guilty of such duress.

In the present case the threat of the criminal prosecution of plaintiff's partner to the ruin of plaintiff's business was duress, analogous to duress of goods, so that she cannot be said to have entered the unlawful transaction voluntarily. For the principles here involved, see Judge Elbert's discussion of duress of goods in *Adams v. Schiffer*, 11 Colo. 15, 30-34, and cases cited, 17 Pac. 21, 7 Am. St. Rep. 202, especially *Chase v. Dwinall*, 7 Greenl. (Me.) 34, 20 Am. Dec. 352.

For these reasons I think the case should be reversed.

(68 Colo. 422)

GUYER v. STUTT, Secretary of Board of Education of School District No. 1.  
(No. 9229.)

(Supreme Court of Colorado. June 7, 1920.  
Rehearing Denied July 6, 1920.)

1. Schools and school districts  $\S$  53(5)—School directors not subject to recall; "general election"; "elective public officers of the state."

Const. art. 21 (see Laws 1913, p. 672), entitled "Recall from Office," is inapplicable to school directors; the recall amendment relating to officers elected at the general election, which does not include school elections, and the words "elective public officers of the state," as used in the amendment, meaning officers whose duties and powers are coextensive with the state, as distinguished from county, city, town, district, and school officers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Elective Office; General Election.]

2. Schools and school districts  $\S$  55—Jurisdiction of school directors is confined to own district.

School directors have no jurisdiction to perform duties outside of the school district where they are elected, and because they act by authority of the state law does not make them state officers.

3. Statutes  $\S$  194—General controlled by particular expression.

A particular power which is clear and definite should be given effect as against a confirming general expression, and especially so when to give the effect contended for would make the clear specific provisions unnecessary and surplusage.

En Banc.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Certiorari by Clarkson N. Guyer to review the proceedings of W. A. E. Stutt, Secretary

(191 F.)

of the Board of Education of School District No. 1, City and County of Denver. Writ quashed, and petitioner brings error. Reversed and remanded, with directions.

Upon petition in certiorari brought by Clarkson N. Guyer to review the proceedings of W. A. E. Stutt, as secretary of school district No. 1, city and county of Denver, the district court held that a school director is subject to recall. May 5, 1917, there was filed with Stutt, as secretary of the board, a petition for the recall of Guyer, a duly elected and qualified member of the school board. A writ of certiorari was issued to Stutt requiring him to certify all his proceedings under the recall to the district court, which was done, and, after argument thereon, the district court quashed the writ and affirmed the recall proceeding, and the only question involved in the case here is whether article 21 of the Constitution, entitled, "Recall from Office" (S. L. 1913, p. 672), applies to school directors.

Warwick M. Downing, Douglas A. Roller, and John D. Milliken, all of Denver, for plaintiff in error.

Cranston, Pitkin & Moore, of Denver, for defendant in error.

GARRIGUES, C. J. [1] Section 1 of the recall amendment expressly provides for the recall of "every elective public officer of the state of Colorado," and also expressly provides the procedure to be followed in exercising such power under this section. Section 4 provides that the recall may also be exercised with reference to the elective officers of each county, city, and town, but, until otherwise provided by law, leaves the manner of exercising the recall power, as to these officers, to be provided by the legislative body of the county, city, or town, showing that, for the purpose of the recall, in the sense contained in the amendment, the elective officers of counties, cities, and towns are not regarded as public officers of the state, but as city, county, and town officers. Of course, it follows that the recall power mentioned in section 4 cannot apply to county, city, and town officers until the manner of exercising it shall be provided according to law. Nowhere in the instrument is it said that school directors may be recalled.

Section 1, which says that every elective public officer of the state may be recalled by and through the procedure and in the manner therein stated, provides that a petition signed by electors equal in number to 25 per cent. of the vote cast at the last preceding election must be filed in the office in which petitions for nominations to office held by the incumbent are required to be filed, provided, if more than one person is required to be elected to the office, then the petition shall be signed by electors entitled to vote for a suc-

cessor equal in number to 25 per cent. of the entire vote cast at the last preceding general election. The petition being sufficient, section 2 provides that the officer with whom it is filed shall forthwith submit it, together with a certificate of its sufficiency, to the Governor, who shall order and fix the day for holding the election, provided, if a general election is to be held within 90 days after the date of submission of said petition, the recall election shall be held as a part of the general election. Section 8 provides that the Governor shall publish notice for holding the election, and that the election officers shall make all arrangements for such election, and the same shall be conducted, returned, and the result thereof declared in all respects as in the case of general elections. Section 4 provides that during the term of office for which one is elected a second recall petition shall not be filed against him unless the signers to the petition shall equal 50 per cent. of the votes cast at the last preceding general election. This section further provides that, if the Governor is to be recalled, the recall duties imposed upon him shall be performed by the Lieutenant Governor, and, if the secretary of state is sought to be recalled, the duties imposed upon him shall be performed by the state auditor. In addition to the recall of state officers provided for in section 1, section 4 provides that the recall may also be exercised by the electors of each county, city, and town with reference to their elective officers, and, until otherwise provided by law, the legislative body of such county, city, and town may provide for the manner of exercising the power, but shall not require any such recall petition to be signed by electors more in number than 25 per cent. of the entire vote cast at the last preceding election. The amendment shows upon its face that it relates to the general biennial election in November, and not the school elections. School elections in this state are not regarded as general elections within the meaning of our Constitution and statutes, but as school elections.

Our Constitution provides for one general election to be held every two years. Section 1, art. 4, provides for the election of state officers at the general election every two years, and section 3, art. 4, provides that the state officers shall be chosen by the qualified electors on the day of the general election. Section 15, art. 6, speaks of choosing district judges at the first general election, and that certain other named officials shall be elected at the time of holding the general election. Before the adoption of the recall amendment, the Constitution expressly referred to the general election, in which school directors were not included. The recall amendment, by referring expressly to the last preceding general election, shows the recall applies to state officers only, except as it otherwise

makes direct provision for the recall of city, county, and town officers.

Having examined the Constitution, let us now see what construction has been placed thereon by the Legislature:

Rev. St. § 2137. State Officers to be Elected.

Sec. 2. At the general election, A. D. 1878, and every alternate year thereafter, there shall be elected the following state officers, to wit, etc.

Rev. St. § 2138. Judge of Supreme Court and Other Officers.

Sec. 3. At the general election, A. D. 1879, and every third year thereafter, there shall be elected, etc.

Rev. St. § 2139. County Officers to be Elected.

Sec. 4. At the general election, A. D. 1877, and every alternate year thereafter, there shall be elected in every county of the state the following county officers, etc.

Rev. St. § 2140. County Commissioners and Other Officers.

Sec. 5. At the general election, A. D. 1877, and annually thereafter, there shall be elected in each county of the state one county commissioner, etc.

The election laws (acts of 1911 and 1917 [Laws 1911, p. 336; Laws 1917, p. 189] regarding registration of electors at general elections) expressly provide that they shall not apply to school elections.

The statute further provides that the regular term of office of all state, district, county, and precinct officers shall commence on the second Tuesday of January after their election, and that school directors shall be elected annually on the first Monday in May. The fact that no manner of procedure is given or provided for exercising the recall as to them is another ground for believing it was not intended as to school directors.

The term "general election" has a well-defined meaning in our Constitution and statutes, and a school election is not so regarded, and we cannot find where it has ever been so held by the courts. We are convinced the recall was intended to apply only to the elective public officers of the state except as provided in section 4 for the recall of city, county, and town officers. The words "every elective public officer of the state of Colorado," as used in section 1, refer, for the purposes of the recall, to officers of the state as distinguished from members of school boards, county, city, town, and precinct officers. In 36 Cyc. 852, under the topic of "Who are State Officers," it is said:

"State officers are those whose duties concern the state at large, or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign power of the state. They are in a general sense those whose duties and powers are coextensive with the state, or are not limited to any political subdivisions of the state, and are thus distinguished from municipal officers strictly, whose functions relate exclusively to the particular municipality,

and from county, city, town, and school district officers."

[2] The words "elective public officers of the state," as used in this amendment, mean officers whose duties and powers are coextensive with the state, as distinguished from county, city, town, district, and school officers. School directors have no jurisdiction to perform duties outside of the school district where they are elected. Their duties are performed in, and relate expressly to, their own district, and are coextensive therewith. Because they act by authority of the state law does not make them state officers. *State v. Dillon*, 90 Mo. 229, 2 S. W. 417; *Travis County v. Jourdan*, 91 Tex. 217, 42 S. W. 543; *People v. Evans*, 247 Ill. 555, 93 N. E. 388; *Lane v. McLemore* (Tex. Civ. App.) 169 S. W. 1072; *State ex rel. Stearns v. Smith*, 6 Wash. 496, 33 Pac. 974; *Ex parte Wiley*, 54 Ala. 226; *State v. Hewitt*, 3 S. D. 187, 52 N. W. 875, 16 L. R. A. 413, 44 Am. St. Rep. 788.

Section 4 provides:

"Every person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers, each of which said elective officers shall be subject to the recall provision of this Constitution."

It is practically impossible to understand or construe this section because of its ambiguity. The trial court said, "It contains an extraordinary jumble of confused ideas in hopeless conflict," in which we concur. It is claimed it makes all elective public officers having authority to exercise or exercising any public governmental duty, power, or function subject to recall through the procedure and in the manner provided in section 1. If such was the intention, it is beyond comprehension why the drawers of the amendment did not say in section 1 that every public officer exercising any public or governmental duty, power, or function should be subject to recall through the procedure and in the manner therein provided, without particularly specifying any class. By classifying practically all of the elective public officers, and omitting school directors, it would seem they were intentionally omitted from the recall. The framers of the amendment must be presumed to have intended what is expressly and specifically therein stated rather than what might be inferred from the use of ambiguous generalities.

[3] It is a rule of construction that a particular power which is clear and definite should be given effect as against a confusing general expression, and especially so when to give the effect contended for would make

the clear specific provisions unnecessary and surplusage. 3 Cyc. 1129; In re Rouse, Hazard & Co., 91 Fed. 98, 98, 83 O. O. A. 856.

Judgment reversed, and cause remanded, with directions to enter the proper judgment in accordance with the views herein expressed.

SCOTT and DENISON, JJ., concur in the conclusion that school directors are not subject to the recall.

(68 Colo. 343)

**SCHOLTZ v. HAZARD. (No. 9478.)**

(Supreme Court of Colorado. May 3, 1920.  
Rehearing Denied July 6, 1920.)

1. Creditor's suit  $\S$ 39(1)—Bill to subject property sold by administrator to claims held to set up equities in plaintiff.

In a creditor's action to have his claim against a decedent's estate declared a lien upon the property after sale by the administratrix to defendant, a plea of a contract between the brother of the testatrix and defendant, whereby defendant was to purchase the property, setting forth the relation of the administratrix thereto, and the fulfillment of the terms of such contract, held a sufficient allegation of equities in plaintiff.

2. Executors and administrators  $\S$ 237—County court order held to show proper exhibition of claim.

A county court order allowing the claim of a creditor against the estate, reciting that such claim was "a certified copy of a judgment heretofore entered against said deceased," will, in a subsequent proceeding to subject property sold by the administratrix to such claim, be taken as true, and to show a sufficient compliance with the statute concerning the method of exhibiting claims.

3. Appeal and error  $\S$ 80(6)—County court order setting aside allowance of claim held final and appealable.

Where the county court by its order sets aside a judgment allowing a claim against an estate, such order is a final judgment as to that claim, and is appealable.

4. Judgment  $\S$ 910(4)—Allowance of claims based on judgment against estate held to create new judgment, as against limitations.

Where a creditor obtained a judgment against decedent in 1894, and his claim thereon was allowed against decedent's estate in 1911, the judgment became a new one against the estate, so that the 20-year statute of limitations did not apply, in view of Rev. St. 1908,  $\S$  7211.

5. Executors and administrators  $\S$ 225(1)—Claim filed 8 months after grant of letters held timely.

Where a creditor filed his claim against a decedent's estate 8 months after the granting of letters of administration, it was filed within the time allowed by the nonclaim statute.

6. Creditors' suit  $\S$ 23—Creditor's action to subject personality in hands of purchaser from administrator held not barred by laches.

In an action by a creditor of a decedent's estate against a purchaser from the administratrix to subject realty purchased to his claim, which had been allowed by the county court, a delay of 6 months in filing the complaint held not to constitute laches.

7. Executors and administrators  $\S$ 75—Status of administrator as trustee defined.

An administrator is a trustee, of whom the utmost good faith is required, and he is particularly the representative of creditors, holding the estate as a trust fund for the payment of debts, so that it is a fraud in law for such trustee to take for his own benefit a position in which his interest will conflict with his duty.

8. Executors and administrators  $\S$ 115—Acts of administrator resulting in personal benefit to him at creditors' expense, held fraud in law.

Where an administratrix sells realty belonging to the estate, which is subject to a foreclosure decree, without attempting to redeem therefrom, and was credited with payment of a note owing by her individually, such conduct, conflicting with her duty to creditors, held a fraud in law.

9. Executors and administrators  $\S$ 148—Purchaser under fraudulent contract from administrator held not entitled to take advantage thereof.

A purchaser from an administratrix of property of the estate under a contract fraudulent in law on the part of the administratrix can take no advantage thereunder as against a creditor who is injured thereby.

10. Executors and administrators  $\S$ 148—Possession by purchaser from administrator held to offset claim of interest under sheriff's sale certificate.

A purchaser of realty from an administratrix under a contract amounting to fraud in law on the part of such administratrix held not entitled to interest on a certificate of purchase under a prior sheriff's sale; it being presumed that the purchaser's possession of the premises will offset such interest.

Department 1.

Error to District Court, City and County of Denver; James L. Cooper, Judge.

Suit by E. L. Scholtz against F. W. Hazard. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

Eliza (Skelton) Swift was the administratrix of the estate of her mother, Catherine W. Skelton, deceased, against which estate plaintiff in error held a claim of \$901.46, based upon a judgment against deceased. The property of the estate consisted of lands and water rights. These had been sold at sheriff's sale, under a mortgage foreclosure, to satisfy a debt of approximately \$34,000. Boyington Skelton was the brother and confidential adviser of the administratrix. Oth-

er heirs employed a real estate broker to find a purchaser for the property, in order that the debts might thereby be paid and something saved for the heirs. This broker obtained an option on the sheriff's certificate of purchase, and in the further discharge of his duties under that employment opened negotiations with defendant in error, who was on intimate terms with Boyington Skelton, and was a creditor of the administratrix to the extent of some \$2,500, secured by a mortgage on her home. Defendant was fully cognizant of the relation existing between the administratrix and Boyington Skelton. A sheriff's deed was due under the certificate of sale on August 25, 1914. August 7, 1914, defendant in error entered into a contract with Boyington Skelton by which he agreed to pay Skelton \$4,000, in consideration whereof Skelton agreed, *inter alia*, to convey to defendant the property in question and procure a similar conveyance thereto from the administratrix, to assign a claim which he held against the estate, to protect defendant against the redemption of the property by his own creditors or those of the estate, to assist defendant in obtaining possession of the premises after the execution of the sheriff's deed, and immediately thereafter to have the estate declared insolvent and the administratrix discharged; all these things being conditions precedent to the payment of the said sum of \$4,000. On the said 25th day of August sheriff's deed was issued to defendant, and the conditions to be performed by Skelton under the terms of this contract were carried out. On March 8, 1915, the estate was declared insolvent on the petition of the administratrix, and she was discharged. Plaintiff's claim was not paid. A week later defendant paid Skelton the \$4,000 mentioned in the contract, crediting the administratrix with \$800 on her note as a part of that payment.

September 25, 1915, plaintiff in error filed his complaint in the district court, setting up these and other facts, alleging that defendant, having made certain secret settlements, induced the administratrix and other heirs to refrain from redeeming from the sheriff's sale, in order that he might obtain the property at less than its actual value and defeat the judgment, and praying that his claim be decreed a lien upon the property. The answer denied defendant's knowledge of plaintiff's judgment, denied any arrangement with the administratrix for a quitclaim of her interest in the estate, denied that the property was worth the amount of plaintiff's claim in excess of the sum brought at the execution sale, denied that he induced the administratrix or any of the other heirs to refrain from redeeming the said property, or paid them any consideration for so doing, or that he obtained the property for less than

its real value, denied the making of secret settlements, and pleaded affirmatively the 20-year statute of limitations (section 3809, R. S. 1908), as well as the bar of paragraph 4, § 7206, R. S. 1908, which provides for the filing of claims against estates within one year from the granting of letters. The new matter in the answer was denied by replication. An amendment to the answer was filed, alleging that the allowance of defendant's claim by the county court had been set aside by that court on April 29, 1914. A replication to the amendment denied the jurisdiction of the county court to make said order, an appeal therefrom to the district court, and the reversal therein of said order of April 29. Trial was had in the district court, and on September 28, 1917, judgment was entered therein against the plaintiff, and such further proceedings thereafter had that the cause is now regularly before us for review on error.

T. J. O'Donnell, Canton O'Donnell and G. W. Musser, all of Denver, for plaintiff in error.

Benedict & Phelps, of Denver, for defendant in error.

BURKE, J. (after stating the facts as above). The parties plaintiff and defendant here were plaintiff and defendant in the court below and will be hereinafter so designated. If, as defendant contends, plaintiff has no standing here, this writ should be dismissed, and the judgment affirmed, irrespective of the facts set up in the complaint. Hence we will first consider the principal reasons urged why such action should be taken. They are: That the complaint sets up no equities in plaintiff; that the exhibition of plaintiff's claim in the county court was not accompanied by "an exemplification of a record whereon such claim was founded," as provided by statute; that the order of the court, setting aside its former order allowing the claim, was not a final judgment, and hence not appealable; that the judgment of the district court reinstating the claim was not brought to the attention of the county court; the bar of the 20-year statute of limitations, requiring the issuance of execution on a judgment within 20 years from the entry thereof; the bar of the nonclaims statute, requiring the filing of such a claim within one year from the granting of letters of administration; and laches.

[1] 1. The plea of the contract between Boyington Skelton and defendant, the relation of the administratrix thereto, and the fulfillment of the terms thereof, was, for the reasons hereinafter set forth, a sufficient allegation of equities in the plaintiff.

[2] 2. The order of the county court, dated April 15, 1911, allowing the Scholtz claim, recites that said claim was "a certified copy



of a judgment heretofore entered against said deceased." That finding must be taken as true, and shows a sufficient compliance with the statute concerning the method of exhibiting such claim.

[3] 3. The order of the county court, by which its judgment allowing plaintiff's claim was set aside and held for naught, was a final judgment as to that claim, and so far as the county court was concerned plaintiff had no further recourse. It was hence appealable. *Balfe v. Rumsey et al.*, 55 Colo. 97, 104, 133 Pac. 417, Ann. Cas. 1914C, 692.

4. The hearing in the district court was on written stipulation. The papers and files were returned to the county court 5 days before the estate was declared insolvent and closed under the Hazard contract; hence defendant is in no position to claim lack of notice of that judgment.

[4] 5. Plaintiff's original judgment was obtained in 1894, and his claim based thereon was allowed in 1911. It thereupon became a new judgment against the estate, and the plea of the 20-year statute is not good. R. S. 1908, § 7211.

[5] 6. Plaintiff's claim was filed against the estate 8 months after the granting of letters of administration; hence within the time limited by the nonclaims statute.

[8] 7. This is an action against defendant, not against the Skelton heirs. The question here is not when the cause of action arose as against the deceased, but when it arose as against defendant. That date was approximately 6 months prior to the filing of the complaint. Under the circumstances of this case, such a delay does not constitute laches.

[7] There remains to be considered the principal contention of plaintiff: That the administratrix, at the instigation of defendant, put herself in a position so inconsistent as to be intolerable in equity, and that defendant can retain no advantage he may have secured thereby. An administrator is a trustee, of whom the utmost good faith is required. *James et al. v. Kelly et al.*, 107 Ga. 446, 33 S. E. 425, 73 Am. St. Rep. 135. He is particularly the representative of the creditors, holding the estate as a trust fund for the payment of debts. 11 R. C. L. p. 25. The law esteems it a fraud in such a trustee to take, for his own benefit, a position in which his interest will conflict with his duty. *Sheldon v. Estate of Rice*, 30 Mich. 296, 301, 18 Am. Rep. 136.

[8, 9] The administratrix was a trustee for the plaintiff. As such it was her duty, if possible, to redeem the property from the claim of defendant, or sell it for such an amount over and above that claim as would pay the judgment of plaintiff, or some portion thereof, although as an heir she obtained nothing thereby. By the terms of the

contract between Boyington Skelton and defendant, with which terms the administratrix scrupulously complied, and which contract must therefore be held to be her contract, she took a position for her own benefit (in the sum of \$800) which conflicted with her duty to see that plaintiff's claim as a creditor took precedence of her own claim as an heir. This conduct on the part of administratrix the law esteems as a fraud. Defendant, who was a party to that contract, can take no advantage under it against one who might have been injured thereby. Whether the administratrix could in fact have made any arrangements by which redemption from the Hazard judgment would have been possible is immaterial. Defendant, having tied her hands, will not now be heard to say what she could or could not have done but for his conduct.

[10] The judgment is accordingly reversed, with directions to the trial court to enter judgment herein for plaintiff decreeing his claim to be a lien on the premises in question as of the date of the sheriff's deed, subject to the amount of the certificate of purchase. No interest will be figured on the certificate of purchase subsequent to the date of the deed; the presumption being that that amount is offset by defendant's possession of the premises, which presumption defendant, by reason of his own wrongful acts, cannot be heard to deny.

GARRIGUES, C. J.; and TELLER, J., concur.

(88 Colo. 467)

INDUSTRIAL COMMISSION et al. v. FUNK.  
(No. 9751.)

(Supreme Court of Colorado. June 7, 1920.  
Rehearing Denied July 6, 1920.)

1. Master and servant §375(1)—Injury to employé disobeying safety order held one "arising out of and in course of employment" within Compensation Act.

Death of employé engaged in mining from an open pit on the fall of overhanging bank held the result of an accident arising out and in the course of the employment within Workmen's Compensation Act, though employé had been ordered not to work under overhanging bank without first causing it to be caved off; such order being one dealing only with employé's conduct without limiting his sphere of employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. Master and servant §385(17)—Compensation held subject to reduction for disobedience of safety rule; "reasonable rule for safety of employées."

Disobedience by employé engaged in mining silica from open pit of employer's order not

to work in pit without causing the overhanging bank to be caved off held a violation of a "reasonable rule \* \* \* for the safety of the employes," within Workmen's Compensation Act 1915, § 61, providing that compensation may be reduced 50 per cent. for such violation.

**3. Master and servant**  $\S$ 362—"Casual" employment within Compensation Act defined.

That employment is not for any specified length of time, or that injury occurs shortly after employe begins work, does not make the employment "casual" within Workmen's Compensation Act, § 4 (e) II, making the act inapplicable to an employe whose employment is but "casual."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Casual.]

**4. Master and servant**  $\S$ 362—Brick manufacturer's employes mining silica held not "casual" employes within Compensation Act.

Where brick manufacturer owned and regularly operated in connection with his brick business a silica bed, employes engaged in the mining of the silica were not engaged in a "casual" employment within Workmen's Compensation Act, § 4 (e) II, making the act inapplicable to person whose employment is "casual."

**5. Master and servant**  $\S$ 361—Employer held within Compensation Act though less than statutory number of employes work at same place; "in or about same place of employment"; "common employment."

Brick manufacturer who operated a silica bed in connection with his brick business, and who employed more than four employes, was liable for compensation for death of silica miner, under Workmen's Compensation Act, though fewer than four employes were engaged at the silica bed, notwithstanding section 4 (d) III, making the act inapplicable to employers of less than four employes "in or about the same place of employment," the silica miners being engaged in a common employment with the employes working in the brick yard, and the act being applicable in view of section 4 (d) II, if four or more persons are regularly employed in the same business or in a "common employment," even though fewer than four are employed at the particular place where accident occurred; citing 1 Words and Phrases (Second Series) p. 808.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Employment.]

**6. Statutes**  $\S$ 207—Legislative intent the important consideration in construing inconsistent sections.

In considering conflicting provisions of a statute, the great object to be kept in view is to ascertain the legislative intent.

Denison and Burke, JJ., dissenting.

En Banc.

Error to District Court, Yuma County; L. C. Stephenson, Judge.

Proceedings under the Workmen's Compensation Act 1915 by Fannie Gaines for

compensation for death of her husband, Sam Gaines, opposed by Martin D. Funk, doing business as the Wray Brick Company, employer. Award for claimant by the Industrial Commission of Colorado was set aside by the district court, and the commission and claimant bring error. Reversed and remanded, with directions.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen. (H. E. Curran, of Denver, of counsel), for plaintiffs in error.

M. M. Bulkeley, of Wray, and Wayne C. Williams, of Denver, for defendant in error.

**ALLEN, J.** This cause is one brought and prosecuted under the provisions of the Workmen's Compensation Act. On June 14, 1916, Sam Gaines and William Gaines, father and son, respectively, were, as the result of an accident, killed while in the employ of Martin D. Funk, doing business as the Wray Brick Company. On August 28, 1918, the Industrial Commission, after due proceedings and a hearing, awarded certain compensation to one Fannie Gaines, the widow of Sam Gaines, deceased, as his dependent during his lifetime. Thereafter Martin D. Funk, the employer and who had been ordered to pay such compensation, filed a petition for rehearing, and the same was, on September 30, 1918, denied by the commission. On November 18, 1918, Funk commenced an action in the district court of Yuma county to set aside the order and award of the commission, and on November 5, 1919, the district court set aside the order and award. The Industrial Commission, and Fannie Gaines, as claimant of compensation, bring the cause here for review.

The record presents three main questions of law for our determination, namely:

(1) Did the accident, which caused the death of Sam Gaines and William Gaines, arise out of and in the course of the employment of the decedents?

(2) Was Sam Gaines, at the time of the accident, an employe, within the meaning of the Workmen's Compensation Act, who or whose dependents would be entitled to compensation under the act?

(3) Was Martin D. Funk such an employer as to be or to become subject to the provisions of the Workmen's Compensation Act?

It is plain from the provisions of the Workmen's Compensation Act, and it is not controverted, that, if any one or more of the foregoing questions must be answered in the negative, no compensation was allowable to any one, and the order and award of the commission cannot be upheld. The district court set aside the order and award on grounds which are the equivalent of answering the first two questions in the negative.

Relevant to the first question, the findings

of the commission, which are supported by the evidence, are as follows:

"That at the date of their death, they (Sam Gaines and William Gaines) were employed by the said Martin D. Funk, doing business as the Wray Brick Company, in mining silica from an open pit or bank then owned and operated by the said Martin D. Funk in connection with his brick business in the city of Wray, Colo. That while so employed and engaged in mining silica under the bank, the top caved off, completely covering the said William and Sam Gaines and causing almost instant death."

"That from the evidence produced at said hearing the commission finds that the said Sam Gaines was guilty of violating a reasonable safety rule, in this: That the said Martin D. Funk has specifically ordered and directed that the said Sam and William Gaines were not to work under the overhanging silica bank without first causing the same to be caved off. That the said Sam and William Gaines had not caved off the top of the silica bank as directed, and that, in accordance with the Workmen's Compensation Law, compensation or death benefits should therefore be reduced 50 per cent."

Whether it is to be held that the accident arose out of and in the course of the employment depends upon the consequences which we find result from the disobedience of the order or direction, mentioned in the findings.

In 1 Honnold on Workmen's Compensation, p. 390, § 113, the author says:

"Disobedience to an order or breach of a rule is not of itself sufficient to disentitle a workman to compensation, so long as he does not go outside the sphere of his employment. There are prohibitions which limit the sphere of employment, and prohibitions which deal only with conduct within such sphere. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere."

[1] In the instant case, it should be noted that the commission found that the workman was directed "not to work under the overhanging silica bank without first causing the same to be caved off." It is thus seen that the workman was not prohibited from working at all on the silica bank in question, but was instructed to cave off the top before commencing the work of mining at that particular place. The order related to the manner in which that particular section of the silica bank was to be worked. The order, therefore, dealt only with the conduct of the workman within his sphere of employment, and did not limit such sphere. Under the rule above quoted from Honnold, which we regard as correct, the violation of the order or direction involved in this case did not make the accident one not arising out of and in the course of the employment, and it

cannot therefore, be held that the deceased were not within the scope of their employment at the time of the accident.

[2] The commission regarded the disobedience of the order as a violation of "a reasonable safety rule," and for that reason reduced the compensation 50 per cent., under section 61 of the Workmen's Compensation Act of 1915 (Laws 1915, p. 551), which provides for such action "where injury results from the employé's willful failure to obey any reasonable rule adopted by the employer for the safety of the employé." We agree with the commission's conclusion that the order in question was a safety rule, within the meaning of the act. With reference to the direction, the employer testified:

"I told them that the bank was safe here and here (pointing) and here not to take any more out unless he caved it down from the top; while it might stand if left alone, if they dug any further it might cave on them."

It is also plain from the section last cited (section 61, c. 179, S. L. 1915) that a willful violation of a safety rule does not defeat compensation, but only reduces it 50 per cent.

The defendant in error, the employer and respondent in the proceedings before the commission, contends, with reference to the second question presented in this case, that Sam Gaines was not such an employé as would be entitled to compensation under the act, or whose dependents would be so entitled. In this connection it is insisted that William and Sam Gaines were "casual" employés, and reliance is placed upon section 4 (e) II of the act, where it is provided that the term "employé" shall not include "any person whose employment is, but casual."

[3, 4] The evidence shows that the employer was in the business of manufacturing brick. The silica bed upon which, the employés worked was operated in connection with such business, and for the purpose, at least among others, of furnishing material used in the manufacture of brick. The work of Sam and William Gaines, performed at the silica mine, was therefore in the usual course of the business of the employer. Such service was not merely incidental to the business, nor occasional. The mining of silica was carried on continuously, or at least with regularity. The employés at the mine were employed to do a particular part of a service recurring somewhat regularly, with the fair expectation of the continuance for a reasonable time. It does not render an employment casual that it is not for any specified length of time, or that the injury occurs shortly after the employé begins work. Under the facts above stated, and the principles announced, we conclude that Sam and William Gaines were not casual employés, within the meaning of the statute. See 1 Honnold on Workmen's Compensation, § 62,

p. 199 et seq., and cases cited in the notes; also, section 43, p. 51, Corpus Juris treatise on Workmen's Compensation Acts, and notes.

As to the third main question, hereinbefore referred to in this opinion, the contention of the employer, defendant in error here, is to the effect that he, Martin D. Funk, was not, at the time of the accident, such an employer as is subject, without his election, to the provisions of the Workmen's Compensation Act. In this connection, defendant in error relies upon section 4 (d) III of the act, which reads as follows:

"III. This act is not intended to apply to employers of private, domestic servants or farm or ranch labor; nor to employers who employ less than four employes regularly in the same business, or in or about the same place of employment; provided, that any such employer may elect to accept the provisions of this act, in the manner provided herein, in which event he and his employes shall be subject to and entitled to all the provisions of this act."

The particular part of this section upon which the defendant in error specially relies is the expression "in or about the same place of employment," and it is argued that the employer in the instant case is not subject to the act, because less than four persons were engaged in performing services at the pit or bank of silica, where Sam and William Gaines were working; in other words, it is contended that the act does not apply to the defendant in error simply because he employed less than four persons at the particular place of employment where the accident occurred.

[5, 6] Under the construction which the defendant in error apparently places upon the Workmen's Compensation Act, and particularly section 4 (d) III thereof, an employer would be subject to the act only as to those employes who work at a place where four or more persons are working, under employment, and would not be subject to the provisions of the act as to those employes who perform services at some particular place, appurtenant to the employer's business, at which less than four persons are working. Such a construction of the statute cannot be upheld. It readily appears from other sections of the act that, if an employer is subject to its provisions, he is subject as to all employes engaged in a common employment, even if a particular group of less than four of them are performing services at some one place. It may be that section 4 (d) III, considered literally, to some extent supports the contention of the defendant in error; but, if so, it is inconsistent with other sections of the act. In the consideration of conflicting provisions in a statute, the great object to be kept in view is to ascertain the legislative intent. 36 Cyc. 1130.

The intent of the Legislature as to who shall be deemed to be employers, subject to

the provisions of the act or within the meaning of the act, is expressed in section 4 (d) II, where it is provided that—

"The term 'employer' shall mean and include: \* \* \* II. Every person, association of persons, firm and private corporation (including any public service corporation), \* \* \* who has four (4) or more persons regularly engaged in the same business or employment, (except as otherwise expressly provided in this act)."

Subdivision III of this section, which is relied on by the defendant in error, does not say who shall be deemed to be employers, but rather who shall not, and its main purpose is to provide that the act shall not apply to employers of private, domestic servants, or farm and ranch labor, unless such employers elect to accept the provisions of the act.

That the intent of the Legislature was to bring under the act those employers who have four or more persons regularly engaged in the "same business or employment," as provided in section 4 (d) II, instead of limiting the application of the act to those having such number of persons "in or about the same place of employment," according to the expression used in section 4 (d) III, is also indicated by the language employed in section 9, subd. II, which reads, in part, as follows (italics ours):

"II. On and after August 1, 1915, every employer of four or more employes, not including private domestic servants and farm and ranch laborers, engaged in a common employment, shall be conclusively presumed to have accepted the provisions of this act. \* \* \* Any employer commencing business subsequent to August 1, 1915, may make his election not to become subject to the provisions of this act at any time prior to becoming an employer of four or more employes, in a common employment. \* \* \*"

Considering together the various sections and subsections above referred to, they must be held to provide that an employer is subject to the provisions of the act, without his election, if he employ four or more persons in the same business, or if he is an employer of "four or more employes engaged in a common employment."

It seems clear that the manufacture of brick, in the sense that material is made into brick, and the procuring of material to be used in such manufacture, together constitute but one business or employment.

The commission found, and the evidence supports the finding, that the silica mine was operated by Funk "in connection with his brick business in the city of Wray." The evidence shows that the employer operated a brick manufacturing plant and brick yard in Wray, and that about 20 per cent. of the volume of material mined from the silica bed or bank operated by Funk, and at which Sam and William Gaines were working, was used by him in the manufacture of brick at such

plant or yard. The evidence shows, and it is not disputed, that more than four persons were employed by Funk in his business which involved the manufacture of brick and the mining of silica used in such manufacture. Those who were mining silica and those working in the brick yard at Wray were each and all together engaged in a common employment, within the meaning of the expression "common employment," as used in the Workmen's Compensation Act. The reason is that the purpose of the work of each was a common one; they were working to accomplish the same general end, the manufacture of brick. See definitions of "common employment" in 1 Words and Phrases (2d Series), p. 808.

Under the views expressed in this opinion, there is no ground shown in the record upon which the order and award of the Commission should be set aside. For the reasons above indicated, the judgment of the district court is reversed, and the cause is remanded, with directions to affirm the order and award of the Industrial Commission.

Reversed.

DENISON and BURKE, JJ., dissent.

(68 Colo. 437)

**RIO GRANDE RESERVOIR & DITCH CO.  
v. WAGON WHEEL GAP IMPROVEMENT CO. et al. (No. 9231.)**

(Supreme Court of Colorado. March 2, 1920.  
Dissenting Opinion April 5, 1920. On Petition for Rehearing July 6, 1920.)

**1. Waters and water courses ¶151—Expressed intent to abandon not forfeiture of rights to water appropriated.**

An intention expressed in a letter to abandon the construction of a reservoir for irrigation purposes did not cause forfeiture of water rights, unless possession relinquished and acts of ownership ceased.

**2. Waters and water courses ¶130—Seepage water could not be appropriated to detriment of prior appropriators.**

The owner of a reservoir could not appropriate seepage water and conduct it by ditch to the gates of a canal belonging to it far down the stream for direct irrigation purposes to the detriment of vested rights to the use of water from the stream, on the theory that the waters, having been impounded in the reservoir during the winter months when direct irrigation was impossible, could not have been appropriated for direct irrigation.

Garrigues, C. J., and Burke and Denison, JJ., dissenting in part.

En Banc.

Error to District Court, Costilla County;  
A. Watson McHendrie, Judge.

Adjudication proceedings by the Rio Grande Reservoir & Ditch Company against the Wagon Wheel Gap Improvement Company and others. From a judgment adjudicating certain priorities, plaintiff brings error. Affirmed in part and reversed in part.

Jesse Stephenson, of Monte Vista, and Goudy, Twitchell & Burkhardt and Frank B. Goudy, all of Denver, for plaintiff in error.

J. T. Adams, of Alamosa, for defendant in error Wagon Wheel Gap Improvement Co. Ezra T. Elliott, of Del Norte, for defendant in error Wilson and others.

Charles M. Corlett and George M. Corlett, both of Monte Vista, for defendant in error San Luis Valley Irr. Dist.

James W. McCreery and Donald C. McCreery, both of Greeley, Stoten R. Stephenson, of Ft. Morgan, and Harry N. Haynes, of Greeley, amici curiæ.

BAILEY, J. Plaintiff in error, The Rio Grande Reservoir and Ditch Company, was awarded certain priorities for 43,565.06 acre feet of water for storage purposes in the Santa Maria reservoir in an adjudication proceedings in Costilla County. At the same time other awards were made to the several defendants in error, all of prior date to that of plaintiff in error. In the same adjudication plaintiff in error was denied a decree for an original appropriation for direct irrigation, for the Santa Maria Seepage Ditch, and brings the record here for review on both propositions.

The matters for determination are, whether upon the evidence the date of the decree awarded to the Santa Maria Reservoir should have been earlier, and whether the capture of the seepage water by the Santa Maria Ditch can be regarded as such an original appropriation as to entitle it to a decree antedating all other appropriations for water for direct irrigation on the stream to which such seepage is plainly tributary.

Upon the first question it appears that the Santa Maria reservoir was originally a small lake, the basin surrounding which was surveyed by one Thorne in August, 1896, for the purpose of locating a reservoir site. The Rio Grande Reservoir and Ditch Company was then organized and a map and statement prepared for it by Thorne was filed in accordance with the federal act of 1891, for the purpose of obtaining a right of way over public lands.

By this map and statement the reservoir company claimed a reservoir capacity of 15,971.2 acre feet, which claim was lodged with the State Engineer on October 8, 1896. On December 5, 1896, the company was notified by the Secretary of the Interior that approval of the filings would be held in abeyance because of international complications.

with Mexico in relation to the diversion of water from the Rio Grande river in New Mexico and Colorado. At this date the company had expended over \$4,000.00 in preliminary preparations and construction. It continued to expend money on the project, and to do everything that could reasonably be done in the absence of a right of way across the public domain, to protect and perfect its claim.

In 1901 the company determined to increase the capacity of its reservoir, and until November, 1907, when its application for the right of way was approved, it constructed ditches, built a dam, made numerous surveys for its inlet ditch, and in other ways expended upon the project, while the approval of its application for the right of way was pending, approximately \$12,000.00.

An amended map and statement was filed in the office of the State Engineer, in August, 1906. Work of some kind was done upon the project in 1907, 1908 and 1909, and in October, 1911, water was turned into the reservoir, which was used in 1911 upon lands to a total amount of 4,800 acre feet. In 1913 the amount so stored and used was 9,600 acre feet. In November, 1913, the reservoir was completed to its full capacity.

It is claimed that the court in its decree failed to give this company the benefit of the doctrine of relation, although that doctrine was applied in behalf of all other claimants. It is urged that upon the evidence the company's priority should bear date as of August 7, 1896, the time of the original survey by Thorne. The record substantially supports the contention of the company that the decrees awarded defendants in error, of date superior to its decree, are based upon less evidence of work done, money expended and diligence employed than that upon which it relies. It is urged that the provisions of section 3284, R. S. 1908, requiring the consideration of the diligence with which the work was in each case prosecuted, the nature of the work as to difficulties encountered, and all such like facts tending to show compliance with the law, in securing the priority claimed was disregarded as to this complainant but recognized as to all the others, and that the court utterly ignored the natural difficulties connected with the project, and the delay occasioned by the federal authorities in granting the right of way, when it determined that due diligence had not been exercised by the company in putting the water to a beneficial use.

It conclusively appears that work was done or money expended by plaintiff in error on this property in every year from 1896 until 1909. During all but two years of this period the project was held in abeyance by federal order. The other reservoirs to which senior priorities were awarded were found to have exercised due diligence up to the time of their respective approval by the De-

partment of the Interior, although their claim of diligence is supported by testimony identical with that offered by plaintiff in error in support of its claim. The trial court, however, applied the doctrine of relation to them, and refused it as to plaintiff in error, giving it a priority as of July 10, 1910, instead of August 7, 1896.

[1] From the brief of defendant in error it appears that the findings complained of were based on a certain letter written by the manager of several of the reservoir companies, but not of the one which owns the Santa Maria reservoir. The letter purports to show that the companies for which the writer was manager had abandoned the idea of constructing the reservoir, and from the testimony of the writer and of others it appears to have been written to mislead rival companies as to the true intentions of plaintiff in error, with a view to obtaining land needed for the Santa Maria reservoir at better prices. It can not, however, in any way bind the plaintiff in error, because it at all times diligently continued work on the project, and on the reservoir site referred to in the letter. Under the law an expressed intention to abandon does not cause forfeiture of rights unless possession is relinquished and acts of ownership cease. The letter, therefore, is not sufficient to justify the conclusion reached by the trial court that plaintiff in error had once abandoned the property and returned to it again in 1910.

[2] As to the denial of an original appropriation for direct irrigation for the Santa Maria seepage ditch it appears that after the Santa Maria reservoir was filled seepage water therefrom appeared at the base of one of the adjacent hills. The ditch in question was then constructed, such seepage water captured and measured over a weir. It was sought to appropriate this seepage water and conduct it by ditch to the gates of a canal belonging to the company far down the stream and there apply it to lands under that system, for direct irrigation purposes. The right is based upon the theory that the waters having been impounded in the reservoir during the winter months when direct irrigation is impossible, have not been and could not have been appropriated for direct irrigation. *Ironstone Ditch Co. v. Aschenfelder*, 57 Colo. 31, 140 Pac. 177, is relied upon as authority to support this contention.

The question involved, as we view it, has been definitely settled against this contention in *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107, where this court makes the following announcement under conditions similar to those involved in this case:

"We take judicial notice of the fact that practically every decree on the South Platte River, except possibly only the very early ones, is de-

pendent for its supply, and for years and years has been, upon return, waste and seepage waters. This is the very thing which makes an enlarged use of the waters of our streams for irrigation possible. To now permit one who has never had or claimed a right upon or from the river to come in, capture, divert and appropriate waters naturally tributary thereto, which are in fact nothing more or less than return and waste waters, and upon which old decreed priorities have long depended for their supply, would be in effect to reverse the ancient doctrine, 'First in time first in right,' and to substitute in its stead, fortunately, as yet, an unrecognized one, 'Last in time first in right.'

\* \* \*  
"Every appropriation of water on this stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the river, and naturally returning to it, is available to supply such appropriations and decrees. To now permit independent appropriation and diversion of these waters in a way to adversely affect prior appropriations and decrees is in direct conflict alike with the spirit of the law under which such priorities have been decreed and the practical purposes for which these appropriations have been made and recognized. It is a well-known fact that practically all appropriations down the stream are dependent on return, waste and seepage waters for their supply. If a part of these waters may be cut off, then all of them may be, with the result that the stream might thus become wholly depleted, and all appropriations and decrees, no matter how early, \* \* \* would be stripped of their rights and rendered useless and of no practical worth or value.

"There is no law anywhere to support the contention that if these waters are naturally tributary to the river, still they may be taken by a new claimant to the damage and injury of prior appropriators upon that stream, simply because he captures and diverts them before they actually get into the river channel. If such act of capture and diversion can be upheld as lawful and proper, by the same reasoning a new claimant could divert the waters of a surface tributary, if he only be spry enough to capture and divert them before they actually reach and mingle with the waters of the main stream. When it is shown or admitted that these waters ultimately return to the river and thereby augment and replenish its flow, they \* \* \* are as much a part thereof as when they actually reach the stream. Whenever these waters start to flow back to the river and it is apparent that they will reach it, they constitute a part of the stream and are not subject to independent appropriation as new or added water, or because they have been used to serve one priority and have thus been artificially brought into that position."

This rule was followed and approved in *Trowel Land & Irrigation Co. v. Bijou Irrigation District*, 178 Pac. 297, in the following language:

"The law makes no distinction, as relates to the return of water to the stream, between that

from a reservoir supplied by a natural stream, or from a ditch supplied directly from the stream, regardless of the fact that the reservoir may be chiefly supplied in time of high water, or in the nonirrigation season. In the *Ramsay Case*, the seepage water involved escaped water, both from a reservoir and ditch, and it was there said, speaking of the identical stream here involved: 'Every appropriation of water on this stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the river, and naturally returning to it, is available to supply such appropriations and decrees.'

That part of the opinion on *Ironstone Ditch Co. v. Aschenfelder*, supra, quoted by plaintiff in error in support of its contention, is purely gratuitous and volunteer matter, and not responsive to any issue in that case. This is plainly apparent since the proceedings there brought were to change the point of diversion of certain appropriations, and the only question for decision, and the only point which could have been properly decided, was whether the proposed change would injuriously affect vested rights to the use of water from that stream. The dictum relied upon cannot be held to overrule former decisions of this court, nor do we think there was any purpose or intention to do so. In any event, the matter in this opinion relied upon can be considered only as the individual opinion of a single justice of this court, and of course, while persuasive, can in no sense be held to be the opinion of the court, much less can it be accounted as overruling our decisions which distinctly declare a different rule.

There is not, neither can there be, any question in this case of newly developed or added water, which subject presents a different question from the one actually involved, so that any such discussion is futile and wholly beside the case, since the seepage water under consideration, on the evidence adduced, is manifestly tributary to the Rio Grande river, from which stream the Santa Maria reservoir secured its storage appropriation. To permit the recapture of the seepage water from such reservoir, while on its way back to the river to which it is tributary, and allow it to be applied to land many miles down the river, under a claim of original appropriation for direct irrigation, prior in time to all other appropriations on the stream, would plainly constitute a wrongful use of water by the reservoir company, and would completely overturn the doctrine, so firmly established in this jurisdiction, that prior appropriation and use give the first and better right. *German Ditch & Reservoir Co. et al. v. Platte Irrigation Co.*, 178 Pac. 896.

It is easy to see how decrees for seepage water for direct irrigation, if made subject to vested rights, may properly be allowed.

and that such decrees might at times and under certain conditions prove most beneficial, but it is equally plain that, under a system of re-appropriation of seepage and return waters indefinitely carried on, awarding priorities antedating all others on the stream, the value of old rights might be not only greatly impaired, but utterly destroyed. Moreover, this proceeding was brought to obtain a decree for storage rights only, and it is of doubtful import whether in any event a decree for direct irrigation could properly be allowed in such action.

The findings and decree of the trial court will be reversed as to the date of the appropriation awarded plaintiff in error for storage in the Santa Maria reservoir and the cause remanded with directions to the court below to modify the decree and award plaintiff in error a storage capacity as of August 11, 1896, for 15,871.21 acre feet, of which 9,600 feet is absolute; also a priority as of September 22, 1902, for 27,954.85 acre feet, which together with the remainder of the August 11, 1896, priority, is conditional. That part of the decree denying an appropriation of seepage water to the Santa Maria seepage ditch for direct irrigation, antedating all other direct irrigation decrees on the stream, is affirmed.

On the reversal of the judgment as to date of the reservoir priority, all concur. On the affirmance of the disallowance of a decree for direct irrigation, the CHIEF JUSTICE and Mr. Justices BURKE and DENISON dissent. Affirmed in part and reversed in part.

GARRIGUES, C. J. (dissenting). It is manifest that the rights of plaintiff in error depend upon whether the water in question is a tributary and a part of the flow of the river. The majority opinion can only be sustained upon the assumption that it is a tributary and belongs to the natural flow of the stream. I think, under the evidence, that the disputed water is extraneous to the natural or regular flow of the stream, which was only being used as a conduit. Plaintiff does not claim a priority, but seeks recognition from the court and water officials of its right to the water and the use of the stream as a conduit for its distribution. The majority opinion denies this right and holds that it will destroy the value of old ditch priorities. From this part of the opinion I dissent.

The majority opinion is based upon *Comstock v. Ramsay*, 55 Colo. 244, 133 Pac. 1107. The law as announced upon the statement of that case necessary for its decision is undoubtedly correct, and has always been the undisputed rule in this state; no one claims the contrary, although there are some expressions and dicta in that opinion which might have been omitted with propriety. It is in fact decided but one point, namely, that a junior appropriator cannot divert the water

of a tributary to the detriment of a senior upon the main stream. The court in that case, 55 Colo. at page 256, 133 Pac. 1111, says:

"What and all we do intend to here determine, on this particular point, is that where it appears that such waters are in fact tributary to the stream, and form a substantial and material source of its supply, upon which appropriators therefrom have long depended for water to satisfy their priorities, that then, as between such bona fide appropriators and users of such waters and a new claimant, the former has the first and better right."

With that I think every irrigation lawyer in Colorado can agree. No one claims here that a junior appropriator can take the water of a tributary to the detriment of a senior upon the stream. What I deny in this case is that the impounded water flowing in this seepage ditch at the base of the dam ever became, under the facts and circumstances of this case, a natural water course, or a part of the natural flow or a tributary of the river.

I lay down, as the first point in the discussion, that water which one has saved, developed, or produced, or which comes from an independent or extraneous source to the natural irrigation flow of the stream, and has been put into the river as a conduit by the producer or owner for the purpose of taking it out and using it lower down the stream for irrigation, belongs to the one who put it into the stream as against all priorities; or, put in a way already expressed by this court, one who by his own efforts increases the natural flow of a stream, either by saving or developing water, is entitled to its benefit to the extent of the increase as against all consumers, regardless of priority. The right is not based upon priority, and the stream is only used as a canal or conduit. This rule is sustained without an exception by every authority in every irrigation state. *Platte Val. Irr. Co. v. Buckers Irr. M. & L. Co.*, 25 Colo. 77, 53 Pac. 334; *Ripley v. Park Center L. & W. Co.*, 40 Colo. 129, 133, 90 Pac. 75; *Ironstone D. Co. v. Aschenfelder*, 57 Colo. 31, 42, 43, 44, 140 Pac. 177; *McKelvey v. N. S. Irr. Dist.*, 179 Pac. 872; *Churchill v. Rose*, 136 Cal. 576, 69 Pac. 416; *Pomona L. & W. Co. v. San Antonio W. Co.*, 152 Cal. 618, 623, 93 Pac. 881; *Miller v. Wheeler*, 54 Wash. 429, 103 Pac. 641, 23 L. R. A. (N. S.) 1065; *Schulz v. Sweeny*, 19 Nev. 362, 11 Pac. 253, 3 Am. St. Rep. 888. Our statute expressly confers this right to the use of the stream.

In the *Buckers Case*, 25 Colo. 77, 53 Pac. 334, it is expressly held that one who increases the average continuous flow of a stream by his own energy and expenditure is entitled to the increase, and the use of the stream as a conduit, as against all other consumers on



the stream, regardless of their priority. This case has never been modified, unless it was intended to silently overrule it in the Ramsay Case. It has often been followed and quoted in other states, and is authority that one is entitled to the increase to the natural flow which he put into the stream with the intention of taking it out for irrigation use. The three Buckers Cases—25 Colo. 77, 53 Pac. 334, 28 Colo. 189, 63 Pac. 305, and 31 Colo. 62, 72 Pac. 49—involve the same water. Beaver lake was an old bed of the river, and Beaver brook was its outlet, and adjacent sloughs caused by seepage from irrigation were the source of supply of Beaver lake and of Beaver brook, the latter being a natural water course and a tributary of the Platte river. The Buckers company constructed Beaver Lake ditch, a seepage drain ditch, which intercepted and diverted the water from Beaver brook. It claimed the use of the water as against prior appropriators upon the main stream (the Platte river), upon the theory that it had developed the water by draining adjacent lands, and had thus increased the natural flow, and was entitled to the increase. The lower court found on the first trial (reported in 25 Colo. 77) that Beaver brook was a natural water-course, and that the Buckers company had increased its natural flow by the drainage of seepage lands adjacent thereto, and therefore was entitled to *all* the water flowing in Beaver brook. Mark the word "*all*." The case was brought here, and reversed upon the ground that the court erred in giving the Buckers company *all* the water of Beaver brook. We held, Beaver brook being a natural water course and tributary of the Platte river, the company was not entitled to *all* the water as against senior appropriators, but expressly held that it was entitled to the use of the water in dispute to the *extent that it had increased the natural flow*. The error of the lower court specifically pointed out, and for which the case was reversed, was in giving it *all* the water, both that which it claimed to have developed as well as the natural flow of the stream. For this error the judgment was reversed and case remanded, and a retrial had which was reviewed by us and reported in 28 Colo. where at page 189 (63 Pac. 305) it is said:

"From this judgment [that is the former judgment giving defendants *all* the water] the plaintiff appealed to this court, where, upon consideration of this branch of the case it was held that the court erred in decreeing the present appellants [the Buckers Company] *all* the water from this source, because they were only entitled to the water flowing from Beaver Lake to the extent they had increased its average continuous flow."

So, we see, in 28 Colo. we expressly reaffirmed the rule theretofore so strongly pronounced in 25 Colo. In the syllabus in

28 Colo. at page 187, it is said, in speaking of the case in 25 Colo.:

"The appellate court sustained the lower court to the extent that such junior appropriators [the Buckers Company] were entitled to the increase of water they had caused to flow in the stream, but reversed the judgment because it decreed them *all* the water in the stream instead of only the increase, and the cause was remanded for a new trial," for this reason.

On the third trial over the same water the lower court found on conflicting evidence that there had been no increase of the natural flow; that the apparent increase was only a concentration of the water present in the sand and gravel, forming the natural channel, and the banks adjacent thereto; that the Buckers Company had added no water to the natural flow, but had simply intercepted the natural surface flow in the channel, and the water saturating the sand and gravel constituting the bed and banks of the channel, which amounted to a diversion of the surface and subterranean flow of the natural stream; that for this reason, the water they claimed to have developed was not an increase, but was in fact taken from the stream itself. This finding of the lower court was affirmed in 31 Colo. 62, 72 Pac. 49, but it accentuates the rule theretofore announced, and in no way abrogated, modified, or changed the former decisions. The case adheres to the rule of law announced in the two former cases, that one who increases the natural flow of a stream is entitled to the increase.

Where one, by his own energy and expenditures, with the intention of using it for irrigation, adds to the natural flow of a stream, it does not become a part of the natural flow, and such water though commingled, to distinguish it from the natural flow, has been given various names by the courts, such as, "the increase," "independent water," "artificial water," "developed water," "saved water," "excess water," "new water," "free water," "water from an extraneous source," "artificial accretion," etc., but whatever the name, and whether saved water or developed water, it is universally held in all the irrigation states that the one saving or developing it and adding it to the stream has a right to its use, and the use of the natural stream for its distribution, and to divert therefrom an equivalent amount for irrigation. This principle was announced by the Supreme Court of California as early as *Butte Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 709. In *Creighton v. Kaweah C. & I. Co.*, 67 Cal. 222, 7 Pac. 659, it is said:

"At best the plaintiff would be entitled only to have the defendant enjoined from obstructing the flow of that which would have naturally flowed, unaided by artificial means with which the plaintiff is not connected."

The matter is fully discussed in *Wiggins v. Muscuplabe L. & W. Co.*, 113 Cal. 195, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337, where the right of one to its use, who either saves or develops water by artificial means, is elaborately considered. In *Churchill v. Rose*, 136 Cal. 576, 69 Pac. 416, it is held that where one increases the natural flow of a creek, he is entitled to the increase as against all other appropriators. In *Pomona L. & W. Co. et al. v. San Antonio W. Co. et al.*, 152 Cal. 623, 93 Pac. 881, the whole matter is again reviewed, and many cases cited, and among others the *Buckers Case*, and it is held that such water, unless abandoned, does not become a part of the natural flow of the stream, and belongs to the person causing the increase. In closing the court says, 152 Cal. at page 624, 93 Pac. at page 884:

"This same doctrine is recognized by all the courts which have been called upon to consider it."

In *La Jara v. Hansen*, 35 Colo. at page 109, 83 Pac. at page 645, it is said:

"After waste waters reach the stream, unless there is then an intention by the owner to reclaim them, they become part of its volume, and inure to the benefit of the appropriators of its waters, to be enjoyed in accordance with their numerical priorities."

In *Ripley v. Park Center L. & W. Co.*, 40 Colo. at page 133, 90 Pac. 175, we held that artificial water, that is, water produced or developed from a source extraneous to the natural flow by the efforts of others, and put into the stream as a conduit for the purpose of taking it out and using it lower down for irrigation, belongs to those causing the increase, and is no part of the natural stream unless abandoned.

In *Comstock v. Ramsay*, 55 Colo. at page 256, 133 Pac. at page 1111, it is said:

"When such waters leave the control of the original appropriator, having been used either for direct irrigation or reservoir purposes, without intention of recapture or further use, by him, they immediately become a component part of the river, and cannot be lawfully diverted from their course to it by independent appropriation, to the injury of those having decreed priorities therefrom."

In the present case there was an intention to recapture and further use. Of course after any water reaches the stream, unless there is an intention by the owner to reclaim it, it becomes a part of the natural flow of the stream, but what I contend is, if it was put in with the intention of taking it out and using it, it belongs to the person causing the increase.

In the fourth paragraph of the syllabus to the *Aschenfelder Case*, 57 Colo. 31 (140 Pac. 177) it is said:

"Whoever has developed water from a source extraneous to the stream may discharge it into the stream, and, using the stream as a conduit, withdraw it below."

In *McKelvey v. North Sterling Irr. Dist.*, 179 Pac. 872, it is said in the first paragraph of the syllabus:

"Water seeping through a dam may be recaptured [by the owner] by means of an irrigation ditch, and other persons have no right to appropriate it."

This is an exact parallel of the instant case, and yet no mention is made of it in the majority opinion.

In *Miller et al. v. Wheeler et al.*, 54 Wash. 429, 103 Pac. 641, 23 L. R. A. (N. S.) 1065, a recent and well-considered case, concurred in by the full bench, it is held, where one, by his own exertion, energy, and expenditure, increases the natural flow or available supply of water in a stream, he has the right to its use to the extent of the increase, and may use the stream as a conduit for its distribution. This is a leading case, and similar in many respects to the *Buckers Case*, which it cites and follows. In that case seepage water caused from irrigation formed bogs and marshes on defendant's land, and the act complained of by plaintiff was the digging of a ditch and draining the marshes into the natural stream, which defendant used as a conduit, and taking the equivalent therefrom for irrigation as against plaintiff, a senior appropriator on the stream. At page 433 of 54 Wash., at page 642 of 103 Pac. (23 L. R. A. [N. S.] 1065) the court says the question is:

"Whether the water from this artificial source, [irrigation] having naturally gravitated into the soil, and percolating therein, may be ditched and drained for further use by the owners as against the right of a lower appropriator; in other words, whether percolating waters arising from an artificial source become a natural flow of an existing watershed and a part of its drainage stream."

The court, in answering this direct question, says that it may or may not, according to the facts in each particular case, depending upon the question of abandonment, but the court holds that the seepage water developed by drainage in that particular case, there being no abandonment, did not become a part of the natural flow of the stream, and that the parties causing the increase were entitled to its use, as against all other consumers on the stream. No question of priority involved. It reviews many cases, and upholds the universal rule that one is entitled to divert the amount he has increased the natural flow as against all prior appropriators on the stream. The artificial means of increase in that case was the drainage of lands seeped by irrigation, and the court held that this water, under the circumstances

of the case, was not a natural flow of the stream, but increase. The above cases have been cited for the purpose of showing the established rule that one who increases the flow of a natural stream is entitled to the increase.

The second point is whether the conditions above mentioned are met. That is, whether plaintiff increased the natural flow of the stream without any intention of abandoning the increase.

Whether waste water escaping from a reservoir is a tributary where no tributary existed before the construction of the reservoir depends upon the facts and circumstances of each particular case. There was no abandonment of the water in this case. On the contrary, the evidence shows an intention to recapture and use the escaping water, so the element of abandonment is eliminated, and the case must be decided upon the theory that there was an intention to recapture and use the escaping water.

The evidence shows plaintiff saved and added to the stream a volume of water not theretofore wont naturally, or at all, to flow down the stream at that time and place. It diverted, stored, and saved unused and unappropriated water which, had it not done so at the time, would have gone out of the state and been lost to every one for direct irrigation. Hence I say it was water saved by plaintiff at a time and place when no appropriator for direct irrigation had any interest in it. For this reason, it was immaterial to those having decreed priorities of appropriation for direct irrigation what became of the water plaintiff impounded, for it was saved at a time when in no event could they have used it. What I mean is, the water plaintiff saved from being lost came into the reservoir from a source extraneous to the natural irrigation flow of the stream, and the escaping water was an artificial increment to the stream over the natural flow, and belongs to the one who saved it. The point I wish to make is that water saved, which would be otherwise lost, belongs to the one who saves it. I think the owner may, in constructing a reservoir, in anticipation of leakage, construct a drain ditch or ditches below the dam to recapture escaping water, and has the right to apply it to the same beneficial use as the water within the reservoir as against all appropriators on the stream when his intention to do so is manifested in due time. The water stored in a reservoir does not depend on any rule of priority except as to filling, but is water saved, and the right to its use belongs to the one who saved it.

It simply goes back to the first proposition that one who increases the natural flow by saving water that otherwise would be lost is entitled to the increase. The fact that

this water was stored is proof sufficient that it would not have been saved, but would have gone down the river into the Gulf of Mexico, except for the energy and expenditure of plaintiff. No rights ever accrued to others in anticipation of this water. Its use was never available nor anticipated for direct irrigation prior to the construction of the reservoir, and no right was ever founded upon it. It is as much saved water to which plaintiff has the right as though it had been drawn directly from the reservoir for the purpose of putting it into the stream for transportation.

It has been suggested that the water escaped from the reservoir against the will of the owner; therefore he is not entitled to recapture it. But why should that make a difference, if the intention to recapture it was the same as the intention to recapture water voluntarily released from the reservoir? It seems a strange doctrine that one cannot recapture his property that has involuntarily escaped.

In the majority opinion it is stated:

"Every appropriation of water on the stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the river, and naturally returning to it, is available to supply such appropriations and decrees."

No doubt all decreed priorities of appropriation on a natural stream are based upon the theory that the flow of the stream and its tributaries from any source that has become an integral part of the stream shall inure to the benefit of all appropriators on the stream in the numerical order of their priorities. But I deny that any appropriation or decree is made or based upon the theory that independent or extraneous water, or water that has been saved in a reservoir, and is being conveyed for distribution, using the stream as a conduit, will inure to the benefit of any priority or to any person except the one who saved it.

In the third paragraph of the Aschenfelder Case, 57 Colo. 31 (140 Pac. 177), it is said:

"Seepage water which is being wasted is the subject of appropriation. The appropriation thereof is not included in or controlled by a prior adjudication decree in the same district."

If the majority opinion intends so to state, it is a grievous misstatement to say that prior appropriators on this stream long depended, or ever depended, upon this disputed water to satisfy their priorities. It was saved to the stream long after their rights accrued.

The majority opinion states that the question is "whether the capture of seepage water by the Santa Maria ditch can be regarded as such an original appropriation as to entitle it to a decree prior to all other ap-

propriators on the stream to which seepage is tributary." This does not state the question correctly. In fact, I do not see how it could be stated more incorrectly. No such claim is made, and no such question is involved. What plaintiff claims is recognition of the right it already had to use the impounded water in dispute, regardless of priorities, upon the theory that it is excess or increase which it produced and put into the stream without any intention of abandoning, but as a conduit for transportation, with the intention of taking it out and using it lower down for irrigation.

The majority opinion further states:

"If such act of capture and diversion can be upheld as lawful and proper, by the same reasoning a new claimant could divert the waters of a surface tributary, if he only be spry enough to capture and divert them before they actually reach and mingle with the waters of the main stream."

This is begging the question. Plaintiff is not diverting the water of a tributary, or claiming the water by virtue of priority of appropriation. It only asks the right to take the increase it saved and put into the stream. It asks no part of the natural flow. This water is not a tributary in the sense that it is a part of the flow of a natural stream. All that plaintiff needs or seeks is recognition by the police officers on the stream of its right to the use of the water it saved, and the use of the stream as a conduit, and it is proper that the courts should grant such recognition in an adjudication proceeding, as a guide to the water officers. This course was pursued in *McKelvey v. N. S. Irr. Dist.*, 179 Pac. 872. I think the case should be reversed and remanded to the lower court to enter a decree in the adjudication proceeding in accordance with the views I have herein expressed.

DENISON, J. I dissent from the opinion of the majority and concur in that of the Chief Justice.

For convenience in this discussion, I shall use the term "direct supply" as equivalent to "that part of the water of the stream available for direct irrigation."

The statement in the majority opinion that the question before us is "whether the capture of the seepage water by the Santa Maria ditch can be regarded as such an original appropriation as to entitle it to decree prior to all other appropriators on the stream to which such seepage is tributary" is inaccurate.

The water in question is not ordinary seepage, and conclusions based on the theory that it is so will be unreliable, and the principal question is not whether the capture of it is a valid appropriation, but whether the owner of the reservoir from which it has escaped has a right to it without appropriation.

It is either mere leakage from the reservoir, or else it is an accretion or addition to the direct supply. It must be either one or the other, because it was not there before the reservoir was filled. If it is not mere leakage, it may perhaps be called seepage, but in that case it must be an accretion or addition to the direct supply, because, since no portion of the direct supply can be lawfully used to fill the reservoir, it follows that all the water, the winter water, for instance, put into the reservoir and released in the irrigation season, must, with mathematical certainty, be an addition to the direct supply.

I think this water is leakage. True, some of it comes through a ridge, a natural barrier, but that is essentially a dam, and is used by the constructors of the reservoir as a part of their dam. Even if it were not a part of the dam, nevertheless, when reservoir water escapes, it is leakage, and, if so, and if it can be identified as from the reservoir, it of right ought to be, and is, certainly, the property of the owner of the reservoir as much after it escapes as before, until he abandons it. If the water in the reservoir is his and escapes against his will, and he has not abandoned it, how does it cease to be his? If he may retain the leakage by a cement lining on the inside of his dam, why not by a cement retaining wall on the outside of it? It is as if he had it in a tub, out of which it leaked, and he caught it in a pail.

If not leakage it is an accretion or addition to the stream, and as such belongs to him who created the addition, as shown in the opinion of the Chief Justice.

#### On Petition for Rehearing.

PER CURIAM. The sole question determined as to seepage water is that no decree, on the facts of this case, for an appropriation thereof by the reservoir company, for direct irrigation, antedating all appropriations from the river for like use, can lawfully be awarded. No other question, upon the subject of seepage, has been presented, considered, or adjudged herein.

Rehearing denied.

(28 N. M. 308)

**CARR et al. v. MAZON ESTATE, Inc.**  
(No. 2271.)(Supreme Court of New Mexico. March 11,  
1919. Rehearing Denied Aug.  
11, 1920.)*(Syllabus by the Court.)***1. Brokers**  $\S$  94—Appointment not authorizing binding contract of sale.

The appointment of a real estate broker or agent "to sell for it all of its property" does not, in the absence of special circumstances, authorize the agent to make a binding contract of sale for the owner.

**2. Frauds, statute of**  $\S$  117—Undelivered deed insufficient memorandum of sale of land.

In the absence of a valid contract of sale of real estate, an undelivered deed, or one delivered in escrow where the grantor retains control over the same, is not a sufficient memorandum to satisfy the statute of frauds.

Appeal from District Court, Bernalillo County; Reynolds, Judge.

Suit by Clark M. Carr and T. F. Godding, doing business under the firm name of the Carr Godding Sheep Company, against the Mazon Estate, Incorporated. Motion to strike parts of complaint sustained in part and overruled in part, and a demurrer sustained in part and overruled in part, and plaintiffs appeal. Affirmed.

H. B. Jamison, of Albuquerque, for appellants.

Neill B. Field, of Albuquerque, for appellee.

**PARKER, C. J.** The appellants alleged in their complaint, *inter alia*, as follows, in substance: On or about December 26, 1916, the appellee employed one J. B. Moore as a real estate broker and agent to sell for it all of its property, consisting of real estate and personal property, located in Valencia county, upon certain terms and conditions; that thereafter the appellee agreed with said Moore upon and designated one William Wilcox, with his consent, as trustee and depository of the legal title for the benefit of the prospective vendee or vendees of said property, and that said Wilcox agreed to act in such capacity, and that a memorandum of such facts was to be found in a certain finding of fact requested and signed by the appellee by its agent in a certain cause in which the said Moore was the plaintiff and the said appellee was the defendant in the district court of Bernalillo county; that thereafter, on January 2, 1917, the appellee executed and deposited with the First Savings Bank & Trust Company, in favor of said William Wilcox, or his assigns, divers deeds, bills of sale, and agreements, copies

of which are attached to the complaint and which convey the property concerned in the transaction; that appellee deposited said deeds, bills of sale, and agreements, under certain written instructions, with the said Bank & Trust Company, a copy of which instruction is attached to the complaint and which directs the said Bank & Trust Company to deliver all of the foregoing documents to the said Wilcox or his assigns on or before January 31, 1917, upon the payment in cash of \$84,575; that thereafter, on January 15, 1917, appellee, by its agent Moore, offered to sell the entire property described in said deeds, bills of sale, and agreements for the prices and under the conditions mentioned in said instruments to the appellants; that thereafter appellee, in Albuquerque, N. M., delivered to appellants an order in writing, signed by it, addressed to one of its agents in Valencia county, instructing its agent to permit appellants or their authorized agent to examine the property described in said instruments so that said appellants might decide whether they desired to purchase the property; that on January 26, 1917, appellants accepted said offer of January 15, 1917, and thereupon agreed to buy all of said property and to pay appellee the price specified in said deeds, bills of sale, etc.; that upon January 27, 1917, the appellee stated to appellants that it would refuse to deliver to the appellants, under any conditions, any of the property mentioned in said instruments, and did wrongfully and unlawfully refuse to deliver any of said property; that on January 31, 1917, the said Wilcox assigned to the said Moore all of his right, title, and interest under said deeds, bills of sale, and contracts, and covenanted to convey to the said Moore upon demand all of the real estate and personal property described in the said instruments; that thereafter, on January 31, 1917, the said Moore assigned to appellants, in the same manner as Wilcox had assigned to him, his rights under the said documents; that on January 31, 1917, after the assignment from Wilcox to Moore and the assignment from Moore to the appellants, appellants tendered to said First Savings Bank & Trust Company the sum of \$84,575 for the benefit of the said appellee, and demanded of the appellee that it deliver to them all the property so agreed to be delivered, and that it otherwise perform its said contract; that they had performed all of their obligations under said contract, but that the appellee had refused, failed, and neglected to perform, and the appellants claimed damages in the sum of \$20,000.

A motion to strike portions of the complaint was sustained in part and overruled in part, and thereupon a demurrer was filed

which was likewise in part sustained and in part overruled.

The appellee by its demurrer raises two points, viz.: That no privity of contract is shown between the parties, and that the contract sought to be set up is, if any existed, within the statute of frauds, and not enforceable. These propositions are presented in paragraphs A, B, C, and D of the demurrer.

[1] 1. The facts set up in the complaint clearly show that the agent, Moore, had no power when first employed to make a contract of sale with any one. He was a real estate broker and agent appointed by the appellee "to sell for it all of its property." There is no allegation of the granting of any authority to make a binding contract of sale for the appellee. That such authority as was given to this agent does not give authority to make a binding contract of sale, see Walker, Real Estate Agency, § 18; 9 O. J. 528; 4 R. C. L. title "Brokers," § 14; 1 Mechem on Agency (2d Ed.) §§ 797, 798; Craig v. Parsons, 22 N. M. 293, 161 Pac. 1117; Jaspar v. Wilson, 14 N. M. 482, 94 Pac. 951 23 L. R. A. (N. S.) 982. In the latter case cited the territorial court held that the circumstances in that case were such that the agent did have authority to make a binding contract of sale. The facts in that case were materially different from those set up by the complaint in the case at bar.

The allegations in the complaint, therefore, that the agent Moore offered to the appellants all of the property, and that the appellants accepted the offer and agreed to purchase the property, is of no avail to the appellants, whether the offer and acceptance were in writing or by parol.

[2] 2. Counsel for appellants seek to draw from the various writings between the parties authority for the agent to make the contract for sale. There is no allegation in the complaint that the appellee ever made the direct offer to sell the property to the appellants either in writing or by parol. At the time of the placing of the deeds and bills of sale in the bank, the appellants were unknown so far as it appears from the complaint. These papers were put in the bank on January 2, 1917, and it was not until January 15, 1917, that the agent, Moore, offered to sell the property to appellants. The writing signed by the appellee and addressed to its agent in Valencia county, which instructed said agent to permit appellants to examine the property, so that they might decide whether they desired to purchase the same, was not a promise or offer to sell to the appellants.

The deeds, bills of sale, etc., which were placed in the bank conveyed the property to one Wilcox, and the writing accompanying the same, signed by the appellee, authorized and directed the delivery of these papers to

Wilcox, or his assigns, upon the payment of a specified sum of money within a specified time. Evidence in writing of the character of Wilcox as grantee under said papers is furnished by a finding requested by appellee in a certain other cause in the district court of Bernalillo county between the agent, Moore, and the appellee, in an action by Moore to recover a commission for his services, which was to the effect that said Wilcox never had any intention of becoming the purchaser of the property, but that the agent, Moore, had procured the consent of Wilcox to permit his name to be inserted in the instruments for a consideration and upon the promise of Wilcox to make a conveyance to such person as might be designated by the said Moore.

These are all the writings which the appellants have pleaded and rely upon, and the question is: Do they, taken separately or together, authorize the agent, Moore, to make a binding contract with the appellants for the sale of this property? That the appellee at one time contemplated selling the property to appellants is evidenced by the written order to its agent to allow inspection and examination so that appellants might determine whether they would purchase, but appellee never granted to the agent, Moore, any authority to deal with the appellants in such a way as to bind it to convey. It did convey to Wilcox, or assigns, and placed the deeds in escrow, but they were executed and deposited so that Wilcox might transfer to the purchaser when found. It was merely to facilitate a sale when consummated that these papers were executed, and they were wholly without consideration as between the parties thereto. The papers might at any time have been withdrawn by the appellee; there being no contract between it and its agent, Moore, that they were to remain in escrow and be delivered upon the performance of conditions. Moore could not under the circumstances assume any adverse position to the appellee, as he was its agent and was acting for, and in concert with, it to effect the sale of the property. It did not under the circumstances surrender its dominion over its property, and there is no pretense that it ever either orally or in writing empowered the agent, Moore, to do more than find a purchaser.

This being our interpretation of the circumstances and the papers, the simple question recurs whether the oral offer of the agent and the oral acceptance by appellants effected an enforceable contract, and the evident answer is, of course, that it did not, because of the provisions of the statute of frauds. It may be that appellants by performance of the conditions imposed in the escrow before revocation by appellee might have secured the papers from the depository, but it failed to do so. Had it done so, the

case would resemble somewhat the case of *Blacknall v. Parish*, 59 N. C. 70, 78 Am. Dec. 239, cited by counsel for appellants. In that case the owner, being about to remove from the county where he lived to another part of the state, authorized the agent to sell for him the land in question, and to enable him to do so prepared a deed describing the land purporting to convey the same in fee, but leaving blanks as to the name of the vendee and the price, and gave oral instructions to the agent to fill up the blanks in the deed in case he made a sale and to deliver to the purchaser. The agent made a sale at a reasonable price and filled up the deed in the proper places with the names of the vendee and the price, and the price was paid. It was held under the circumstances that the deed, while not operative as such, was a memorandum sufficient to take the case out of the statute of frauds. It is to be observed, however, that in that case the agent was authorized by the owner to sell and pass title to the purchaser, which he attempted to do by means of a writing in the form of a deed, which was delivered and the purchase price paid. There was evident intent on the part of the owner expressed in writing that the agent might contract and convey the title. Just so in the case at bar, there was an intent on the part of the appellee that the agent, Moore, might find a purchaser for the property and he might deliver the papers placed in escrow to the purchaser upon the performance of the conditions, and had the same been done a good title would have passed to the appellants. But the appellee gave no irrevocable power to the agent, and until payment of the price named the agent had no power to deliver the papers or to make a contract for their delivery. The appellee reserved the right under the circumstances to abandon the enterprise at any time before the payment of the money. On the other hand, in the North Carolina case the transaction was consummated, and it became an enforceable contract between the parties. In such a case, of course, the deed, though defective, was a sufficient memorandum of a contract actually made to satisfy the statute. This distinction is pointed out in 2 Page on Contracts, § 686. The author states that the weight of authority is that an undelivered deed, or a deed in escrow, is not a sufficient memorandum to take the contract out of the statute of frauds. Upon principle this must be correct, although there is great conflict in the cases. Of course, if there is a contract in fact made with authority by an agent, a deed executed in pursuance of the contract and referring to it would be a memorandum sufficient to satisfy the statute. But where no contract exists independent of the deed, an undelivered deed can create no contract and is not evidence of a contract; there being none. When

the deed is delivered, it becomes the contract, and of course evidences the same. See in this connection 29 A. & E. Ency. Law (2d Ed.) 855; 20 Cyc. 257; *Charlton v. Columbia Real Estate Co.*, 87 N. J. Eq. 629, 60 Atl. 192, 69 L. R. A. 394, and note, 110 Am. St. Rep. 495, 3 Ann. Cas. 402. See, also, *Moore v. Ward*, 71 W. Va. 393, 78 S. E. 807, 43 L. R. A. (N. S.) 390, Ann. Cas. 1914C, 263, and note, where recent cases are collected. In some of the cases the distinction is made that an undelivered deed may be sufficient memorandum where it contains a recital that it is made in pursuance of a previous contract, and not otherwise. An example of this holding is, *Lowther v. Potter* (D. C.) 197 Fed. 196.

*Kopp v. Reiter*, 146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273, 87 Am. St. Rep. 156, is an instructive case on the general subject under discussion. In that case Reiter, the husband of the owner, contracted in writing for a sale of the property to Kopp, who paid \$250 as earnest money, and agreed to pay \$2,750 after title was examined and found to be good. For the balance Kopp was to give his notes secured by a trust deed on the property. Reiter had been brought into communication with Kopp by a real estate firm, and the earnest money and contract were deposited at their office. Abstract was delivered to Kopp, who after examining it, demanded an affidavit establishing the death of a party whose death was recited in one of the deeds. Meanwhile a warranty deed had been executed by Mrs. Reiter and her husband, but was retained by the latter. Kopp also executed the note and trust deed, but they were never delivered to Reiter. The affidavit demanded was never obtained. On a certain date Mrs. Reiter told her husband that, unless Kopp closed the transaction on that day, she would not permit the deed to be delivered. Kopp was communicated with, and said that he could not pay the money until the following Monday. Reiter upon receiving this answer said that the business must be completed on that Saturday, or not at all. When Kopp came on Monday to pay the money, he was told that it was too late. On Wednesday Kopp tendered the amount he was to pay down and the note and trust deed, which were refused, and a few days after the warranty deed was destroyed. In Illinois their statute requires authority of an agent to make a contract for the sale of real estate to be in writing, which was not had in this case by the husband. The contract therefore was a parol contract. The deed executed by the wife was not executed with reference to the previous written contract, but with the understanding that the husband was to deliver it upon receiving \$3,000 in money and a note and trust deed for \$2,000. The court said:

"Where, as is the case here, the owner of the land, without making a valid executory contract to convey it, deposits a deed of it with a third person to be delivered to the grantee upon certain terms, he may cancel the instructions given to such third person and recall the deed at any time before the specified terms have been complied with; nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner agreeing to convey the land therein described so as to authorize a decree of specific performance. A deed which has not been delivered is not, by its own force and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds."

In *Morrow v. Moore*, 98 Me. 373, 57 Atl. 81, 99 Am. St. Rep. 410, a deed was executed by the owner and sent to his attorney for delivery upon the payment of the purchase price, and the court said:

"Nor do these facts, the signing of the deed by the plaintiff and its being sent by him to his attorney, constitute a sufficient memorandum in writing to take the contract out of the statute of frauds. It was still an unexecuted deed because undelivered and still in the possession and under the control of the grantor. *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124."

In *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427, the parties entered into a parol agreement for the sale of certain land at a stipulated price. The purchaser paid the owner a small sum on account of the purchase money, and the latter executed a deed of the premises to the purchaser and delivered the same to his attorney, with directions to deliver it if the purchaser should two days later deposit with the attorney his notes and mortgages on the property of a certain sum and at the same time pay the balance of the agreed price. At the appointed time the purchaser deposited with the attorney the notes, mortgages, and money as agreed, and demanded the deed; but the attorney, acting in obedience to directions from the owner, refused to deliver the deed. At the same time the owner tendered back to purchaser the money which the latter had paid when the verbal agreement was made. The action was brought to compel the attorney to deliver the deed. The court, after an examination of many of the cases discussing the question of the delivery of a deed being necessary, says:

"But we have not discovered a single case in which it has been held that one who has deposited a deed of land with a third person with directions to deliver it to the grantee on the happening of a given event, but who has made no valid executory contract to convey the land, may not revoke the directions to the depository and recall the deed at any time before the conditions of the deposit have been complied with, provided those conditions are such that the title does not pass at once to the grantee upon delivery of the deed to the depository."

In *Mertz v. Hubbard*, 75 Kan. 1, 88 Pac. 529, 8 L. R. A. (N. S.) 733, 121 Am. St. Rep. 352, 12 Ann. Cas. 485, a real estate broker wrote to the owner of a tract of land saying that he had a customer for it and asking its price. Correspondence followed, which resulted in a contract in writing for the sale of the land, except that, while it showed that the agent was acting for another, and was not himself bound, it nowhere disclosed the identity of his principal. The owner refused to convey, and the would-be purchaser brought an action for specific performance. The court, after an exhaustive review of the authorities, said:

"Where a written agreement for the sale of lands is entered into by two competent persons, each apparently acting for himself, the requirements of the statute of frauds are fully met and the result is a valid and enforceable contract. Being then complete, it has no further concern with the statute. It is like any ordinary written contract. Parol evidence cannot vary its terms, but may add a new obligor or obligee by showing that one or the other of the parties was in fact acting as the authorized agent of a third person. The authorities are practically unanimous on this proposition. [Citing cases.] But when the writing discloses that one of the persons is avowedly acting as an agent for some one else, who is not named or described, an entirely different situation is presented. An imperative requirement of the statute is that the memorandum must indicate the parties. 29 A. & E. Ency. of L. 864. This requirement is not met by the naming of an agent who confessedly acts only as such. Not being personally concerned in the matter, assuming no individual liability, he is not a party to the agreement. The mention of his name is therefore immaterial, and fails to satisfy the statute. The memorandum being for this reason futile, no enforceable contract results."

So in the case at bar neither Moore, the agent, nor Wilcox, the trustee, assumed any individual liability or made any contract with the appellee by reason of the papers heretofore mentioned. These papers, as heretofore pointed out, were prepared merely for the purpose of facilitating the transaction in case a purchaser should be found, and were not intended by the parties as any contract between them. The appellee therefore necessarily retained full control and dominion over them.

Many other cases might be cited, but they are all referred to in the citations heretofore made and will require no further discussion.

It seems clear from the cases, as we understand them, that the facts presented in this case fall absolutely to make out any contract between the appellants and the appellee which is enforceable under the statute of frauds. It is true that appellants allege that they tendered to the bank the purchase price of the property for the benefit of the appellee within the time limited by the terms of



the escrow, if such it may be called, but we do not understand from the brief of counsel that any reliance is placed upon this allegation as showing performance by appellants. What appellants rely upon is the proposition that the papers pleaded and set out constitute a sufficient memorandum of a contract between the parties to satisfy the statute of frauds. In this, as we have seen, they are in error.

It follows that the judgment of the district court was correct and should be affirmed; and it is so ordered.

ROBERTS, J., concurs.

RAYNOLDS, J., having tried the case below, did not participate.

(28 N. M. 288)

**ABO LAND CO. v. TENORIO, Sheriff.**  
(No. 2363.)

(Supreme Court of New Mexico. June 21, 1920.)

*(Syllabus by the Court.)*

**1. Bankruptcy** — 438 — Property not taken in charge by trustee remains in or reverts to bankrupt.

Where a trustee in bankruptcy elects not to take and charge the estate with incumbered property of the bankrupt, or where he abandons it, the property or right, whatever it is, remains in or reverts to the bankrupt.

**2. Bankruptcy** — 438 — Right of redemption, abandoned by trustee, reverts to bankrupt.

Where a trustee in bankruptcy abandons the right to redeem property from an execution sale, such right passes or reverts to the bankrupt, and he may exercise it.

**Appeal from District Court, Torrance County; Ed Meachem, Judge.**

Mandamus by the Abo Land Company against Roman Tenorio, Sheriff of Torrance County, to compel the issuance of a deed. Judgment for defendant, and plaintiff appeals. Affirmed.

Rodey & Rodey, of Albuquerque, for appellant.

R. L. Hitt, of Willard, for appellee.

RAYNOLDS, J. This case comes up on a stipulation as to the facts, which is as follows:

That the suit is a petition for mandamus to compel the sheriff of Torrance county, N. M., to issue to the petitioner, the Abo Land Company, a deed for an undivided two-thirds interest in and to lots 10, 11, and 12 in block 15 of the townsite of Mountainair, Torrance county, N. M., and a deed for an undivided one-half interest in and to the S. W.  $\frac{1}{4}$  of N. E.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 6, township 3

north, range 7 east, N. M. P. M., also situated in said Torrance county, N. M.

That on January 29, 1912, the Torrance County Savings Bank recovered judgment in the above-named court against one Spencer and wife, W. M. McCoy & Co., W. M. McCoy, and J. P. Dunlavy. That on February 1, 1915, W. M. McCoy & Co., and W. M. McCoy and J. P. Dunlavy as individuals, were adjudged bankrupts.

That the interests in the lots first above described were scheduled as the individual property of W. M. McCoy, and the interest in the property last above described was scheduled as the property of J. P. Dunlavy.

That on October 28, 1916, the defendant, Roman Tenorio, as sheriff of Torrance county, under an execution issued in the case against Spencer and wife et al., as aforesaid, levied upon and sold by two separate sales the interests, respectively, in the above-described real estate to the petitioner, the Abo Land Company aforesaid, and issued to it his certificates of sale therefor.

That on May 18, 1916, the trustee in bankruptcy obtained an order from the federal judge of New Mexico to abandon the interests in the land last above described as worthless and burdensome, on account of the mortgages to which it was subject, and for the trustee to refuse to take the same into his possession.

That, although all of said bankrupts have long since been discharged, the bankruptcy case is still open and pending in the District Court of the United States for New Mexico.

That within one year from October 28, 1916, the said J. P. Dunlavy attempted to redeem the interests in said real estate, and the defendant sheriff issued to him certificates of redemption therefor.

That after the expiration of one year from said October 28, 1916, the purchaser of said two interests in each of the pieces of real estate above described, to wit, the Abo Land Company, applied to said sheriff for a deed therefor, but he refused to issue the same to it, because, as he alleged, the said property had been redeemed from said execution sales as aforesaid; hence the petition for mandamus.

That after full proofs were introduced in the cause the court made findings of fact as aforesaid, and in addition found that:

"It is the opinion and judgment of the court that as to the interest in the town lots above described the said J. P. Dunlavy had no right of redemption, as it was the individual property of W. M. McCoy, and as to said interest the writ should be granted; that as to the interest in said property last above described, when the trustee abandoned the same, J. P. Dunlavy's title to the same remained in him, and he had the right to redeem, and that as to such interest the writ should be denied."

That thereupon a proper final judgment was entered in the cause, granting the writ of mandamus as to the interest in the lots, and denying it as to the interest in the tract of land, to which each party duly entered an objection and prayed for and was granted exceptions.

That thereupon the said Abo Land Company, as to that portion of the judgment denying the

writ, prayed an appeal to the Supreme Court of the state, which was granted.

Appellant assigns as error the action of the lower court, first, in holding that a trustee in bankruptcy may or can abandon the property of the bankrupt. In this contention we think he is in error.

"It has long been a recognized principle of bankrupt law that a trustee is not bound to take property of an onerous or unprofitable character, or property which will be a burden, instead of a benefit." Loveland on Bankruptcy (3d Ed.) par. 151, and cases cited.

[1] Appellant further assigns as error the holding of the trial court that a bankrupt could redeem at an execution sale, and in failing to hold that the trustee was the only one who had this right to redeem.

The Bankruptcy Act, as above shown by the authorities, permits the trustee to elect whether he will take incumbered property or not, and to elect whether he will abandon incumbered property which he holds in his possession. The cases go further, and hold that where the trustee has elected not to take the property, or has abandoned it, whatever title or right the trustee had reverts to the bankrupt, and he may use it.

"Where the trustee elects not to take the property or right of the bankrupt, and charge the estate with it, the property and right, whatever it is, remains in the bankrupt." Loveland on Bankruptcy (3d Ed.) par. 151, and cases cited.

"Upon abandonment or refusal of title by the trustee, the property reverts in the bankrupt." Brandenburg on Bankruptcy (4th Ed.) par. 760, at page 552, and cases cited.

Appellant cites and relies upon the case of *In re Lighthall* (D. C.) 34, *Am. Bankr. Rep.* 594, 221 Fed. 791; for the proposition that closing an estate in bankruptcy does not have the effect of transferring "title to the unadministered assets which had vested by operation of law in the trustee back to the bankrupt." The case cited does not apply to the present one, for it was found as a fact in that case that the trustee had not abandoned nor elected not to take the property in question. It further appears that, unlike the present case, the estate had been closed, and the question was whether, upon the estate being closed, the unadministered assets belong to the trustee, or had reverted to the bankrupt. In this case the question is whether or not, by an unambiguous act of the trustee in abandoning the property or right in question, the right or property had passed to the bankrupt.

[2] It is therefore apparent that the trial court properly refused to issue a mandamus to the sheriff, commanding him to make a deed to the appellant for the land in question, where, as here, the bankrupt had exercised,

within a year from the date of the execution sale, the right to redeem, which right the trustee had abandoned.

Finding no error in the record, the case is therefore affirmed; and it is so ordered.

PARKER, C. J., and ROBERTS, J., concur.

(28 N. M. 236)

MAXWELL v. HOLLAND. (No. 2407.)

(Supreme Court of New Mexico. June 14, 1920.)

(Syllabus by the Court.)

1. Brokers  $\S$ 2—Employment held contract for services and not for brokerage.

Where one is employed to purchase cattle for another at a certain specified commission per head, it is a contract for services to be rendered, and the principle that the agent must be the procuring cause of the sale or purchase has no application.

2. Principal and agent  $\S$ 81(4)—Assistance of agent in purchasing cattle on commission held to entitle him to such commission.

Where plaintiff is employed to purchase cattle for the defendant at a certain specified commission per head, it is not error in this case to instruct that he can recover his commission if he purchased the cattle for the defendant, or assisted the defendant in purchasing the cattle, because under the facts as shown by the evidence, purchasing for the defendant, or assisting the defendant in purchasing, mean the same thing.

Appeal from District Court, Roosevelt County; Bratton, Judge.

Action by Fred L. Maxwell against William Holland, before a justice of the peace. From a judgment of the district court affirming a judgment of a justice of the peace in favor of plaintiff, defendant appeals. Affirmed.

G. L. Reese and Compton & Compton, all of Portales, for appellant.

T. E. Mears, of Portales, for appellee.

RAYNOLDS, J. This action originated in the justice court for Roosevelt county, N. M. The plaintiff, Fred L. Maxwell, alleged that on the — day of February, 1918, he and the defendant entered into a contract whereby the defendant employed plaintiff to purchase cattle for him, and that the defendant agreed to pay the plaintiff the sum of \$2.50 per head for all cattle which should be purchased by the plaintiff for the defendant under said agreement; that, pursuant to said agreement, the plaintiff purchased 76 head of cattle for the defendant, and the defendant thereby became indebted

to him in the sum of \$180, said cattle being purchased from one Wortham; that said sum was due the plaintiff, and defendant refused to pay the same.

The defendant's defense was a general denial of the allegations of the complaint. The case was tried in the justice court, and judgment rendered for the plaintiff in the sum claimed. The defendant appealed to the district court of said county, where the case was tried by a jury and resulted in a verdict for the plaintiff. From judgment on this verdict the defendant appeals to this court.

The evidence was conflicting. Both plaintiff and defendant were present when the cattle were purchased from Wortham. Plaintiff testified that he purchased the cattle for defendant; that defendant paid for them with his (defendant's) check; that defendant was not present at plaintiff's request, but had joined plaintiff on his way to buy the cattle. The defendant denied employing plaintiff to purchase the cattle in question. The witness Wortham testified that he did not know to whom he was selling, plaintiff or defendant; that they conferred apart and after conferring would make him an offer for his cattle. There was evidence that defendant had said plaintiff was a good close buyer and that he relied on his judgment. The making of this statement was denied by defendant.

1. Appellant, defendant below, assigns among other errors the giving by the trial judge of the following instruction:

"You are instructed that the plaintiff's cause of action in this action is a claim made by him for compensation for services rendered to the defendant in connection with the purchase of yearlings or live stock for the defendant, and that, to entitle the plaintiff to recover herein, you must believe from the evidence in the case that the plaintiff purchased the yearlings for the defendant, or assisted the defendant in purchasing the Wortham yearlings, and that such services, if any, were rendered pursuant to and as contemplated in the contract."

Appellant also assigns as error the failure of the court to give the following instruction:

"The court instruct the jury that the plaintiff's cause of action in this case is a claim made by him for compensation by way of commission upon the purchase of yearlings or live stock for the defendant by the plaintiff, and that, to entitle the plaintiff to recover such commission, or any compensation on account of such purchase of cattle, the jury must believe from the evidence in the case that the plaintiff purchased the Wortham yearlings for the defendant, or was the procuring cause of such purchase, and that such services were performed by the plaintiff under a contract with the defendant to pay commission for such services."

The two assignments may be treated together. Appellant argues that the appellee,

plaintiff below, acted as a broker in the purchase of the cattle, and that, unless the plaintiff was the procuring cause of the purchase of the property in question, he cannot recover. He cites and quotes from the case of *Arnold v. Wells*, 21 M. N. 445, 155 Pac. 724, where the following language is used:

"The rule unquestionably is that, before a real estate broker can recover his commissions, he must allege and prove, either that he was the procuring cause of an actual sale, or that he produced a purchaser ready, able, and willing to purchase upon the terms named by the vendor."

[1] The requested instruction was properly refused. The principle of "procuring cause of the sale," as the words are used in the cases, has no application to a suit of this kind. Plaintiff was not a middleman, a go-between or a broker, whose duty it was to bring buyer and seller together so that they might negotiate with each other, nor to negotiate with the seller and arrive or attempt to arrive at a satisfactory agreement so that the defendant would purchase. He was employed as a purchasing agent to buy cattle for the defendant, using his own judgment, and authorized to pay for the cattle himself, or to check up the defendant's account for such purchases. The contract or agreement was a contract for services, for which he was to be paid when he had performed them.

[2] 2. The instruction given by the court was correct as applied to the facts in this case. It is urged that the phrase "assist the defendant to purchase" introduces an element into the plaintiff's contract which is not justified by the pleadings or proof. The argument is plausible, but does not apply to this particular transaction in which both plaintiff and defendant were present and the negotiations were carried on by the plaintiff. The defendant's presence was immaterial. The plaintiff could have recovered when the cattle were purchased by him for the defendant. He and the defendant purchased the cattle for the defendant. While the phrase "assist the defendant to buy" is inapt and ordinarily has a much broader meaning than buying for the defendant, as applied to this transaction, it means the same thing, that is, under the peculiar facts of this case, assisting the defendant to buy meant that he was present, conducted the negotiations, made the offer, and had it accepted. It means no more than that he worked with the defendant in purchasing the cattle, although, incidentally, it might be said that he assisted the defendant to buy. The phrase in this particular case under the evidence was not misleading or incorrect. It introduces no new element in the contract and did not tend to lead the jury away from the real issue. If there had been a substantial conflict in the evidence as to what took

place at the time of the purchase, the phrase "assisting the defendant to purchase" might then refer to collateral matters, and thus broaden the terms of the contract or agreement. But there is little conflict in the evidence as to what took place. The defendant allowed the plaintiff to trade for him, did not trade independently of the plaintiff, took the benefit of plaintiff's services, and worked with him to purchase the cattle with his assistance. The instruction therefore as applied to the particular facts of this case was not erroneous.

There are other assignments of error as to the admission and exclusion of evidence, which we have examined and find without merit.

As there is no error in the record, the cause is therefore affirmed, and it is so ordered.

PARKER, O. J., and ROBERTS, J., concur.

(26 N. M. 283)

STATE ex rel. RIVERA v. ESQUIBEL et al.  
(No. 2374.)

(Supreme Court of New Mexico. July 1, 1920.  
Rehearing Denied July 12, 1920.)

(Syllabus by the Court.)

1. Pueblo lands  $\S$  224 $\frac{1}{2}$ , New, vol. 11A Key-No. Series—Qualifications of voters at election of trustees under named land grant stated.

Section 828, Code 1915, relative to election of trustees for the Cevilleta de la Joya land grant construed. *Held*, that it is the duty of the trustees to receive the vote of any voter at such election who files an affidavit to the effect that he is the owner of an interest in the land grant and that he is a qualified voter at such election, supported by affidavits of two other persons, qualified voters at such election, and that such trustees cannot refuse to count such votes so cast because in their judgment the voter is not qualified to vote.

2. Pueblo lands  $\S$  224 $\frac{1}{2}$ , New, vol. 11A Key-No. Series—Trustees of land grant held to have no power in election of successors to apportion votes according to interest in land.

Under such section the trustees have no power to apportion the vote according to the interest owned by the voter in the lands of the grant; but each owner of an undivided interest in the grant is entitled to one vote, regardless of the extent of such interest.

Appeal from District Court, Socorro County; M. C. Mechem, Judge.

Mandamus by the State, on the relation of Lorenzo B. Rivera, against Sylvestre Esquibel and others, Board of Trustees of the Cevilleta de la Joya Grant, to compel an

election to be conducted according to statute. Judgment for defendants, and both parties appeal. Reversed on relator's appeal, and affirmed on defendants' appeal.

James G. Fitch, of Socorro, for appellant.  
Fred Nicholas, of Magdalena, and Rodey & Rodey, of Albuquerque, for appellees and cross-appellants.

ROBERTS, J. This was an action of mandamus upon the relation of Lorenzo B. Rivera against Sylvestre Esquibel and others constituting the board of trustees of the Cevilleta de la Joya grant, a Spanish grant located in Socorro county, this state, for the purpose of compelling the respondents to conduct an election, to be held on the last Monday in April, 1919, for the election of their successors, in accordance with the provisions of section 828, Code 1915. There were two grounds upon which the application for the writ was based: (1) That the board of trustees gave out and announced that they would not receive and count the votes of any save those whose names were recorded upon the list of owners prepared by the board, or such as the board might determine for itself were legally qualified voters at such election; and (2) that such board gave out and announced that it would not count each vote cast at such election as one full vote, but would count the same according to a resolution theretofore adopted by the board, fixing the ownership of an interest in the undivided lands of the grant equivalent to 4,050 acres of land as entitled to one vote, and the ownership of a less interest should be counted in proportion that such interest bore to said fixed amount of 4,050 acres.

An order to show cause was issued, and respondents admitted that they intended to conduct the election as charged in the petition, and attempted to justify under the provisions of sections 828 to 841, Code 1915. The court held as a matter of law that it was the duty of the board of trustees to count each vote cast as one full vote, regardless of the interest owned by the voter in the grant. It further held that it was the duty of the board to receive the ballot of any one offering to vote, although his name was not recorded upon the list prepared by the board of those owning interest in the grant, if such proposed voter filed an affidavit showing his due qualification as such voter, supporting the same by the affidavits of two other persons, qualified voters at such election, but that the board of trustees was not required to count the ballot so cast, if satisfied that, notwithstanding the affidavits so filed, such voter was not the owner of an interest in such land grant.

Relator has appealed from the judgment entered, and here assigns as error the ruling of the court holding the board of trustees

had the power to determine, for itself the question as to whether a voter was qualified to vote. At the election in question 32 votes were cast upon affidavits, all of which the board refused to count, because it decided that the votes were cast by nonqualified voters. The district court held that this action of the board was proper, and it is to review this that relator prosecutes the appeal.

Respondents have taken a cross-appeal, in which they assign as error the judgment of the court, which required the respondents to count each vote cast as one full vote, regardless of the interest owned by the voter casting the same in the land grant.

The validity of the statute involved in this case is not questioned by either party. The determination of the two questions presented depends upon a construction of the language of section 828, Code 1915, which was originally enacted by the Legislature in 1905 as a part of chapter 46, Laws 1905. This was an act to provide for the control and management of the Cevilleta de la Joya grant, an old Spanish grant made by the Spanish crown in the year 1819 to some 50 odd people, who had petitioned for it to the proper authorities, and confirmed by the Court of Private Land Claims in the year 1896. Section 828, supra, created a board of trustees to manage said grant, composed of five members, to be elected every two years, the election to be conducted by the board of trustees in office at the date fixed for such election. The section of the statute involved in the determination of the questions presented by this appeal, in so far as material, reads as follows:

"Only those persons who own and possess undivided interests in the lands of said grant through meane conveyances or by inheritance from or through the original grantees, their heirs or assigns, shall be qualified voters at such election for said trustees; the vote of no other person shall be received or counted by said trustees at said election. At least thirty days before any such election said trustees shall cause, a correct list, as far as possible, to be made of all persons entitled to vote for trustees as above provided which said list shall be used by the said trustees in holding said election and in determining the qualification of voters thereat: Provided, that any person who actually possesses the necessary qualifications as a voter for such trustees at any such election, whose name may not have been placed in said list, shall be entitled to vote at said election, if he shall make affidavit before some person authorized to administer an oath, showing his due qualification as such voter and the same shall be corroborated by the affidavits of two other persons who may be qualified vot-

ers at such election; said affidavits to be in writing, signed by the parties making the same, and delivered to the said board of trustees at said election."

[1] Relator contends that the language just quoted requires the board of trustees to receive the ballot of any person making the affidavit required and corroborating the same by the affidavits of two other persons who may be qualified voters at such election, and to count the same. Respondents concede that the board is required to receive the ballot, but insist, as held by the district court, that, notwithstanding the reception of the ballot, the board has the power to determine for itself whether or not the vote was cast by a legally qualified voter. We believe that the district court was in error in placing this construction upon the statute. Had it been the intention of the Legislature to invest the board with the judicial power to pass upon the qualification of the voters, it is not likely that it would have made the provision for the filing of the specified affidavits, and it could easily have so provided. In the case of *Territory ex rel. v. Suddith*, 15 N. M. 728, 110 Pac. 1038, the territorial Supreme Court held that, where a ballot had been received by the election judges and deposited in the ballot box, the board had no authority to refuse to count the ballot. The same rule would apply here.

[2] We agree with the conclusion of the trial court upon the point presented by the cross-appeal. The language quoted supra from section 828, clearly implies that each owner of an interest, however large or small such interest in the grant may be, is entitled to one vote, and no more. If it be assumed, as it is in this case, that it is competent for the Legislature to regulate the management and control of land grants, such as the one in question here, and to provide for the qualification of voters at elections for trustees of such grants, it would necessarily follow that the Legislature would have the power to confer equal suffrage upon all owners of interests therein, or that it might in its discretion fix the value of the vote according to the interest owned in the grant. It has not seen fit, however, to do this, but has conferred equal voting power upon all owners of any interest in the common lands of the grant.

The judgment will be reversed on the relator's appeal, and affirmed as to the cross-appeal; and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(111 Wash. 333)

**LEWIS COUNTY v. ÆTNA ACCIDENT & LIABILITY CO. (No. 15686.)**

(Supreme Court of Washington. June 23, 1920.)

1. Highways  $\S$  113(5) — County cannot recover on contractor's bond if it has breached contract.

A county can have no right to recover on the bond of a contractor, if it has itself breached the contract in any material respect.

2. Highways  $\S$  113(5) — County cannot recover on contractor's bond for money due, after paying contractor.

Payment by a county to a contractor of whole amount due, without deducting amounts due the county for material, which under the contract it had the right to do, was the giving up of a security for the debt on which contractor's surety had the right to rely, and the county could not recover from the surety for the amount due on the material.

**Department 2.**

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Suit by Lewis County against the Ætina Accident & Liability Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for dismissal.

H. E. Donohoe, of Chehalis, and C. H. Winders, of Seattle, for appellant.

Herman Allen, of Chehalis, and J. H. Jahnke, of Centralia, for respondent.

**BRIDGES, J.** This is a suit on a road contractor's bond to recover the value of certain cement furnished by Lewis county to the contractor.

In April, 1916, the respondent, Lewis county, entered into a contract with T. H. Cochran & Sons, whereby the latter agreed to build a certain county road for \$15,950. All cement to be used by the contractor was to be purchased from the county at \$1.56 per barrel. With reference to payment therefor the contract provided that—

"Payments for the cement to the county shall be made not later than the 10th day of the month following the month in which any cement was ordered. Payment for the cement may be made by check to Lewis county, or by the county withholding an amount equal to the price of the cement from the monthly estimates."

The contract further provided for monthly payments not to exceed 75 per cent. of the amount due the contractor for the previous month. It was further provided that—

"Final payment for said work shall be made within thirty (30) days after the entire work has been completed and accepted \* \* \* provided, that before the making of such final payment the contractor shall show to the satisfaction of the board (of county commission-

ers) that all just dues, debts of laborers, mechanics, materialmen and persons who have supplied such contractor or subcontractor with material or goods of any kind for such work, have been paid."

The contractor gave a bond for the faithful performance of the contract, with the appellant, Ætina Accident & Liability Company, as surety. This bond was conditioned upon the contractor complying with the contract in all of its terms and paying "all laborers, mechanics, subcontractors and materialmen and all persons who shall supply such person or persons or subcontractors with materials, supplies and provisions for carrying on such work, all just dues, debts and demands incurred in the performance of such work."

In the performance of this contract, the county sold to the contractor \$4,073.88 worth of cement. The road was completed and accepted, and all the contract price paid to the contractor by the county, but the latter has not received payment for its cement. The county had a judgment in the lower court against the surety. All the other parties to the action were either not served with process or were, by the trial court, dismissed out of the suit.

From month to month, as the work progressed, the contractor was paid 75 per cent. of the amount he had earned during the previous month. The road was completed and duly accepted on November 9, 1916, and at that time the balance found due to the contractor was \$7,949.64. A warrant for this amount was drawn in favor of the contractor. Previously, he had assigned this warrant to the defendant, Peninsular National Bank, of St. John's, Or., who subsequently received the same from the county auditor and cashed it with the county treasurer. At all times the county and its officers knew that it had not received any pay for the cement it had furnished. In fact, the testimony shows that the county commissioners and the county auditor intended to refuse to deliver the warrant until the county had been paid, but, through some apparent mistake, the warrant was delivered without such payment being made, and without the amount owing for the cement being deducted from the warrant. Appellant did not know, before the bringing of this suit, that the bill had not been paid.

[1, 2] This suit was brought more than two years after the delivery and payment of this warrant. The only question before us is whether under these facts the county is entitled to recover of the appellant. We are satisfied that the learned trial court erred in giving judgment against the appellant. It is fundamental that the county can have no right to recover on the bond if it has itself breached the contract in any material

(191 P.)

respect. This we think it did. The contractor was obliged to purchase his cement from the county, and the contract required that—

"Payments for the cement to the county shall be made not later than the 10th day of the month following the month in which any cement was ordered. Payment for the cement may be made by check to Lewis county or by the county withholding an amount equal to the price of cement from the monthly estimates of the engineer in charge."

A fair construction of this provision of the contract required the county to get its pay monthly, either by receiving the check of the contractor or by deducting the amount from sums earned by the contractor. The county could not look to the contractor or to the surety at its option. The contract provided a way by which it could protect itself, and it was bound so to do. Indeed, the duty of the county was made the plainer by the actions of the parties themselves. After the work was completed the county auditor wrote the contractor, asking him to remit for the cement, and he answered, saying, "We wish you would retain, from the amount due us for this improvement, the \$4,073.88 for cement."

The authorities are numerous in support of the proposition that where the contract requires the county, or other builder, to apply money in its hands belonging to the contractor to the payment of claims or demands against the latter incurred in the performance of the work, it may not pay out to the contractor the balance earned by him and look to the surety for the payment of claims which at all times it knew existed.

In the case of *Greenville v. Ormand*, 51 S. C. 126, 28 S. E. 147, 39 L. R. A. 847, 64 Am. St. Rep. 663, the court said:

"The payment by the city of Greenville to the contractor of the whole amount due under the engineer's estimate, including the 10 per cent. reserve, without deducting the amount due the city for tools and dynamite, which, under the contract the city had the right to do, was the giving up of a surety for the debt sued on, upon which the surety had the right to rely."

In *Klæssig v. Allspaugh*, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418, the contract for the construction of a building provided that the owner should retain one-fourth of the contract price until final settlement. After the building was completed and accepted, and after he knew there were outstanding claims for labor, the owner paid the contractor the balance of the contract price. He then paid the laborers' claims, and sought to hold the surety company therefor. The court said:

"The appellant Lundeen was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or ought to have been, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it

to the contractors. This balance was to be retained in his hands as an additional security against liens upon the building, and in equity he held the same also for the benefit of the sureties."

In the case of *Taylor v. Jeter*, 23 Mo. 244, the court said:

"The contract duty of this builder was to furnish the materials and do the labor, and he failed in both respects when he allowed the building to be incumbered with these liens. The owner having notice of them, and paying what by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must therefore bear the loss occasioned by his own negligence or folly."

To the same effect are *Electric Appliance Co. v. U. S. Fid. & Guarantee Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609; *City of New York v. Baird*, 117 App. Div. 659, 102 N. Y. Supp. 915.

In the case at bar the contract not only required the respondent to retain the reserved 25 per cent. and the last payment, until the contractor had paid all claims, but it further obligated the county to see that its cement bill was paid from month to month by deducting, if necessary, proper sums from the monthly or final payments.

Counsel for respondent cite the cases of *Spokane v. Costello*, 42 Wash. 182, and 84 Pac. 652, and *Maryland Cas. Co. v. Hill*, 100 Wash. 289, 170 Pac. 594, as opposed to the doctrine which we are here advocating. We think those cases uphold rather than oppose our holding here. In the first case *Costello* had a contract for the building of certain streets in the city of Spokane. The contract obligated him to protect the city from damage resulting from his negligence. Before the work was complete and accepted, one Born was injured through the alleged negligence of the contractor, and notified the city of his claim. After that the city accepted the work and paid the contractor the amount due. Later, Born obtained a large judgment against the city, and it sought to hold the contractor's bond therefor. The surety defended on the ground that the city should have retained in its hands sufficient to protect it against this liability. Judge Fullerton, writing the opinion, said:

"The cases cited as maintaining the contrary doctrine are distinguishable from this case in the fact that the contracts there under consideration expressly made it the duty of the owner to withhold of the contract price a specific sum until final settlement between the parties, and the release of the surety was based on the fact that payment of the entire contract price had been made after the owner had notice that claims were made against his property for which the contractor was primarily

Hable. In other words, the payment was made in violation of the express terms of the contract. But here the facts are different. It will be noticed from the quotation made from the contract that the city was not required to withhold any fixed sum, but it is provided that 'if in the judgment of the board of public works it shall be necessary to retain a portion' of the contract price the city may retain such amount as the board may deem necessary."

The opinion then proceeds to show that the contract did not require the city to withhold any sum, but merely authorized it so to do if it saw fit.

In the Hill Case, *supra*, discussing a similar question, the court said:

"The contract contained no clause requiring the adjustment of these claims as a condition precedent to the contractor's right to payment when the work was completed and accepted. No provision had been made for the retention by the city of any part of the contract price pending the settlement of claims for labor and material furnished to the contractor. In no sense of the term was the contractor in default of his obligation to the city, which had fulfilled the measure of its duty by taking the bond required by the statute."

Where a building contract provides that the owner shall retain in his hands certain moneys earned by the contractor for protection against labor and materialmen's claims, fairness, reason, and the authorities require us to hold that the owner, having knowledge of such claims, may not pay to the contractor all the sums earned by him, and then look to the surety for reimbursement.

The judgment is reversed, and the cause remanded for dismissal.

HOLCOMB, C. J., and FULLERTON, MOUNT, and TOLMAN, JJ., concur. .

(111 Wash. 435)

### STATE v. SKINNER. (No. 15837.)

(Supreme Court of Washington. July 8, 1920.)

1. Criminal law §868—Reading of newspaper articles by jurors held not ground for reversal, where defendant consented to separation.

Defendant, having voluntarily consented to the separation of jurors during the trial, cannot complain that during separation jurors read newspaper articles pertaining to the trial, in the absence of positive showing that the reading of the articles caused the rendition of a verdict that was the result of passion and prejudice.

2. Brokers §34—Broker, agreeing to get purchaser out of deal, guilty of breach of faith.

If vendor's broker, to whom purchaser had made payment, agreed to get purchaser out

of the deal, if agent could keep money so paid, he would be guilty of a breach of faith with vendor.

3. Criminal law §823(5)—Instruction held not prejudicial, in view of other instruction given.

In prosecution of real estate agent for embezzlement of money paid agent by purchaser, involving the question of whether the money had been paid over to defendant as agent of the purchaser, or had been received by defendant as a payment on the price, and was therefore the property of the vendor, instruction that, as defendant was vendor's agent, it would have been a breach of faith to agree to get purchaser out of the deal, if purchaser would permit him to keep the money, was not prejudicial to defendant, where court further instructed that defendant could not be convicted, even though guilty of a breach of faith, if he claimed the money in good faith as against purchaser.

4. Criminal law §763, 764(1)—Hypothetical instruction held not prejudicial.

In prosecution of real estate agent for embezzlement, instruction that, if defendant was the agent of the vendor and had agreed to get purchaser out of the deal if he could keep payment received by him from purchaser, he would be guilty of breach of faith, held not prejudicial as against contention that it was on the weight of the evidence.

5. Criminal law §741(1)—Weight of the evidence and credibility for jury.

Where there was sufficient evidence to justify the verdict, the weight of the evidence and the credibility of the witness were for the jury, and not within the province of the trial or appellate court.

#### Department 1.

Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

O. Z. Skinner was convicted of grand larceny by embezzlement, and he appeals. Affirmed.

Cary M. Rader, Elihu F. Barker, and Sharpstein, Smith & Sharpstein, all of Walla Walla, for appellant.

Earl W. Benson and A. J. Gillis, both of Walla Walla, for the State.

MACKINTOSH, J. Appellant was convicted of the crime of grand larceny by embezzlement, and on this appeal urges that the conviction should be set aside for three reasons:

[1] First. That the jury during the trial read certain newspaper articles, which contained references to the matter involved in the criminal case, and also referred to a judgment which the prosecuting witness had recovered against the appellant in a civil proceeding involving the same state of facts. These newspaper articles were not read in the jury room, but were read by the



jurors at their homes during recesses in the trial, and from the record we cannot say that from these they were prejudiced. The defendant voluntarily consented to the separation of the jury during the trial, and must be held to have anticipated that during such recesses the jurors would follow the general habit of reading current news, and, if there were news articles with reference to the controversy between the prosecuting witness and the defendant, that in all human probability such articles would be read by some or all of the jurors. In the absence of a positive showing that the reading of these articles resulted in a verdict being returned, not upon the evidence in the case, but as a result of passion and prejudice aroused by what the jurors had read, the appellant must abide the consequences of his voluntary act in allowing the jurors to come into possession of such articles.

[2-4] Second. The next claim is that the court, in an instruction to the jury, commented upon the facts to the prejudice of appellant. The important question in the case was whether the money which it was alleged the appellant had embezzled was received by him as agent for the prosecuting witness, or had been received by him from the prosecuting witness as a payment upon the sale of property, and became thereby the property of the bank, which was the owner of the property. The court informed the jury that, if the money was paid on the purchase price, the appellant would have no right to agree with the prosecuting witness to "get Cook out of the deal, for if Skinner was the agent of the bank it would have been a breach of faith on his part to thus agree with Cook; but if Cook did agree with Skinner that Skinner should keep the money if Skinner should assist him to get out of the deal, and if Skinner did so conduct the matter that Cook was gotten out of the deal, and if Skinner then claimed the money in good faith, as against Cook, you could not find the defendant guilty."

The point raised by the appellant is that in this instruction the court passed upon the facts, and instructed the jury that he was guilty of a breach of faith, even if his contentions were correct that the bank was the owner of the money. It appears to us that, taking appellant's version of the transaction as true, the court was correct in his interpretation of it, and that the instruction was not prejudicial, for the reason that the court instructed the jury that the defendant could not be found guilty, even though he had committed a breach of faith with the bank. Furthermore, the instruction is not a positive statement by the court of any fact, but merely is a statement that, if certain things are true, certain other things are also necessarily true. This hypothetical instruc-

tion is not of such a prejudicial nature as to warrant a new trial.

[5] The third and most important question in the case is whether there was sufficient evidence to go to the jury to show defendant was acting as the agent of the prosecuting witness at the time of receiving and withholding the money. Abundant evidence was introduced in behalf of appellant which might justify the jury in finding he was not such agent. A view of the testimony, however, discloses that there was evidence to the contrary from which the jury was entitled to arrive at the verdict returned by it. It is not for us to weigh the evidence upon this appeal, nor would the lower court have been justified in taking the case away from the jury upon its weighing the testimony. As long as there was sufficient evidence to justify the verdict, the court will not interfere with the jury's prerogative of weighing the testimony and measuring the credibility of the witness from whom it is produced.

We find no error in the record, and the judgment is affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and MITCHELL, JJ., concur.

(111 Wash. 400)

LUCOPOULOS v. SOTRIOPOULOS et al.  
(No. 15853.)

(Supreme Court of Washington. July 7, 1920.)

1. Partnership ⇐21—Agreement to take in plaintiff as partner operative in futuro.

Contract by defendant partners to sell plaintiff a one-fifth interest in their restaurant business for \$400 and to take him in as a partner did not, in itself, create the partnership relation between them, but was to be operative only in futuro.

2. Specific performance ⇐79—Agreement to take in partner will not be decreed.

The courts, except under certain special circumstances, will not decree specific performance of an agreement to enter into a partnership, or to admit another member to a firm, but will relegate the injured party to his remedy of damages.

3. Partnership ⇐52—Evidence held to show contract to sell share of business, broken by plaintiff buyer.

In an action for breach of defendant's agreement to sell plaintiff a one-fifth interest in their restaurant business and to take him in as a partner, evidence held to justify finding that any breach was on the part of plaintiff.

Department 2.

Appeal from Superior Court, King County;  
D. F. Wright, Judge.

Action by Christ Lucopoulos against Christ Sotriopoulos and others. From judgment for defendants, plaintiff appeals. Affirmed.

Walter B. Allen, of Seattle, for appellant.  
Phillip Tworoger, of Seattle, for respondents.

FULLERTON, J. In August, 1918, the respondents, as partners, owned and operated a restaurant in the city of Seattle, known as the Stadium Café. On the 27th day of that month they entered into a contract with the appellant by which they agreed to sell him a one-fifth interest in the business for \$400 and take him in as a partner. The business was then being conducted on leased premises under a month to month tenancy. The respondents were negotiating for a term lease, and it was a part of the agreement of purchase that it would not be consummated unless a term lease was obtained. Such a lease was afterwards obtained, and the appellant informed of the fact.

As to the subsequent happenings the evidence is in direct conflict. The appellant testifies that after he obtained knowledge of the execution of the term lease he tendered to the respondents the purchase price, and that they, after various excuses and subterfuges, finally refused to carry out the agreement. It is the respondents' version that, after the appellant had been informed that the agreement was ready for consummation, he was unable to procure the purchase price, and sought to have them execute the agreement on his paying a part of the purchase price in money and giving his notes payable at future times for remainder; that they refused to accede to this change in the agreement, and that after repeated demands on the appellant to comply with the agreement as originally entered into, and his failure to comply, they declared the deal off, and refused to negotiate with him further.

In this suit the appellant seeks a decree of the court, decreeing him to be a partner in the business and entitled to a one-fifth interest therein, and decreeing, further, that an account be had of the partnership effects, that a receiver be appointed to take charge of the partnership business and property and sell the same, and that the proceeds of the sale be divided between the parties as their respective interests may appear. The trial court held that the evidence was insufficient to establish a partnership relation, and that the appellant was not entitled to the relief sought.

[1-3] With this holding we agree. Plainly the contract between the parties did not in itself create the partnership relation, but was an agreement to enter into a partnership relation at a future date. It is also plain that this agreement was never carried into effect. Whichsoever party was at fault, therefore,

the relief sought cannot be granted, since the courts, except under certain special circumstances not present here, will not decree a specific performance of an agreement to enter into a partnership, but will relegate the injured party to the remedy of damages. But we think the evidence justifies the conclusion that the breach of the contract was on the part of the appellant rather than on the part of the respondents. Such being the case, the appellant is not entitled to relief in any form, and the trial court did not err in so holding.

The judgment is affirmed.

HOLCOMB, C. J., and MOUNT, TOLMAN, and BRIDGES, JJ., concur.

(58 Mont. 167)

**STATE ex rel. DANSIE v. NOLAN.**  
(No. 4483.)

(Supreme Court of Montana. June 25, 1920.)

1. Appeal and error  $\S$  889(3) — Complaint deemed amended by defendant's affidavit to conform to proof.

In an action to enjoin the closing of a road on the theory of the right of prescription, where the complaint did not state that the land was a homestead, the title being yet in the government, but defendant's affidavit remedied this defect and evidence was submitted without objection which would tend to support the change of theory to government dedication, the complaint will on appeal be deemed amended to conform to proof.

2. Highways  $\S$  77(8) — Party specially injured authorized to maintain injunction against closing road.

If land is so situated that the owner cannot gain ingress or egress without the use of a public road and it is necessary for him to pass to and from his land, he would have a special and vital interest in the road not shared by the general public, which would entitle him by reason of injury to maintain an action to enjoin its being closed.

3. Highways  $\S$  2 — Statutes as to highways by user construed.

Rev. Codes,  $\S$  1337, declaring highways used by the public to be public highways, and section 1340, declaring that no route so used should become a public highway until declared by county commissioners or by dedication by the owner of the land, are re-enactments of Pol. Code 1895,  $\S\S$  2800, 2803, adopted July 1, 1895, so that any changes in the law or status of the public by waiver thereof must be considered as of the last-mentioned date.

4. Highways  $\S$  21 — Right of way over public land complete only when highway established under state law; "dedication by owner."

Rev. St. U. S.  $\S$  2477 (U. S. Comp. St.  $\S$  4919), granting right of way for construction of highways over public lands not reserved for public use, grants only a right of way for con-

struction of a highway across lands, and does not extend to the entire tract and cannot constitute "dedication by the owner" as contemplated by Rev. Codes, § 1340, and the grant is but an offer of a way for the construction of a highway on some particular strip of public land and can only become fixed when a highway is definitely established in one of the ways authorized by the laws of the state where the land is located.

**5. Highways §21—A highway over public land accepted by state law must have been legally established.**

Prior to July 1, 1895, a public highway could have been established either by public authorities, or by public use, for the period of limitation as to land, of the exact route claimed confined to the statutory width, or by dedication, or on partition, and on that date it was declared by Rev. Codes, § 1340, then first adopted, that no route used over lands of another should become a public highway except as provided by the statute, and so whether a road over public land claimed to have been offered by Rev. St. U. S. § 2477 (U. S. Comp. St. § 4919), and accepted by Rev. Codes, § 1337, was established in any manner before or since July 1, 1895, it must have been under some legal authority.

**6. Highways §5—Casual journeying over public land held not to establish highway by user.**

Mere casual journeying over what might thereafter become a right of way for a public highway over public land could not constitute the trail thereby made a public highway by user.

**7. Highways §1—Accepted way by user over public land must have continued over exact route for statutory period.**

An offer by Rev. St. U. S. § 2477 (U. S. Comp. St. § 4919), of a way by user over public land accepted under state law, must be shown to have been continued over the exact route claimed for the statutory period prior to enactment of the law accepting the same.

**8. Highways §17—Evidence insufficient to establish highway by user over public land prior to law accepting it.**

Evidence that a road over public land had been used "since the early 90's," even though use was confined to a particular way, was not sufficient to establish a prescriptive right prior to July 1, 1895, when Rev. Codes, § 1337, enacted on that date, declared highways used by the public to be public highways.

Appeal from District Court, Beaverhead County; Jeremiah J. Lynch, Judge.

Proceeding by the State, on the relation of Parley A. Dansie, against Joseph P. Nolan, to enjoin the closing of a road. From an order dissolving a temporary restraining order and denying injunction pendente lite, the relator appeals. Affirmed.

W. D. Rankin and A. H. McConnell, both of Helena, and C. W. Robison, of Astoria, Or., for appellant.

Norris, Hurd & Collins, of Dillon, for respondent.

**MATTHEWS, J.** This is a special proceeding to enjoin the defendant from closing a certain road. A temporary restraining order was issued, together with an order to show cause. The defendant moved to dissolve the temporary order and to deny the injunction pendente lite, and, in connection therewith, filed an affidavit setting up the facts as he viewed them. The court held the motion in abeyance until the evidence was all in, whereupon its order was entered dissolving the temporary restraining order and denying the injunction pendente lite. From this order relator appeals.

The complaint alleges, in substance, that the road in question is a public highway established by prescription, and that "said road crossed the lands of the defendant at the time the defendant entered into possession of the lands owned by him"; that the relator maintains a sheep camp on certain lands owned by him adjoining the lands of the defendant, and that the road in question is the only road by which his lands can be reached; that he desires to cultivate his land and will suffer irreparable injury if deprived of the use of the road. The affidavit filed by defendant supplies the additional facts that defendant is a homestead entryman who filed on the land in the year 1915, and that title is still in the government.

Evidence was introduced on the hearing tending to show that the road in question had been traveled for more than 20 years prior to the commencement of the action, by stockmen and trappers and, since 1915, by settlers in the vicinity. While the testimony is that the trail was traveled since "some time in the early '90's," it discloses that the route was not originally the same as at the time of the commencement of the action.

[1] 1. Counsel for defendant contend that the cause was originally tried on the theory of a right by prescription and that relator changed his theory to that of dedication by the government after the order complained of was made. While the complaint is silent as to the nature of the land, the affidavit of defendant remedied this defect, and evidence was submitted, without objection, which would tend to support the latter theory. The complaint will therefore be deemed amended to conform to the proof (*Ellinghouse v. Ajax Livestock Co.*, 51 Mont. 275, 152 Pac. 481, L. R. A. 1916D, 836; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071; *Lackman v. Simpson*, 46 Mont. 518, 129 Pac. 325; *Post v. Liberty*, 45 Mont. 1, 121 Pac. 475), and we will dispose of the matter on the assumption that the

questions here presented were duly presented to the lower court.

[2] 2. It is urged that the wrong, if any, was to the general public, and that relator is not entitled to maintain this action. It would seem, however, that if relator's land is so situated that he cannot gain ingress and egress without the use of the road, and that it is necessary for him to pass to and from his land in order to care for his sheep and cultivate his land, he would have a special and vital interest in maintaining the road, not shared by the general public. Such is the holding in *Highbarger v. Milford*, 71 Kan. 331, 80 Pac. 633. He would therefore, in our opinion, be in a position by reason of the special injury to him, to maintain the action.

3. The only question seriously presented herein is: Was the road, at the time the defendant sought to close it, a public highway?

It is admitted that the road was never constructed or established by order of the county authorities nor by them worked or repaired, other than that, after Nolan settled on the land and constructed an approach to his place, the county, in constructing a cross-road, made this approach impassable and thereafter, on complaint of Nolan, a county employé repaired it to this extent. The contention of relator now is that section 2477 of the Revised Statutes of the United States (U. S. Comp. St. § 4919) which provides that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted," is a dedication of the public domain for road purposes, and that the enactment of section 1337 of the Revised Codes of 1907 which was enacted in 1903 was an acceptance of the grant as of that date. It is further contended that—

"By section 1340 of our Codes, it is specifically provided that a road may be established by use when a dedication of the same has been made by the owner."

The sections of the code referred to read as follows:

"Sec. 1337. All highways, roads, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways."

"Sec. 1340. A highway laid out and worked and used as provided in this act must not be vacated or cease to be a highway until so ordered by the board of county commissioners of the county in which said road may be located; and no route of travel used by one or more persons over another's land shall hereafter become a public road or byway by use, or until so declared by the board of county commissioners, or by dedication by the owner of the land affected."

[3] These provisions are not, however, as counsel seem to urge, original declarations on the subjects embraced, but are merely the re-enactment, on the codification of the highway laws, of sections 2600 and 2603 of the Political Code adopted July 1, 1895, and any change in the law or in the status of the public by reason of such declarations must be considered as of the last-mentioned date.

[4] Section 2477 of the Revised Statutes of the United States goes no further than to grant a right of way for the "construction" of a highway across public lands; it does not extend to the entire tract of land and cannot constitute a "dedication by the owner of the land," as contemplated by that portion of section 1340, Revised Codes, relied on by counsel. It is inconceivable that it was the intention of Congress and of the Legislature to say that two or more persons crossing at random on each of a dozen trails across an open quarter section of land could constitute an acceptance of the government grant as to each of such trails, and the entire quarter section thus become but a series of irregular and divergent rights of way. The grant is but an offer of the right of way for the construction of a public highway on some particular strip of public land, and can only become fixed when a highway is definitely established and constructed in some one of the ways authorized by the laws of the state in which the land is situated.

[5-7] Prior to July 1, 1895, a public highway could have been established either by the act of the proper authorities, as provided by the statute, or by use by the public, for the period of the statute of limitations as to lands, of the exact route confined to the statutory width of a highway, later claimed to be a public highway, or by the opening and dedication of a road by an individual owner of the land, or on a partition of real property. On that date it was declared by section 1340 that thereafter no route of travel used by one or more persons over the lands of another should become a public highway, except in the manner provided in the statute. Whether the establishment of the road was before or since July 1, 1895, by whatever method it was accomplished, it must have been under some legal authority; the mere casual journeying over what might thereafter become the right of way for a public road could not constitute the trail, thereby made, a public highway. In other words, the government, by the enactment of section 2477 of the Revised Statutes, offered to the public the right of way for such highways across the public lands as may be found to be necessary; but this offer can only be accepted by the "construction" of a public highway in some one of the ways in which they can be legally established, and becomes effective as a right of way only when the road is thus finally constructed. If, therefore, the offer is ac-

cepted by user under the laws of this state, that user must be shown to have continued over the exact route claimed, for the statutory period prior to July 1, 1895.

Sections 1337 and 1340 were repealed in 1913 (Laws 1913, p. 139); but the provisions of section 1337 were re-enacted as section 3 of chapter 1 of the "General Highway Law," and, on the amendment thereof, were continued in force (Laws of 1915, p. 319). The provision contained in section 1340, concerning the establishment of a road by use, does not appear in the "General Highway Law" of 1913-15. However, whatever the effect of the omission, it cannot aid relator in this action, as the period of the statute of limitations referred to is ten years. Section 6432, Rev. Codes.

This precise question was before the Supreme Court of Washington in the case of *Vogler v. Anderson*, 46 Wash. 202, 89 Pac. 551, 9 L. R. A. (N. S.) 1223, 123 Am. St. Rep. 932, and it was there said:

"The trial court based its judgment on the theory that the act of Congress granting a right of way for the construction of public highways over public lands not reserved for public use was a grant in presenti, and became effective the moment the public began using the way as a public highway, and that it is not necessary that a way should be used for any specific time in order to constitute an acceptance of it as a grant under this statute. \* \* \* But it was not said, or intended to be said, that a user for any lesser period than seven years would be sufficient for that purpose. On the contrary, to hold that a lesser period would suffice in this state would violate the terms of the grant made by Congress. The grant is for a right of way to establish a public highway, and a public highway must be established in some of the ways provided by statute before the grant takes effect. \* \* \* The shortest period allowed by statute to establish a highway by user in this state is seven years, \* \* \* and no user short of this period can therefore be held to be an acceptance of the grant contained in the act of Congress cited."

In 1898 this court, in *State v. Auchard*, 22 Mont. 14, 55 Pac. 361, held that—

"Section 2600, Political Code [now section 1337, Rev. Codes] \* \* \* must, in so far as applicable here, be interpreted as a remedial statute, curing irregularities, but not supplying jurisdiction, where none was acquired, in the creation of the roads, and as recognizing the existence of highways by prescription when they had been used or traveled by the people generally for the period named in the statutes of limitation. It is also doubtless true that if the road had been used and traveled by the public generally as a highway, and is treated and kept in repair as such by the local authorities whose duty it is to open and keep in repair public roads, proof of these facts 'furnishes a legal presumption, liable to be rebutted, that such a road is a public highway.'"

The case of *Murray v. City of Butte*, 7 Mont. 61, 14 Pac. 656, cited by counsel as sustaining relator's contention, is not in conflict with the declaration in the *Auchard* Case, or with anything said herein. At the time the opinion was rendered, the statutory period was five years (section 29, c. 2, tit. 3, Comp. Stat. 1887). The answer showed that the road in question had been in existence since 1866; plaintiff's notice of location was filed in 1875. The court said:

"Section 2477 was a grant by the government of an easement, and defendant sought to prove an acceptance prior to the location upon which the patent was based. If such an acceptance of the grant of the easement could have been established, it would have been valid against the government."

The proof suggested would, we take it, have been that of a right by prescription.

Likewise the opinion in the case of *Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593, but bears out the statement that the proof offered must show the establishment of a road in some one of the ways recognized by law in order to constitute an acceptance of the grant.

In *Barnard Realty Co. v. City of Butte*, 48 Mont. 102, 136 Pac. 1064, this court, in commenting on sections 1337 and 1340, said:

"We are not now concerned with the question whether it was the intention of the Legislature to declare all roads then in use to be public highways, without reference to how long the use had continued or what the character of use had been. We think, however, as was said in *State v. Auchard*, 22 Mont. 14, 55 Pac. 361, that the intention was to declare those only to be public highways which had been established by the public authorities, or were recognized by them and used generally by the public, or which had become such by prescription or adverse use at the time the provision was enacted. Any other view would, in our opinion, render the legislation open to serious constitutional objection (Const. § 14, art. 3). Be this as it may, the second section clearly evinces the intention that no highway falling within the enumeration contained in the former section should be vacated except by the public authorities, and that no route of travel should thereafter become of public right until declared so by the public authorities or had been made so by dedication by the owner of the land affected. \* \* \* By these enactments the Legislature explicitly declared it to be the rule that after July 1, 1895, when the Codes went into effect, a highway could not be established by use unless the use should be accompanied by some action on the part of the public authorities having jurisdiction of the subject, tantamount to a declaration that the particular road was a public highway."

In *Montana Ore Pur. Co. v. Butte & B. Consol. Min. Co.*, 25 Mont. 431, 65 Pac. 421, this court held:

"Where the claim is founded upon use only, without color of title, it must appear that the

use has been confined to the particular way for the full time of the prescribed limitation. *State v. Auchard*, supra. Travel by the public generally over uninclosed land, but not confined to any particular way, will not inaugurate such an adverse claim as will \* \* \* ripen into a right which may be asserted against the owner."

[8] The testimony to the effect that the road had been used "since the early 90's," even though the use had been confined to the particular way, was not sufficient to establish a prescriptive right prior to July 1, 1895, and, as such a right must have been established in order that relator might prevail herein, the order of the district court is affirmed.

Affirmed.

BRANTLY, O. J., and HOLLOWAY, HURLY, and COOPER, JJ., concur.

(79 Okl. 50)

**THOMPSON v. WALKER et al.** (No. 9677.)

(Supreme Court of Oklahoma. June 22, 1920.  
Rehearing Denied July 13, 1920.)

*(Syllabus by the Court.)*

1. Evidence §386(2)—Evidence held not objectionable as attacking county court judgment.

Record examined, and held that in the circumstances disclosed in the opinion herein the trial court did not err in admitting in evidence the testimony objected to by counsel for the appellant.

*(Additional Syllabus by Editorial Staff.)*

2. Appeal and error §1097(8)—Matter considered on motion to dismiss would not be reconsidered on the merits.

Where appellee's contention on an appeal in the Supreme Court had theretofore been passed on by the Supreme Court in overruling a motion to dismiss on the same grounds filed by appellee, it was unnecessary to rule upon it again in considering the case on its merits.

Appeal from District Court, Seminole County; J. W. Bolen, Judge.

Herbert Thompson, a minor, by Lafayette Walker, United States Probate Attorney, appeals from the action of the district court affirming the county court's distribution of the proceeds derived from a sale of land purporting to belong to the minor, made by his guardian, Thomas S. McGelsey, in which certain sums were ordered to be paid to C. S. Walker, Harry Rogers, and Frank H. Reed. Affirmed.

Lafayette Walker, of Okmulgee, for plaintiff in error.

C. S. Walker, of Tulsa, and J. R. Cottingham and S. W. Hayes, both of Oklahoma City, for defendants in error.

KANE, J. This is an appeal from the action of the district court affirming the action of the county court of Seminole county in the matter of the distribution of the proceeds derived from the sale of a certain tract of land purporting to belong to Herbert Thompson, a minor, by his guardian, Thomas S. McGelsey, the appeal being prosecuted by Lafayette Walker, the United States probate attorney.

The questions presented for consideration by the respective parties may be briefly summarized as follows:

(1) On behalf of the defendant in error it is contended that Lafayette Walker, as United States probate attorney, had no right or authority to prosecute an appeal from the order of the county court to the district court and thence to the Supreme Court, and therefore the appeal should be dismissed.

(2) And on the part of the plaintiff in error the probate attorney contends that the district court erred in overruling his objection to certain testimony introduced in evidence, which, it is claimed, attacks the verity of a certain judgment rendered by the district court of Creek county, Okla., on July 3, 1916, quieting the title to the entire tract of land involved in the minor Herbert Thompson.

[2] As the first question now presented in the brief of counsel has heretofore been passed upon by this court in overruling a motion to dismiss upon the same ground filed by the defendant in error, we do not deem it necessary to rule upon it again in considering the case on its merits.

[1] The facts necessary for the review of the question raised by the second assignment of error present a somewhat novel proposition of law. All the parties, including the probate attorney, concede that the proceedings before the county court for the sale of the minor's land were regular up to the point of disposing of the proceeds of the sale after they came into the hands of the guardian. Ordinarily the distribution of the proceeds of such a sale by the guardian is a very simple matter. The sale, being allowed by the court for certain specific purposes authorized by statute, after it is confirmed by the court and the guardian's deed is executed, the money derived therefrom must be disbursed by the guardian for the benefit of the minor pursuant to the order of sale in the manner prescribed by the governing statutes. The case at bar, as we have seen, followed the ordinary procedure until after the proceeds of the sale came into the hands of the guardian, whereupon the county court made the

order of distribution complained of which ordered:

"That the guardian, Thomas S. McGeisey, pay out of the funds received for his guardian's deed covering said property 50 per cent. to C. W. Walker, attorney for certain interest, 10 per cent. to H. H. Rogers, and 10 per cent. to Frank H. Reed, all in accordance with a contract heretofore approved and order heretofore entered in this matter. It being understood that out of the proceeds of the said sale said guardian shall have the sum of \$20,000 after making said payments.

"Provided, however, that upon approval by Hon. R. C. Allen, attorney for the Creek Tribe of Indiana, said guardian is authorized to pay said parties an additional sum of \$2,000, leaving the amount then in his hands at \$18,000."

The testimony upon which this order was based and upon which it was affirmed by the district court, which it is claimed was erroneously admitted, conclusively established the following state of facts:

Prior to the institution of the proceedings for the guardian's sale, the title to the entire tract of land involved herein was in litigation in several actions in the district court of Creek county between three different sets of claimants, Herbert Thompson, the plaintiff in error herein, a Creek Indian minor, forming one side of the triangular controversy. In a settlement which was finally reached between the parties it was agreed that each set of claimants was entitled to a certain specific portion of the land involved. In a subsidiary contract entered into at the same time it was further agreed that, instead of the judgment being entered in the district court in strict accordance with the interest of the respective sets of claimants, as disclosed by the settlement, which it is conceded was just, fair, and equitable to all the parties concerned, the judgment and decree should be entered, quieting the title to the entire tract in Herbert Thompson, a minor, the appellant herein. The arrangement outlined in the secondary agreement was entered into for the convenience of all the parties, it being understood and agreed between them that immediately upon the entry of said judgment the guardian of Herbert Thompson would make application to the county court for the sale of the land, and upon consummation of the sale the guardian's deed would be made to one Farmington, whereupon each set of claimants would receive his pro rata share of the consideration accruing therefrom in accordance with his interest as disclosed by the terms of the contract of settlement. The courts being complaisant, these agreements were carried out by the parties, with the approval of the county court, the national attorney for the Creek Indians and the probate attorney, up to the point of distributing the proceeds of the guardian's sale in accordance with the subsidiary agreement. At this point the probate attorney objected to the introduction in evidence of the subsidiary agreement, upon the ground that it contradicted

the terms of the judgment and decree of the district court of Creek county, which, as we have seen, upon its face quieted the title to the entire tract of land in Herbert Thompson, the minor. It is not entirely clear to us that either the county court, not being a court of equity, or the district court on appeal, possessed the power to enforce the subsidiary contract by ordering distribution in accordance with its terms. But assuming, as counsel for the appellant seems to, the existence of such power, we cannot agree with him that the testimony objected to was improperly admitted upon the ground stated. As we view the case, there was no purpose on the part of any of the parties to this controversy to question the verity of any of the judicial proceedings of either the district or county court up to the point of distributing the proceeds derived from the sale of the land. The title of the purchaser of the land at the guardian's sale, which is not assailed, rests upon the verity of the judgment of the district court of Creek county, and no one is attempting to question it. The probate attorney, it seems to us, is attempting to gain an undue advantage for his client by standing upon a too rigid enforcement of the letter of the law governing the sale by guardian of a minor's lands, and disregarding the equitable considerations growing out of the contracts between the parties hereinbefore referred to.

The case at bar seems to us to be somewhat similar in principle to *Talbott v. Barber*, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491. In that case Susan Barber, the wife of the defendant, had an inchoate interest in 160 acres of land owned by her husband. Thomas Barber was heavily indebted to Jesse Durham, and to secure the payment of the indebtedness mortgaged said land to him. Durham, being desirous of foreclosing on the land, so that he could realize on the debt, agreed with Susan Barber that if she would not appear at the trial of the foreclosure suit, and would let judgment be taken against her by default, he would buy in the property, sell it, and account to her for one-third of the proceeds of the sale. The mortgage was foreclosed, and the land purchased by Durham in accordance with his promise. Subsequently he sold the land, but did not account to Susan Barber for her share of the proceeds, and to enforce the provisions of the agreement she brought suit against the administrator of the estate of Durham, who had died. One of the defenses urged by the administrator, was that the judgment of foreclosure was *res adjudicata*, and parol evidence was inadmissible to vary or contradict it; that if plaintiff had any interest or right in the land at the time it was foreclosed, it was her duty to have appeared in answer to the summons and presented it to the court. To this defense, plaintiff's demurrer was sustained, and after trial had, judgment was rendered in favor of plaintiff. On appeal, with reference to the ruling of

the trial court on the demurrer, the court in its opinion said:

"The plea of *res adjudicata*, to which a demurrer was sustained, was clearly insufficient. The gist of it is that the appellee was duly served with process in the foreclosure proceedings, but failed to appear, and that judgment was rendered against her by default. This, however, was one of the very things she contracted to do, according to the averments of the complaint, and it was partly this agreement not to appear which constituted the consideration of the trust. It is doubtless true, as a general rule, that when the wife of a mortgagor of real estate, in which she has an inchoate interest, is brought into court by summons in a foreclosure proceedings and fails to set up any claim or interest, she is concluded by the decree. But this rule can have no application to the facts in the present case. We apprehend that no court would debar a litigant, who, by special agreement, suffered default and judgment to be taken against him in consideration of some benefit inuring to him, from showing that fact."

It is true that the agreement in that case was to suffer default in the trial of the suit, while in the present case the parties agreed to quiet the title to the entire tract in Herbert Thompson under the agreement hereinbefore referred to, which it is conceded was equitable and fair to all the claimants. In the case at bar we understand that the guardian of Herbert Thompson is willing to carry out the agreement, and that his purpose to do so is approved by the county court, the national attorney for the Creek Indians, and by all the other interested parties except the probate attorney.

In these circumstances, paraphrasing the language used by the learned justice who prepared the opinion in *Talbott v. Barber*, *supra*, we apprehend that no court of equity would debar these appellees from introducing in evidence the equitable facts which show them to be entitled to the part of the proceeds derived from the sale of this land, which was set apart to them by the order of distribution appealed from.

For the reasons stated, the judgment of the court below should be affirmed.

RAINEY, C. J., and PITCHFORD, JOHN-  
SON, and McNEILL, JJ., concur.

(79 Okl. 21)

FRALEY et al. v. WILKINSON et al.  
(No. 9756.)

(Supreme Court of Oklahoma. June 29, 1920.)

(Syllabus by the Court.)

1. Deeds §70(1)—Nonperformance of promise not fraud in absence of fraudulent intent.

Mere nonperformance of a promise, although such promise is a part of the consid-

eration for a deed, is not within itself either fraud or evidence of fraud. There must be either a specific averment that the contracting party made the promise with the secret intention of not performing it, or facts must be pleaded establishing such intent not to perform.

2. Deeds §154—"Condition precedent" defined.

A "condition precedent" is one that must be performed before the estate can vest or be enlarged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condition Precedent.]

3. Deeds §155—Operation of "condition subsequent" stated.

A "condition subsequent" operates upon estates already created and vested, and renders them liable to be defeated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Condition Subsequent.]

4. Deeds §145—Clause construed as covenant rather than condition.

Courts are inclined to construe clauses in deeds as covenants rather than as conditions if the language employed is capable of construction as a covenant, and if it be doubtful whether the clause is intended as a condition or as a covenant, the doubt will be resolved in favor of construing the clause as a covenant and not as a condition.

5. Deeds §154—Condition construed as subsequent rather than precedent.

Where there is doubt as to whether a condition is precedent or subsequent, courts lean to that construction rendering performance a condition subsequent.

6. Deeds §155—Absence of forfeiture provision indicates there was no condition subsequent.

The absence of a provision for forfeiture or reversion for failure to erect a building on the land conveyed, or perform some other executory promise in connection therewith, tends to refute an intention to make the performance a condition subsequent.

7. Deeds §144(1)—Recital held not to create estate on condition.

A recitation in a deed that it is made in consideration of a certain sum of money and the agreement of the grantee to do other things therein specified, such as construct a building on the land, etc., does not create an estate on condition.

8. Deeds §155—Conditions subsequent strictly construed.

Conditions subsequent are always construed strictly, and will not work a forfeiture unless clearly expressed in unequivocal terms, or necessarily implied.

9. Pleading §72—Prayer for judgment constitutes no part of statement of cause of action.

The plaintiff's prayer for a judgment is only a matter of form, and is no part of the statement of the cause of action.



10. Dismissal and nonsuit  $\S$  54—Where cause of action is stated, action will not be dismissed because prayer for relief improper.

Under the Code of Civil Procedure in force in this state, a plaintiff is required to set forth the facts constituting a cause of action, and if he states facts showing that he is entitled to a remedy, either legal or equitable, his action will not be dismissed because he has misconceived the nature of his remedial rights and has asked for equitable relief when he should have asked for a legal remedy, or asked for the wrong equitable relief, or vice versa.

11. Specific performance  $\S$  128(1) — Court may refuse specific performance and award damages.

In suits for specific performance, the court may refuse to decree specific performance of the contract, but in lieu thereof award plaintiff compensation in damages.

Error from District Court, Carter County; W. F. Freeman, Judge.

Suit by Charles E. Fraley and wife against Leslie I. Wilkinson and another for cancellation of a deed. The petition was dismissed, and, Charles E. Fraley having died, the suit was revived in the name of William S. Fraley as his administrator, and plaintiffs bring error. Reversed and remanded on condition.

Geo. A. Ahern and I. R. Mason, both of Ardmore, for plaintiffs in error.

Cruce & Potter, of Ardmore, for defendants in error.

RAMSEY, J. Charles E. Fraley and wife filed their petition in the district court, alleging that on May 19, 1915, they were the owners and in possession of a 53-foot lot in the city of Ardmore, which they sold to the defendants in error for \$3,646.60, paid, and the agreement to erect a brick building on the lot; that they conveyed said 53-foot lot to the defendants by deed duly executed, acknowledged, and delivered; that they also owned considerable other property adjoining said lot, and were interested in securing the erection of a brick building on the lot sold to defendants; that said property was all suitable for building sites for business houses; that the consideration of \$3,646.60 stated in the deed, while paid, was not all the consideration; that there was another and further consideration for the execution and delivery of said deed, to wit, "the obligation, promise and agreement on the part of defendants to immediately construct and erect on said block of land a brick building," and "that had the defendants not promised and agreed to build the same, and had the same not been a part of the consideration, these plaintiffs would not have sold said block of land for the recited consideration therein." It is further alleged that defendants immediately upon the execu-

tion of the deed took possession of the 53-foot lot, and, although demanded by plaintiffs to construct the brick building as agreed, defendants, at first promising to do so in a short while, failed to erect said building; and after postponing same from time to time, giving one excuse after another, finally refused to erect the building, declaring they had a deed to the property and that it was theirs, and they did not intend to carry out their contract. Plaintiffs tendered defendants the \$3,646.60 cash consideration, and demanded a reconveyance of the lot, which defendants refused. Plaintiffs offer to return the money, and pray for rescission and cancellation of the deed. The defendants' demurrer to the petition was sustained, and, as plaintiffs stood on the petition, the court rendered final judgment, dismissing the same. Charles E. Fraley died, and the suit was revived in the name of his administrator, and it is here on petition in error.

[1] 1. Mere nonperformance of a promise, although such promise is a part of the consideration for the deed, is not within itself either fraud or evidence of fraud. There must be either a specific averment that the contracting party made the promise with the secret intention of not performing it, or facts must be pleaded establishing such intent not to perform. *Hayes v. Burkam*, 51 Ind. 180; *Patterson v. Wright*, 64 Wis. 289, 25 N. W. 10; *Fenwick v. Grimes*, Fed. Cas. No. 4734; *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640; *Miller v. Sutliff*, 241 Ill. 521, 89 N. E. 651, 24 L. R. A. (N. S.) 735; *German National Bank v. Princeton State Bank*, 128 Wis. 60, 107 N. W. 454, 6 L. R. A. (N. S.) 556, 8 Ann. Cas. 502; *Blackburn v. Morrison*, 29 Okl. 510, 118 Pac. 402, Ann. Cas. 1913A, 523; *McLean v. Southwestern Casualty Ins. Co.*, 61 Okl. 79, 159 Pac. 660.

[2-5] 2. The alleged agreement to erect the building was neither a condition precedent nor a condition subsequent. A condition subsequent operates upon estates already created and vested, and renders them liable to be defeated; while a condition precedent is one that must be performed before the estate can vest or be enlarged. Courts are inclined to construe clauses in deeds as covenants, rather than as conditions, if the language employed is capable of construction as a covenant. If it be doubtful whether the clause is intended as a condition or a covenant, the doubt will be resolved in favor of construing the clause as a covenant, and not as a condition. *Jones on Landlord and Tenant*, § 487; *Johnson v. Gorley*, 52 Tex. 222. Of course, the erection of the building was not a condition precedent. The defendants paid the cash consideration, and the deed was delivered, and they went in possession. Where there is doubt as to whether a condi-

tion is precedent or subsequent, courts lean to that construction rendering performance a condition subsequent. *Ross v. Sanderson*, 162 Pac. 709, L. R. A. 1917C, 879; *Front Street M. & O. R. R. Co. v. Butler*, 50 Cal. 574; *Tipton v. Feltner*, 20 N. Y. 423, 433; *Antonelle v. Kennedy & Shaw Lumber Co.*, 140 Cal. 809, 73 Pac. 968.

[8-8] The absence of a provision for forfeiture or reversion for failure to erect the building tends to refute an intention to make the erection of the building a condition subsequent. A recitation in a deed that it is made in consideration of a certain sum of money and the agreement of the grantee to do other things therein specified, that is, construct a building on the land, does not create an estate upon condition. The language used must be so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created. Conditions subsequent are always construed strictly, and will not work a forfeiture unless clearly expressed in unequivocal terms or necessarily implied. *Hawley v. Kaitz*, 148 Cal. 393, 83 Pac. 248, 3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282; *Board of Education v. Brophy* (N. J. Ch.) 106 Atl. 82. It is absolutely clear that the erection of the building was neither a condition precedent nor a condition subsequent, and that the failure to erect the building is no cause for rescission and cancellation. See *Eckhart v. Irons*, 128 Ill. 568, 20 N. E. 687; *Carroll County Academy v. Trustees of Gallatin Academy*, 104 Ky. 621, 47 S. W. 617; *Clement v. Burtis*, 121 N. Y. 708, 24 N. E. 1013; *Hays v. St. Paul Church*, 196 Ill. 633, 63 N. E. 1040; *Minard v. Delaware, L. & W. R. Co.* (C. C.) 139 Fed. 60; *Davis v. Jernigan*, 71 Ark. 494, 76 S. W. 554; *Braddy v. Elliott*, 146 N. C. 578, 60 S. E. 507, 16 L. R. A. (N. S.) 1121, 125 Am. St. Rep. 523; *Soria v. Harrison County*, 96 Miss. 109, 50 South. 443; *German E. P. Congregation v. Schreiber*, 277 Mo. 113, 209 S. W. 914; *Nowak v. Dombrowski*, 267 Ill. 103, 107 N. E. 807; *Kampman v. Kampman*, 98 Ark. 328, 135 S. W. 905; *Thompson v. Hart*, 133 Ga. 540, 66 S. E. 271; *Koch v. Streuter*, 232 Ill. 594, 83 N. E. 1072.

[9] 3. The plaintiffs misconceived their remedy. The district court no doubt sustained the demurrer upon the theory that the plaintiffs were entitled to rescission or no relief, and, not being entitled to rescission, no relief could be granted under the prayer. The demurrer admitted the facts alleged, and, if it be true that defendants, as a part of the consideration, agreed to erect the building as alleged, and then refused to perform their contract, the plaintiffs are entitled to specific performance or damages in lieu thereof. The prayer for judgment is only a matter of form, and is no part of the statement of the cause of action. *Smith v. Smith*, 67 Kan. 841, 73 Pac. 56; *King v. Milner*, 63

Colo. 405, 167 Pac. 958; *Carson v. Butt*, 4 Okl. 133, 46 Pac. 596.

[10] Under the Code of Civil Procedure in force in this state, a plaintiff is required to set forth the facts constituting a cause of action; and, if he states facts showing that he is entitled to a remedy, either legal or equitable, his action will not be dismissed because he has misconceived the nature of his remedial right, and has asked for equitable relief when he should have asked for a legal remedy. A plaintiff is simply required to state the facts, and although he prays for legal relief when he is entitled to equitable relief makes no difference. If he shows facts constituting a cause of action, the error should be overlooked, and that relief granted which the facts alleged and proved justify. *Pomeroy's Code Remedies*, §§ 11 to 25, inclusive; 16 Ency. Pl. & Pr. 796.

[11] The plaintiffs may reform their petitions so as to ask for damages for breach of the contract to erect the building or for specific performance, and, if that relief cannot be granted under the doctrine of *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509, *Lone Star Salt Co. v. T. S. L. Ry. Co.*, 99 Tex. 434, 90 S. W. 863, 3 L. R. A. (N. S.) 828, *Edelen v. Samuels & Co.*, 126 Ky. 295, 103 S. W. 360, *Berliner Gramophone Co. v. Seaman*, 110 Fed. 30, 49 C. C. A. 99, *Javierre v. Central Altigracia*, 217 U. S. 502, 30 Sup. Ct. 598, 54 L. Ed. 859, and *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955, then the plaintiffs may have the alternative relief of damages for the breach of the contract. *Ball v. White*, 50 Okl. 429, 150 Pac. 901; 20 Ency. Pl. & Pr. 482.

The petition does not disclose whether the alleged agreement to erect the building is evidenced by a separate writing or by parol testimony. Where a pleading falls to allege the character of the evidence, whether written or parol, to establish a contract, and the law requires the contract to be in writing, the presumption is that the contract was in writing. Whether parol evidence is competent to prove a contractual consideration is a question on which we express no opinion, but see *Tayiah v. Bunnell*, 186 Pac. 240; *Galveston, H. & S. A. R. Co. v. Pfeuffer*, 56 Tex. 66; *Houston & T. C. R. Co. v. McKinney*, 55 Tex. 176; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638; *Halvorsen v. Halvorsen*, 120 Wis. 52, 97 N. W. 494; *Chesson v. Pettijohn*, 28 N. C. 121; 4 Ency. Ev. 204.

Upon the court sustaining the demurrer, plaintiffs could have amended their petition to conform to the suggestions herein made. Having failed to do so, the reversal of this case with leave to amend in the trial court is a matter of grace and not of right. Section 5261, R. L. 1910, directs a judgment in favor of plaintiffs in error for the recovery of their cost, including cost of the transcript

(191 P.)

of the proceedings or case-made filed with the petition in error, unless the case is reversed in part and affirmed in part. It would not be just for the plaintiffs in error in this case to recover their cost on appeal. It is therefore ordered that the judgment of the district court be, and the same is hereby, reversed, and the case remanded to the district court of Carter county, with directions to permit plaintiffs to recast their pleadings as herein suggested, this order of reversal being conditioned, however, upon plaintiffs in error within 15 days from this date filing with the clerk of this court a written statement, confessing judgment for all the cost of this appeal. Unless such confession of judgment is filed within 15 days from this date, the judgment of the trial court will be affirmed.

HARRISON, V. C. J., and PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

(79 Okl. 33)

**RAILWAY MAIL ASS'N v. EDMONDS.**  
(No. 9833.)

(Supreme Court of Oklahoma. July 6, 1920.)

*(Syllabus by the Court.)*

1. Appeal and error  $\S$  230—Sufficiency of evidence must be raised by demurrer or request for instructed verdict.

Where a party submits his case to the jury, without demurring to the evidence or asking an instructed verdict, or otherwise legally attacking its sufficiency, the question whether there is any evidence reasonably tending to support the verdict is not presented for review by his motion for a new trial.

2. Appeal and error  $\S$  1002—Verdict on conflicting evidence not disturbed.

Where a verdict is rendered upon conflicting evidence, and there is evidence reasonably tending to support the verdict, this court will not disturb the verdict on appeal.

Appeal from District Court, Oklahoma County; John W. Hayson, Judge.

Action by Charles H. Edmonds against the Railway Mail Association, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Warren K. Snyder, of Oklahoma City, for plaintiff in error.

R. M. Campbell, of Chicago, Ill., and Everest, Vaught & Brewer, of Oklahoma City, for defendant in error.

McNEILL, J. This action was commenced in the district court of Oklahoma county by Charles H. Edmonds against the Railway Mail Association, a corporation, to recover upon an insurance policy for the loss of an eye in the sum of \$1,000, the amount provided in the policy. The petition alleged

that plaintiff received an injury on the 11th day of May, 1915, which resulted in the loss of his left eye and within 120 days after the accident. It was further alleged in the petition that the plaintiff at the time of the injury was engaged as a postal clerk on car No. 326, Missouri, Kansas & Texas Railway Company, and while so engaged, owing to the defective condition of the guard wire in said car, the plaintiff, while endeavoring to shut the door, slipped and fell, striking his left eye upon said wire, making an abrasion upon the ball of the eye, which became diseased, and thereafter the eye had to be removed.

The answer filed was a denial that plaintiff was the real party in interest, claiming the policy had been assigned, admitted issuance of the policy, but denied that the plaintiff was injured by an accident, but alleged the eye was removed by reason of a self-inflicted injury by the plaintiff himself, for the purpose of recovering on the policy; denied that any proof of loss was made; answered especially that the policy provided the defendant should have the right to treat and examine the injury, and that plaintiff had refused to permit the defendant to treat or examine the injury or to have any one present when the eye was being inspected or the operation at the time of the removal of the eye. To this answer the plaintiff filed a reply which was a general denial. With the issues thus joined, upon the trial of the case to the jury, a verdict was returned in favor of the plaintiff, and from a judgment thereon the defendant has appealed to this court.

For reversal of the case the plaintiff in error has presented seven assignments of error. The third, fourth, fifth, and sixth assignments of error go to the sufficiency of the evidence to support the verdict. These assignments are not well taken, for the reason the sufficiency of the evidence was not raised in the lower court by demurrer to the evidence, nor by motion to direct a verdict.

[1] This court, in the case of Norman v. Lambert, 167 Pac. 218, states as follows:

"Where the plaintiff submits his case to the jury, without demurring to the evidence or asking an instructed verdict, or otherwise legally attacking its sufficiency, the question whether there is any evidence reasonably tending to support the defense is not presented for review by plaintiff's motion for a new trial."

This same rule was announced in the following cases: Muskogee Electric Traction Co. v. Reed, 35 Okl. 334, 130 Pac. 157; Bank of Cherokee v. Sneary, 46 Okl. 186, 148 Pac. 157; Reed v. Scott, 50 Okl. 757, 151 Pac. 484; Oaks v. Samples, 57 Okl. 660, 157 Pac. 739; Rutledge v. Jarvis et al., 60 Okl. 66, 158 Pac. 586.

The seventh assignment of error is that the

verdict of the jury was given under bias, prejudice, and passion. This assignment of error is not briefed separately nor is the assignment argued in the brief unless it can be said that the verdict could not have been rendered upon the evidence given unless the jury was biased and prejudiced, but in this we cannot agree. The evidence was conflicting, and the jury was properly instructed, and returned a verdict for plaintiff upon said conflicting evidence.

[2] The second assignment is errors of law occurring at the trial which were duly excepted to. This assignment is not separately briefed, nor does plaintiff in error set out what particular errors are intended to be covered by this assignment. If it raises the question of whether the plaintiff was the real party in interest, upon the theory that the plaintiff has assigned the insurance policy, or the question of whether the plaintiff had denied the defendant company the right to examine or treat the eye, and refused to permit them to have some one present at the time of the operation when the eye was removed, then it is not well taken, for these were questions of fact upon which the evidence was conflicting, and upon which the parties themselves disagreed, and the court upon proper instructions submitted these questions to the jury, and, the sufficiency of the evidence not being presented by demurrer or motion to direct the verdict, the finding of the jury is conclusive upon this point.

The first assignment of error is that the court erred in overruling the motion for new trial. Being unable to sustain any of the other assignments of error, it necessarily follows that this assignment is not well taken. It is sufficient to say that the case was submitted to the jury upon conflicting evidence, and neither side saved any exceptions to the instructions given by the court, nor requested any instructions, and upon the conflicting evidence the jury returned its verdict in favor of the plaintiff, and the same will not be disturbed on appeal.

Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

RAINEY, O. J., and HARRISON, KANE, PITCHFORD, and JOHNSON, JJ., concur.

(79 Okl. 70)

NEW et al. v. McMILLAN et al. (No. 10071.)

(Supreme Court of Oklahoma. May 25, 1920.  
Rehearing Denied July 20, 1920.)

(Syllabus by the Court.)

#### I. Sufficiency of Instructions.

Instructions examined, and found to contain no substantial error, either in the instructions

given nor in the refusal of instructions offered by plaintiffs in error.

2. Master and servant ¶277, 278(17)—Evidence held to show that deceased was in employment of defendant, and that death was caused by defendant's negligence.

(a) The record of testimony examined, and found to be sufficient to sustain the finding of the jury that deceased at the time of his death was in the employ of the railroad company.

(b) That it is sufficient to warrant the finding that the deceased came to his death through the negligence of the railroad company.

(c) Under all the evidence, it is sufficient to sustain the verdict as modified.

3. Master and servant ¶284(2)—Relation of parties held a question of fact.

Whether or not the relation of master and servant exists in a given case is a question of fact or of mixed law and fact, and is to be proved as any other like question.

4. Master and servant ¶3(1)—Essentials of contract of employment, stated.

The relation of master and servant arises only out of contract, to constitute such contract there must be mutual understanding, a mutual agreement between and a mutual meeting of the minds of the parties.

5. Master and servant ¶88(7)—Test as to termination of employment stated.

Where it is agreed that the relation of master and servant had existed up to a given time but an issue as to whether such relation ceased at such time and was transferred to a third person, a reasonable test in such case is whether or not the servant by mutual agreement terminated his employment, ceased to be under the control and orders of the former master, renounced obedience to such master, and knowingly and willingly subjected himself to the orders of another under a new agreement with a new master.

6. Master and servant ¶88(1)—When servant assisting third person remains servant of original employer, stated.

Where a servant is under the control and subject to the orders of the master and under his employ owes obedience to such master and is ordered by such master to assist a third person to do a piece of work, and while so doing he remains under the control and subject to the orders of his master, he does not in such case become the servant of such third person, but remains the servant of his master.

7. Master and servant ¶96(2)—Master loaning servant to third person held liable for death from failure to warn.

Where a master orders his servant to assist a third person in doing a hazardous piece of work without warning him of the dangers thereof, the servant being unacquainted with the dangers of such work, and being under the control and subject to recall from same while engaged in such work, and while so engaged he loses his life through negligence in the operation of machinery, the master is liable in damages for such injury.

8. Master and servant ¶101, 102(1, 8), 150 (1), 168(1)—Duties of master to safeguard servant, stated.

It is the duty of the master to exercise reasonable care in providing for his servants a safe place in which to work, reasonably safe tools and appliances with which to work, reasonably careful, prudent and competent fellow servants with whom to work, and to warn them of dangers incident to a new piece of work, with which they are unacquainted, and, where a failure to discharge any one of such duties constitutes the proximate cause of an injury, the master will be held liable for damages.

9. Death ¶95(1)—Damages are reasonable compensation for pecuniary loss.

In an action by a widow and minor children for the death of the husband and father caused by the wrongful act of another, the law does not undertake to condone for the loss of the husband and father, but merely provides for such damages as will reasonably compensate the family for the pecuniary loss sustained.

10. Appeal and error ¶1140(1)—Death ¶99(4)—Excessive verdict will be reduced; \$21,780 held excessive and reduced to \$14,520.

Where a verdict for damages is so far beyond the compensation contemplated and provided for by law as to plainly indicate that the jury was actuated by bias, prejudice, or passion, the verdict will be reduced for excessiveness.

Error from District Court, Pontotoc County; J. W. Bolen, Judge.

Action by Effie McMillan, administratrix of the estate of Ben J. McMillan, deceased, and others, against Alexander New and another, receivers for the Missouri, Oklahoma & Gulf Railway Company, a corporation, to recover for wrongful death. Judgment for plaintiffs, and defendants bring error. Modified and affirmed.

Arthur Miller, of Kansas City, Mo., and Jones & Foster, of Muskogee, for plaintiffs in error.

S. P. Jones, of Marshall, Tex., and E. N. Jones, of Ada, for defendants in error.

**HARRISON, J.** This suit was begun by Effie McMillan, as administratrix of the estate of her deceased husband, Ben McMillan, and for herself and five minor children asking judgment against the Missouri, Oklahoma & Gulf Railway Company and its receivers for negligently causing the death of her husband, while engaged in unfastening an elevator bucket at the top of a coal chute.

The cause was tried upon the issues: First, whether the deceased, if found to be in the employment of defendants, came to his death by his own contributory negligence, Second, whether he was in the employ of defendants or that of Arnold & Co., independ-

ent contractors, who are constructing the coal chute for the railroad company.

The verdict of the jury was in favor of plaintiffs, against the railroad company, for the sum of \$21,780. From the judgment upon such verdict, the railroad company appealed.

The assignment of errors contains 15 separate grounds for reversal. These may all be embodied in and disposed of under the following heads, to wit:

(1) Whether the court erred in instructing the jury.

(2) Whether the evidence supported the verdict of the jury.

(3) Whether the court erred by entering a judgment not in accord with the verdict.

(4) Whether the verdict was excessive.

[1] On the first question we have examined the court's instructions, as well as those offered by the defendants and rejected by the court, and are of the opinion that the court's instructions upon the theory upon which the cause was tried was a fair and substantially correct statement of the law applicable to the facts in the case.

The cause was tried upon the theory that the railroad company was engaged in interstate commerce, and that, if the deceased was in the employ of the railroad company and came to his death by the negligence of the railroad company, the damages, if any, should be awarded under the federal Liability Act (U. S. Comp. St. §§ 8657-8665).

As to whether the work in which the deceased was engaged did in fact constitute interstate commerce, thereby bringing him within the federal Liability Act, we are not called upon to decide, as that question is not made an issue here, nor was it made an issue in nor decided by the trial court.

The cause seems to have been tried, by mutual consent, upon the theory that if the railroad company was liable at all it was liable as an interstate carrier.

The court instructed the jury as to the law applicable in such case, and we find no substantial error in the instructions given, nor in the refusal of the instructions offered by the railroad company.

[2] As to the sufficiency of the evidence, three questions are to be determined:

(1) Whether the evidence was sufficient to warrant the jury in finding that the deceased was in the employ of the railroad company and not in that of the independent contractor.

(2) Whether there was sufficient evidence to warrant the finding that deceased came to his death by the negligence of the railroad company, or whether by his own contributory negligence.

(3) Whether under all the evidence it is sufficient to sustain the verdict as modified.

On each of these questions the testimony was in direct conflict.

It is undisputed, however, that deceased was in the employment of the railroad company, and under its direction and control, up to the very minute that he began work on the coal chute.

M. P. Nash, the roundhouse foreman, denied that he had ordered or directed the deceased to go up on the coal chute, though he admitted that deceased was under his orders and control in and around the roundhouse and that he would have been discharged for any disobedience of his orders. He testified that Mr. Korten, the man who had had charge of the construction of the coal chute for the construction company, called to him (Nash) and asked him to send up a man to help dislodge the bucket at the top of the coal chute; that he told Joe McMillan, a brother of deceased, to go up on the coal chute and help Joe Korten, the Arnold man, and repeated that he told Joe McMillan to help Joe Korten with the bucket, but did not tell Ben McMillan, the deceased, to go.

Joe Korten testified that the deceased went up on the coal chute of his own accord, though he admitted that he asked Nash to send up a man to help him, and testified that Joe McMillan was the man who came in obedience to Nash's orders, but Joe McMillan testified that Mr. Nash told him to go up and help Ben, the deceased, with the bucket, and Ed Davis testified that he heard Mr. Nash tell Ben to go up. Here was a direct conflict in testimony; Nash and Korten testifying that Nash did not order the deceased to go up, and Joe McMillan and Ed Davis testifying that Nash did order deceased to go up.

The jury was the exclusive judge of the credibility of these witnesses, and gave credence to the testimony of Joe McMillan and Ed Davis, and under the law, the jurors being the exclusive judges of the credibility of the witnesses and the weight to be given their testimony, this court cannot say that they erred. And if Joe McMillan and Ed Davis told the truth, then Ben McMillan, the deceased, was ordered by Nash to go up on the chute and help Korten. This being true, he went up there in obedience to the command and orders of the railroad company, through its roundhouse foreman, and in fulfillment of his obligations under his employment, to obey the orders of such foreman; therefore he was in the employment of the railroad company, notwithstanding the fact that the coal chute had been constructed under an independent contract. The construction company nor Joe Korten, the representative of such company, had no authority to command Ben McMillan nor Joe McMillan, nor did either presume to exercise such authority. It had completed its independent contract, and its men had quit work some time before, and Joe Korten had been recalled by the railroad company to repair a

defect in the working of the coal bucket in which the coal was carried up through an open steel frame elevator and dumped into the coal chute. Under his testimony, and also the testimony of Mr. Nash, the roundhouse foreman, Korten did not assume to direct the roundhouse employes to help him, but recognizing Nash's authority to do so, called upon Nash to send help, and Nash said he sent the help in response to Korten's request for it. Nash also testified that he required strict obedience to his orders and would fire an employe who refused to obey.

The circumstances were that a concrete coalhouse had been constructed upon trestles high enough above the ground that cars could pass under the coalhouse and load with coal. On the south side of the coalhouse the Arnold Construction Company had constructed a steel shaft or tower, operated by electricity, by means of which coal was elevated from the coal pit on the ground to the top of the coal chute which ran at an angle of 45 degrees from the elevator shaft, down into the top of the coalhouse. The elevator shaft extended high enough above the top of the coalhouse that, when the coal bucket dumped, the coal was discharged in the top of the chute, extending from the elevator shaft into the top of the coal house. The defect requiring repair was that the bucket did not dump and return automatically as it was intended to do, but when it reached the top of the shaft it would hang and would not come down again. This shaft together with the machinery and appliances necessary for its operation, had been completed and turned over to the railroad company, and Mr. Korten and his employes had left; he having gone to his home in Denison, Tex.

There was an effort on the part of Mr. Korten to show that this elevator had been operated without authority, and to saddle such operation upon Ben McMillan, the deceased. There was also some disposition on the part of the railroad company to deny that it had operated the elevator; but, whatever their contentions in that regard may have been, the facts were that the elevator had been completed and turned over to the railroad company and coal had been elevated up through the shaft and dumped into the coal chute extending from the shaft into the top of the coalhouse, and, in thus operating the machinery of the elevator, the bucket, which held about a ton and a quarter of coal, had dumped the coal into the chute, but had turned upside down and became fastened and failed to return to the bottom.

Now the jury was at liberty to conclude that the railroad company had been operating the elevator, else the bucket would not have been hung at the top, and the railroad company would not have known that it did not work with the automatic perfection it was intended to work and therefore at liber-

ty to disregard the testimony of Korten, which tended to show that Ben McMillan had been operating it, without authority, as well as the testimony of Nash that it had not been operated at all.

The testimony was that Ben McMillan was without education, had nothing to do with the operation of the machinery, but was an ordinary manual laborer, who under the direction of his foreman, Mr. Nash, worked in and around the fire pit, and there was no testimony that he ever attempted to operate any of the machinery or to assist in the operation of same. Hence the finding of the jury that the deceased went to this work in obedience to the commands of his foreman was supported by the positive testimony of two witnesses, whose testimony, if true, was sufficient to sustain such finding, and the jury was at liberty and it was their exclusive province to decide whether or not these two witnesses, Joe McMillan and Ed Davis, told the truth.

Likewise the finding that deceased at the time of his death was in the employ and working under the orders and directions of his foreman was sustained by the evidence and is supported by the law.

This was only a 10 or 15 minute job. Korten had no authority to command Joe and Ben McMillan to do anything and plainly recognized such fact. Nor would Joe and Ben McMillan have been under any obligations to obey Korten's orders. They could not have done so without disobedience to Nash. Nor could Nash terminate their obedience to him and transfer same to Korten except by a full agreement and understanding on their part and consent on their part to terminate obedience to Nash and acknowledge obedience to Korten. Such a condition is not apparent from the record.

[3, 4] For, if the testimony of Joe McMillan and Ed Davis was true, then Ben McMillan went to this work in obedience to the commands of the railroad company, speaking through its foreman, Mr. Nash, and the relation of master and servant between the railroad company and the deceased had not terminated.

"Whether or not the relation of master and servant existed in the given case is a question of fact or of mixed law and fact and is to be proved as any other like question." 26 Cyc. 971.

"The relation of master and servant arises only out of contract." 26 Cyc. 968.

To constitute such contract there must be a mutual understanding, a mutual agreement between and mutual meeting of the minds of the parties.

"Like every other contract the relation of master and servant is a product of the meeting of minds, there must be an offer on the part of one and an acceptance on the part of the other, no person can be subjected against

his will to the full measure of an obligation that the law has attached to a contract of service." 18 R. C. L. p. 493, § 3, citing *W. U. T. Co. v. Northcutt*, 158 Ala. 539, 48 South. 553, 132 Am. St. Rep. 38; *Maciay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Fitzpatrick Ginning Co. v. McLaney*, 153 Ala. 586, 44 South. 1023, 127 Am. St. Rep. 71; *Atlantic R. Co. v. West*, 121 Ga. 641, 49 S. E. 711, 67 L. R. A. 701, 104 Am. St. Rep. 179.

To the same effect is the text in *Labatt's Master & Servant*, vol. 1 (2d Ed.), beginning on page 98.

[5-7] In cases like the one at bar, where it is agreed that the relation of master and servant had existed but where there is an issue, as to whether such relation had ceased and been transferred to a third person, a reasonable test, and it seems to us the real test, in such case, is whether or not the servant by mutual agreement terminated his employment, ceased to be under the control and subject to the orders of the former master, renounced further obedience to such master, and knowingly and willingly subjected himself to the orders of another, under a new contract with a new master. Likewise, the test as to a third person's liability for injuries caused by the acts of such servant depends upon whether the master has relinquished all control over the servant or still retains a general contract over him, and, where only partial contract is exercised by such third person, he cannot be held liable for the acts of such servant. See 26 Cyc. 1522, 1523.

There was no evidence to the jury that Nash's authority over Joe McMillan, the surviving brother, ever ceased, or was in any wise or for any period of time relinquished, further than as to the mere details as to how to do the work, which the master, Nash, had ordered him to do. Joe McMillan was ordered by Nash to go help Korten on the tower, Korten exercised no further control over him than merely to tell him how to do the work, and, after the work was done, Joe McMillan continued in obedience to and subject to the orders and control of Mr. Nash. It was never intimated to him by Nash that the relation between them ceased or terminated and that he would thereafter be subject to the orders of Korten under a new contract with Korten, nor is there any intimation that Korten and Joe McMillan entered into any agreement out of which the relation of master and servant could arise. It was merely the granting of a favor to Korten in the granting of which both Korten and the railway company were to be benefited.

Now, if Joe McMillan and Ed Davis told the truth, the indential condition or relation existed between Ben McMillan, the deceased, and the railroad company, that existed between Joe McMillan, the surviving brother, and the railroad company.

The transaction at the utmost amounted to no more than a mere temporary lending for a few minutes, by the master, Nash, of his servants, Ben and Joe McMillan, to a third person, either or both of whom were subject to recall by Nash at any moment he saw fit.

"It is well settled that one who is a general servant of another may be loaned or hired by his master to another for some special service, so as to become as to this service the servant of such third person, the test being whether in the particular service in which he is engaged to perform he continues liable to the direction and control of his master or becomes subject to that of the person to whom he is loaned or hired, it makes no difference whether the proprietor to whom the servant is loaned actually exercises his right of control or direction as to the details of the work or simply sets the servant to do what is necessary, trusting to his expert skill for the results." 18 R. C. L. pp. 493, 494, § 3, citing *Wyman v. Berry*, 106 Me. 43, 75 Atl. 123, 20 Ann. Cas. 439; *Sacker v. Waddell*, 98 Md. 43, 56 Atl. 399, 103 Am. St. Rep. 374; *Hasty v. Sears*, 157 Mass. 123, 31 N. E. 759, 34 Am. St. Rep. 267; *Gagnon v. Dana*, 69 N. H. 264, 39 Atl. 982, 41 L. R. A. 389, 76 Am. St. Rep. 170; *Wilson v. Valley Imp. Co.*, 69 W. Va. 778, 73 S. E. 64, 45 L. R. A. (N. S.) 271, Ann. Cas. 1913B, 791; *Patterson v. Canadian Pac. R. Co.* 26 Ont. L. Rep. 410; *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328.

Some features of the doctrine announced in the foregoing text are reflected in each of the above-cited cases.

Also, 26 Cyc. 1087; *Mo., etc., R. Co. v. Ferch*, 18 Tex. Civ. App. 46, 44 S. W. 317; *Goodwin v. Smith* (Ky.) 66 S. W. 179, holding that the liability of the master does not cease unless the servant has been informed of the change and has willingly accepted same.

Hence under the facts, which the jury within its exclusive province found to be true, and under the decisions applicable to such state of facts, the deceased was a servant of the railway company at the time he met his death.

As to the question of contributory negligence and assumption of risk, these questions were fairly and correctly submitted as questions of fact to be found by the jury. There was conflict in the testimony as to whether defendants or Korten were guilty of negligence, and also conflict as to whether deceased by his own negligence contributed to the cause of his death, and upon such conflicting testimony the jury found for the plaintiffs.

The railroad company claimed that deceased did not go to his work under its orders, but went either voluntarily or under the orders of Korten. Korten denied having ordered him, but stated that he went voluntarily. However, there was no testimony as to whether Korten had opportunity to

know whether Nash had ordered deceased to go to the work or not. Hence Nash was not corroborated, and there was the positive testimony of Joe McMillan and Ed Davis, as before stated, that Nash had ordered Joe to go upon the tower and help dislodge the bucket.

Joe McMillan testified that after he and his brother, the deceased, had climbed to the top of the tower, they debated as to how they would go to work to unfasten the bucket, and finally concluded that he would go into the shivehouse, a house erected on top of the frame tower, and stand on the south side on a little platform between the elevator shaft and the walls of the shivehouse, while his brother would slip around to the north side and hang over into the chute while he worked from that side. There was not room on the north side of the shivehouse between the wall and the elevator shaft for him to stand and work, so in order to get at the work he was compelled to climb around the shaft and hang his feet and body down the coal chute, holding with one hand while he wrenched at the bucket with the other. Likewise Joe was compelled to stand on the platform south of the shaft and hold to the framework with one hand while he worked at the bucket with the other; that in a few moments, or about the time they both took hold of the bucket, the electric current was turned on from the bottom without any knowledge of theirs or warning to them, and which caused the bucket to suddenly jerk upward throwing them both loose; that it gave him a severe shock and threw him back against the wall; that, after the sudden jerking of the bucket which threw them loose, he stood for some minutes without doing anything; that it had not occurred to him at that time that his brother had been killed, but that he stood there thinking that possibly his brother had caught and saved himself the same as he had and would climb back and show himself in a short time; that while he was standing there a man by the name of Williams climbed up to the top of the tower and asked him what had become of the other man (Williams, it seems, had gone to the top of the tower in response to a request of Korten); that, not seeing deceased, Williams suggested that he was a goner, and they went down the shaft to a place where they could look through a crack into the coal-house, and there they saw the deceased crushed and mangled from the fall of about 40 or 46 feet.

[8] Under this testimony and the attendant circumstances, the jury is sustained in finding the railroad company guilty of negligence in the following particulars:

(1) In failing to provide a reasonably safe and suitable platform on each side of the elevator shaft and on the inside of the shivehouse for employes to stand upon in adjust-



ing the bucket or other machinery which required attention at that point.

(2) In failing to instruct them of the dangers incident to the work which they were ordered to do, they both being unskilled laborers, neither of whom knew anything about machinery or electric appliances or the dangers incident to the operation of same.

(3) In failing to furnish reasonably careful, prudent, and competent fellow servants with whom to work.

These are duties which the master owes to his servant, duties which the law required to be discharged, and where, by the failure to discharge any one of such duties, the servant is injured, the master may be held liable therefor in damages. *Ardmore Oil Co. v. Barner*, 179 Pac. 932; *Dickinson v. Whitaker*, 75 Okl. 243, 182 Pac. 901; *Davis v. Ball*, 76 Okl. 252, 185 Pac. 105; *Ft. S. & W. Ry. Co. v. Knott*, 60 Okl. 175, 159 Pac. 847; *C. R. I. & P. Ry. Co. v. De Vore*, 43 Okl. 534, 143 Pac. 864, 865; *C. R. I. & P. Ry. Co. v. Brazzell*, 40 Okl. 460, 138 Pac. 794.

The jury made no special finding as to what specific act of negligence upon which the railroad company was found liable, but returned a general verdict in favor of plaintiffs for a specific sum. That the railroad company had failed to discharge all of the above duties was an issue in the case. The testimony as to all of such duties was conflicting, yet from an examination of the entire record we must conclude that the evidence was sufficient to sustain the jury in finding the railroad company liable. As to whether the court rendered a judgment not in accord with the verdict of the jury, and thereby committed error, it is argued at considerable length by plaintiffs in error in their briefs that the judgment of the court was not in accord with the verdict of the jury, and that the court erred in rendering such judgment, and have cited a number of authorities in support of their contention.

The verdict of the jury was as follows:

"We, the jury, impaneled and sworn in the above-entitled cause, do upon our oaths find for the plaintiffs and assess their damages at \$21,780.00, twenty-one thousand seven hundred and eighty dollars. And apportion it among them as follows:

To Effie McMillan .....	\$ 9,000
Ben J. McMillan .....	1,000
Joseph McMillan .....	1,780
Lucile McMillan .....	2,500
Rosella McMillan .....	3,500
Ozetta McMillan .....	4,000

Total ..... \$21,780

"J. H. Lovelady, Foreman."

The judgment as amended by the court is as follows:

"It is therefore ordered, adjudged, and decreed by the court that the said plaintiffs, Effie McMillan, administratrix; for the use and benefit of Effie McMillan, Ben J. McMillan, Joseph McMillan, Lucile McMillan, Rosella Mc-

Millan, and Ozetta McMillan, have and recover of and from said defendants, Henry C. Ferris and Alexander New, receivers for the Missouri, Oklahoma & Gulf Railway Company, a corporation, \$21,780, apportioned as follows, to wit: Effie McMillan, nine thousand (\$9,000.00) dollars; Ben J. McMillan, one thousand (\$1,000.00) dollars; Joseph McMillan, one thousand seven hundred eighty (\$1,780.00) dollars; Lucile McMillan, twenty-five hundred (\$2,500.00) dollars; Rosella McMillan, thirty-five hundred (\$3,500.00) dollars; Ozetta McMillan, four thousand (\$4,000.00) dollars—together with the costs of this case, for which let execution issue."

Now, it must be observed that the plaintiffs, in the amended petition, the petition which presented the issues for a trial in the court below, were Effie McMillan, the administratrix of the estate of Ben McMillan, deceased, and Effie McMillan for herself and her five minor children, naming them. It is observed, also, that the jury found for the plaintiffs in the sum of \$21,780, but apportioned such sum among the plaintiffs as stated in the verdict.

Now, the judgment of the court was no more nor less than a judgment in favor of plaintiffs, apportioned exactly as the jury had apportioned it. Therefore we must conclude that the judgment of the court was not in conflict with the verdict of the jury, and that the decisions relied upon by plaintiffs in error are not in point.

On the issue as to whether the verdict is excessive, it is contended by plaintiffs in error that the verdict is grossly excessive, citing decisions of this court and from other courts where verdicts have been reduced, in support of such contention.

On the other hand, it is urgently insisted by defendants in error that the verdict is not excessive, citing a great number of well-reasoned cases, wherein verdicts varying from \$18,000 to \$40,000 have been sustained.

But in cases of this character there is no fixed and definite rule, nor can there be made a rule by which exactly correct compensation with absolute justice may be measured in all cases. No fixed rule could possibly give exactly correct compensation with absolute justice in all cases; hence the decisions of other courts in other jurisdictions, or this court in other cases, although in a general way based upon a somewhat similar state of facts, do not become binding precedents in all cases, but, while they may be of great assistance and become mutually beneficial, they are at least no more than persuasive.

Neither the decision in *Brickman v. Southern Ry. Co.*, 74 S. O. 306, 54 S. E. 558, cited by defendants in error as sustaining a verdict for \$40,000 as not excessive, nor the decision of this court in *Independent Cotton Oil Co. v. Beacham*, 31 Okl. 384, 120 Pac. 969, cited by plaintiffs in error as reducing

a verdict for \$25,000 as being excessive, is binding, in the case at bar, although the reasoning in each of said decisions has been of great assistance herein. We readily concede the correctness of each of said decisions. They were based upon different facts and surrounded by different circumstances, neither of which is identical with the case at bar. Therefore this court is not bound, nor could it be bound, by either of said decisions.

Every case of this character must be decided under the light of past human experience and wisdom, and in view of all the particular facts and circumstances surrounding it and the peculiar conditions arising from or created by it. The deceased in the case at bar was a man 33 to 37 years of age. The record is not clear on this point, but he was uneducated, unskilled, and not qualified for any other work than simple manual labor. He was engaged in working around the fire pit and in cleaning out the fire pit, earning \$55 per month, or \$666 per year. The verdict for \$21,780 at 10 per cent. per annum would bring an annual income more than three times as great as what he could earn, and about twice as great at 6 per cent. per annum, and more than  $2\frac{1}{2}$  times as great at 8 per cent. So eliminating all possibilities of sickness and other disabilities, and all tables of life expectancy, the verdict at the medium rate of interest would bring an income more than  $2\frac{1}{2}$  times as great as his labor.

The act under which this case was tried, the federal Employers' Liability Act, provides that a carrier shall be liable in damages to the person sustaining an injury, or in case of death to the personal representative of deceased, for the benefit of survivor and children, but does not fix nor undertake to graduate the amount of damages recoverable.

Section 2845, R. L. Okl. 1910, provides that any person who suffers detriment from an unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages.

[9] It will be observed that the damages provided for in the above statute, the damages contemplated by such statute, are such as will compensate in money, that is, such as will compensate for the money loss sustained, the pecuniary injury sustained. The law does not undertake to heal the wounds of grief nor to supply the counsels and comfort of a husband and father, and very wisely refrains from such undertaking. To attempt to do so would be futile and impossible as well as unsafe.

This provision of law may seem cold and sordid, and in many cases may be so; but on the other hand, the lawmakers and the

courts have realized that to undertake with money to fill the place which a father and husband has filled in his family is just as sordid, and that to undertake to do so by law would be to open up avenues more dangerous to justice than to merely prescribe a compensation for the pecuniary injuries sustained.

[10] It seems to us, in view of the entire record and in consideration of the surrounding conditions and circumstances, that a judgment for two-thirds of the amount of the verdict, that is, that a judgment for \$14,520 and costs, would fully and fairly meet the compensation contemplated and provided for by law.

With this modification of the judgment and with instructions that plaintiffs file a remittitur of all in excess of \$14,520, and that said sum of \$14,520 be apportioned to plaintiffs in the same ratio, as the verdict, the judgment is affirmed.

RAINEY, C. J., and JOHNSON, HIGGINS, RAMSEY, McNEIL, and BAILEY, JJ., concur.

(79 Okl. 97)

TEXAS CO. v. BRANDT et al. (No. 10859.)

(Supreme Court of Oklahoma. June 3, 1920.  
On Rehearing, July 24, 1920.)

*(Syllabus by the Court.)*

1. Evidence  $\S$ 5(2)—Judgment  $\S$ 256(2)—Nuisance  $\S$ 33—Decision contrary to law will be reversed; judicial notice as to noise and odors from automobiles; evidence insufficient to enjoin gasoline filling station.

Where a trial court, as a part of the judgment, makes separate findings of fact, responsive to and within the issues, and such ultimate or controlling facts are insufficient to support the judgment, the decision is against the law, and the cause will be reversed.

On Rehearing.

2. Nuisance  $\S$ 6—Filling station violative of municipal ordinance held not ground for injunction.

In an action for injunction for the violation of a municipal ordinance regulating the location of a gasoline filling station, equity will not restrain the act which violates such ordinance unless the act is a nuisance per se or operates to cause an irreparable injury to property or rights of a pecuniary nature.

3. Nuisance  $\S$ 33—Clear proof necessary to justify injunction on ground of violation of municipal ordinance.

Where relief is asked by injunction, against the commission of an act constituting a violation of a municipal ordinance on the ground of injury to the property rights of an individual, the court will require that the complainant

clearly show such facts and circumstances in the particular case as will justify the court in granting the relief desired.

Error from Superior Court, Muskogee County; Guy F. Nelson, Judge.

Suit by J. L. Brandt and others against the Texas Company, a corporation. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

A. L. Beaty, of New York City, and Ames, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error.

Grant Foreman, J. D. Simms, and Malcolm E. Rosser, all of Muskogee, for defendants in error.

JOHNSON, J. This is an appeal from the granting of a temporary injunction by the superior court of Muskogee county. On July 15, 1919, the defendants in error filed a petition in that court seeking to enjoin the plaintiff in error from building a proposed gasoline filling station at the intersection of Twelfth street and Okmulgee avenue in the city of Muskogee. The petition charged that the contemplated gasoline filling station would constitute a nuisance. As grounds for this charge, the petition set forth that the place of its intended establishment was a residence district; that its erection there would impair the value of the property of the plaintiffs joining in the petition; that it would cause much noise and confusion; that it would result in the storage at such place of gasoline, "a dangerous and highly explosive substance"; that the place selected for the said filling station was at the foot of a hill, and its presence at such point would be a menace to the safety of the people living in the neighborhood; and, lastly, that the proposed location of the filling station was outside the fire limits of the city of Muskogee, and that the consent in writing of two-thirds of the property owners within 300 feet of the proposed station had not been obtained as required by a certain ordinance of the city of Muskogee enacted on July 11, 1919.

A temporary restraining order having been issued, the case, on July 23, 1919, came on for a hearing on the granting of a temporary injunction. A somewhat extensive hearing, lasting three days, was had, and at the conclusion of the hearing the court granted the temporary injunction.

The trial court at the request of the defendant made special findings of fact which were incorporated in the judgment and were as follows:

"(1) That the defendant in this action has commenced and is about to erect a filling station to be used for the sale of gasoline, oil and other lubricants for automobiles on the property described in the plaintiff's petition.

"(2) That the plaintiff, J. L. Brandt, lives

across the street north from the place where this filling station is to be built. That there are other residences on that street, Okmulgee avenue, north of this filling station.

"(3) That the place where the proposed plant is to be built is in an exclusive residence district.

"(4) That the stopping and starting of automobiles to be served at the filling station proposed to be maintained by the defendants will create loud and unusual and obnoxious noises in starting, and stopping, and will emit noxious and unpleasant odors which will annoy and render uncomfortable the home of the plaintiff, J. L. Brandt, and others in that immediate neighborhood.

"(5) That the plaintiff, J. L. Brandt, will be damaged in the enjoyment of his home by reason of the noxious odors and noises, and that the maintenance of said filling station by reason of the noxious odors and noises, aforesaid, would be a nuisance, and that the contemplated erection of the plant and maintenance of the filling station would damage the plaintiff, Brandt, and that he has no adequate remedy in law.

"(6) That the defendant is enjoined and restrained from erecting for the purpose of maintaining a filling station in the proposed building and enjoined from maintaining a filling station.

"(7) This order to become effective upon the plaintiffs filing a bond in the sum of \$1,000.

"(8) In making the foregoing findings of fact the court, in addition to the evidence offered, is impelled to make the findings also by reason of the fact that the court takes judicial knowledge that there are unnecessary, unusual noises made by automobiles stopping and starting at filling stations and by reason of the fact that the court takes judicial knowledge of the odors emitted when started and stopping, and the court takes judicial knowledge that odors will travel from 50 to 125 feet.

"The court further finds that the evidence of witnesses who have testified in the case, the court does not consider sufficient to base the foregoing judgment unless the court took into consideration the judicial knowledge of the facts above set forth. The court further finds that the gasoline in the proposed plant as intended to be handled by reason of the construction of the plant itself and system of handling gasoline is not necessarily dangerous, and the same in itself does not constitute a nuisance."

Thereafter the defendant commenced this proceeding in error to reverse the judgment of the trial court. The defendant makes 20 assignments of error, the first 14 of which counsel discuss in their brief under 4 propositions or subheads, the first of which is that of judicial knowledge.

The findings of fact of the court upon which the temporary injunction was based was contained in paragraph 4 of the court's findings, and was that the stopping and starting of automobiles to be served at the filling station will create loud and unusual and obnoxious noises in starting and stopping and will emit obnoxious and unpleasant odors, which will annoy and render uncomfortable

the home of plaintiff, J. L. Brandt, and others in that immediate neighborhood.

And the court further finds in the fifth paragraph of his findings that by reason of the foregoing facts the plaintiff, J. L. Brandt, would be damaged, and that the maintenance of said filling station by reason of the noxious odors and noises would be a nuisance, and that the plaintiff has no adequate remedy in law.

The sixth paragraph enjoined the defendant from erecting the building and maintaining a filling station. The seventh paragraph fixed the amount of the bond to be given by the plaintiff. In the eighth paragraph the court stated that, in making the foregoing findings, the court, in addition to the evidence offered, was impelled to make the findings by reason of the fact that the court took judicial knowledge that there are unusual noises made by automobiles stopping and starting at filling stations, and that the court takes judicial knowledge of the odors emitted when starting and stopping, and takes judicial knowledge that odors will travel from 50 to 125 feet.

The court further finds that the evidence of witnesses who have testified in the case, the court does not consider sufficient to base the foregoing judgment, unless the court took into consideration the judicial knowledge of the facts above set forth.

The court further finds that the gasoline for the proposed plant as intended to be handled by reason of the construction of the plant itself and system of handling gasoline is not necessarily dangerous, and the same itself does not constitute a nuisance.

The plaintiffs by their counsel excepted to the last finding of the court contained in paragraph 8:

"That the gasoline for the proposed plant as intended to be handled by reason of the construction of the plant itself, and system of handling gasoline, is not necessarily dangerous, and the same itself does not constitute a nuisance."

But such finding is not brought here for review by cross-petition and is therefore not for our consideration.

Concerning the other findings of the court in paragraph 8, it is said:

"That in making the foregoing findings, the court, in addition to the evidence offered, was impelled to make the findings by reason of the fact that the court took judicial knowledge that there are unnecessary, unusual noises made by automobiles stopping and starting at filling stations, and that the court takes judicial knowledge of the odors emitted when starting and stopping and takes judicial knowledge that odors will travel from 50 to 125 feet. And the court further finds that the evidence of witnesses who have testified in the case, the court does not consider sufficient to base the foregoing judgment, unless the court took into con-

sideration the judicial knowledge of the facts above set forth."

Counsel for defendant say in their brief:

"From this it is patent that we have here a temporary injunction, resting as its sole support upon the purported judicial knowledge of the trial court, that there was unnecessary, unusual noises made by automobiles at filling stations when starting and stopping, and that the same automobiles under such conditions emit noxious and unpleasant odors which will travel from 50 to 125 feet. This sweeping use of the beneficent principle of judicial notice or knowledge is startling, and, we venture to declare, unprecedented. Its novelty is greatly enhanced when we recollect that the record contains the evidence of 11 witnesses all of whom live near gasoline filling stations, and all of whom testified in plain, unmistakable language that the noises and odors judicially noticed by the trial court did not, in point of fact, exist."

[1] From an examination of the record we are convinced that the trial court is correct in stating that the testimony of the witnesses alone was not sufficient upon which to base the judgment.

R. C. L. vol. 15, pp. 1058-1060, observes that, before the matter can be held to be within the category of judicial notice, it must conform to three material requisites. These requisites are thus stated:

"(1) The matter of which a court will take judicial notice must be a matter of common and general knowledge. The fact that the belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by every one. Courts take judicial notice of those things which are common knowledge to the majority of mankind, or to those persons familiar with the particular matter in question. But matters of which courts have judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognized.

"(2) A matter properly a subject of judicial notice must be 'known,' that is, well established and authoritatively settled, not doubtful or uncertain. In every instance the test is whether sufficient notoriety attaches to the fact involved as to make it safe and proper to assume its existence without proof. In harmony with that view it has been said that courts must 'judicially recognize whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life.'

"(3) A matter to be within judicial cognizance must be known 'within the limits of the jurisdiction of the court.' Thus, for example, foreign laws are not generally judicial notice."

In support of this rule a long list of cases was cited, including many decisions of the Supreme Court of the United States.

In the case of *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200, it is said:

"This power is to be exercised by courts with caution. Care must be taken that the requisite

notoriety exists. Every reasonable doubt upon the subject should be resolved \* \* \* in the negative."

In the case of *Timson v. Mfg. Coal & Coke Co.*, 220 Mo. 580, 119 S. W. 565, the Supreme Court of Missouri said:

"The judicial recognition of facts without proof should be exercised with caution, and care taken that the requisite notoriety exists, and every reasonable doubt as to whether sufficient notoriety exists should be resolved in the negative."

In *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 147 N. W. 53, Ann. Cas. 1916B, 330, the Supreme Court of Wisconsin said:

"A fact must be pretty well known and obvious before judicial notice thereof can be taken."

In the case of *Carr v. Fair*, 92 Ark. 359, 122 S. W. 659, 19 Ann. Cas. 906, the Supreme Court of Arkansas said:

"But this is a cause pending in a court, and the controverted questions of fact must be established by the testimony of witnesses duly sworn, and judicial knowledge cannot be taken of those facts."

In the case of *L. & N. R. Co. v. Brewer*, 170 Ky. 505, 186 S. W. 186, the Supreme Court of Kentucky said:

"The court will not take judicial notice of the distance that sparks from a locomotive may be carried."

In *Thayer v. Denver & R. G. R. Co.*, 21 N. M. 330, 154 Pac. 691, the Supreme Court of New Mexico said that the manner and method of operating a locomotive engine, the space within which it can be stopped at a certain rate of speed, the best means of stopping it, etc., cannot be known judicially by the court.

In *Schlag v. Chicago, M. & St. P. Ry. Co.*, 152 Wis. 165, 139 N. W. 756, the Supreme Court of Wisconsin said that it could not as a matter of common knowledge take judicial notice that there are no spark arresters which will prevent the emission of live sparks from a locomotive.

In *Royer v. Penn. Ry. Co.*, 259 Pa. 438, 103 Atl. 276, the Supreme Court of Pennsylvania said that the court had no judicial knowledge as to the effect of a locomotive whistle on a person 10 feet away.

We think the authorities cited, *supra*, announce the true rule as to the exercise of judicial notice by trial courts, and that the temporary injunction was improvidently granted, and therefore cannot be sustained. While this disposes of this appeal, we will briefly notice one other question. Counsel for plaintiff say in their brief:

"We pleaded the ordinance and proved it at the trial. \* \* \* The substance of the ordi-

nance, however, prohibits an erection of such a plant without a permit issued by the city clerk of Muskogee, and provides that it shall not be erected outside of the fire limits without the consent in writing of the owners of two-thirds of the property estimated by the front foot lying within 300 feet of the proposed service or filling station. The bill alleged that defendant did not secure the necessary consent of the property owners."

The trial court made no such findings as to such ordinance and did not grant an injunction on account of any violation thereof, either actual or threatened; this being the state of the record, and having reached the conclusion that the cause must be reversed for the reasons stated, and as the trial court made no findings as to the ordinance, we express no opinion concerning that question.

The judgment of the trial court granting a temporary injunction is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

RAINEY, C. J., and KANE, HARRISON, PITCHFORD, and McNEILL, JJ., concur.

#### On Rehearing.

PER CURIAM. It is urged on rehearing that even if the trial court did not grant the injunction on account of the municipal ordinance, if a violation of the ordinance in itself is a sufficient ground for injunction, the judgment of the trial court should have been affirmed. The question presented therefor on rehearing is, not the validity of the ordinance, that is, whether a business or a structure not a nuisance per se, and not subject to total legislative suppression may, by reason of its location or inherent attribute, be prohibited in certain circumstances and in particular localities by municipal ordinance, but whether such business or structure may be enjoined by reason of the threatened or actual violation of such ordinance alone.

[2] Equity in a case of this character will not undertake to restrain an act which violates a city ordinance unless the act is a nuisance per se or operates to cause an irreparable injury to property or rights of a pecuniary nature. *State ex rel. West, Attorney General, v. State Capital Co.*, 24 Okl. 252, 103 Pac. 1021; *Whittridge v. Calstock*, 100 Misc. Rep. 367, 165 N. Y. Supp. 640; *High on Injunction*, § 1248; 47 L. R. A. (N. S.) 673, note; 14 R. C. L. 377, § 79, and cases cited thereunder.

[3] Where relief is asked by injunction, against the commission of an act constituting a violation of a municipal ordinance on the ground of injury to the property rights of an individual, the court will require that the complainants clearly show such facts and circumstances in the particular case as will justify the court in granting the relief desired. 14 R. C. L. 377, § 79.

It follows therefore that our opinion re-

versing the judgment of the trial court and remanding the cause must be adhered to.

For the reasons stated, the petition for rehearing is denied.

(79 Okl. 93)

**SHANKS et al. v. NORTON.** (No. 9638.)

(Supreme Court of Oklahoma. May 11, 1920.  
Rehearing Denied July 24, 1920.)

*(Syllabus by the Court.)*

**1. Homestead §117—Consent of spouse necessary to sale.**

Under section 2, article 12 of the Constitution of Oklahoma, the owner of a homestead, if married, is without power to sell the same without the consent of his or her spouse, given in such manner as prescribed by law.

**2. Homestead §118(2)—Judgment §693—Deed of Indian allottee without joinder of husband held void; allottee's husband not bound by judgment against allottee.**

Certain land was allotted to Peggie, which was thereafter occupied as the homestead of herself and husband. Peggie executed to Norton a deed to the land so occupied, but without her husband joining therein. Afterwards the husband died, and Peggie intermarried with one Joseph, who with Peggie continued to reside upon the land, claiming the same as their joint homestead. Thereafter Peggie filed an action against Norton to cancel the deed, alleging fraud in procuring the same. Joseph was not made a party to this action. Norton prevailed in the suit, and then instituted the present action against Peggie and Joseph for possession of the premises. *Held*, that the deed to Norton was void at the date of the marriage of Joseph to Peggie, and as Joseph and Peggie thereafter occupied the premises as their joint homestead, Joseph was not concluded by the judgment in favor of Norton against Peggie, and that Norton was not entitled to the possession of the premises sued for.

Error from District Court, Seminole County; J. W. Bolen, Judge.

Action by Sam Norton against Peggie Shanks and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. A. Baker, of Wewoka, for plaintiffs in error.

Fowler & Wilson, of Wewoka, for defendant in error.

**PITCHFORD, J.** This is an appeal from the district court of Seminole county. The plaintiffs in error were defendants and defendant in error was plaintiff in the court below. The parties will be designated as they appear in the trial court.

The action was prosecuted by plaintiffs against defendant to recover possession of certain real estate and for rents. A jury

was waived, and the case submitted to the court upon the following agreed statement of facts:

"It is stipulated and agreed by and between the parties and by counsel as follows, to wit:

"That Peggie Shank is a Seminole freedman duly and legally enrolled as such under the name of Peggie Jackson, opposite Roll No. 2368, and that the land sued for in this case was a part of her allotment as such Seminole freedman.

"That the certificate of allotment was issued to her, and patent afterwards issued and delivered to her to the land involved in this controversy; the patent issuing to her on this land being a homestead patent, under the laws of the United States relating to allotments of lands of the Seminole Tribe of Indians.

"That Peggie Jackson the allottee, now Peggie Shank, went into possession of the land involved in this controversy before it was allotted to her, and has been continuously in possession of the same, residing thereon from that date until the present time, claiming the same as her homestead.

"That afterwards, to wit, while residing upon the land, the said Peggie Shank, formerly Peggie Kelley and formerly Peggie Jackson, executed a warranty deed on the 5th day of August, 1908, to the plaintiff, Sam Norton, to the land involved in this controversy, to wit, the southeast quarter of the northeast quarter of section twelve, township eight north, range seven east, I. M. in said county of Seminole.

"That at the time of making and executing the deed just referred to, a copy of which is hereto attached and made a part of this stipulation and agreement and marked Exhibit A, the said Peggie Shank, née Peggie Kelley, née Peggie Jackson, was married to Barrett Kelley, and was living with him as husband and wife. That the said Barrett Kelley did not join in said deed, as appears by reference thereto.

"That during the year 1908, after the execution of said deed by the said Peggie Kelley, as aforesaid, the said Barrett Kelley died, and that afterwards, during the same year, she was intermarried with the defendant Joseph Shank, with whom she is now living upon said land as their joint homestead.

"That afterwards Peggie Kelley, under the name of Peggie Jackson, who is now the defendant Peggie Shank, filed in the district court of Seminole county case No. 1797, to cancel the aforesaid deed to Sam Norton, the plaintiff herein. A copy of the petition, answer, and judgment of the court are hereto attached in said case No. 1797, and made a part of this agreed statement of facts and marked Exhibits B, C, and D, respectively.

"It is further stipulated and agreed that on October 31, 1912, Peggie Kelley, now Peggie Shank, formerly Peggie Jackson, filed her action in the district court aforesaid as cause No. 2123. A copy of the petition, answer therein, the findings of fact by the court, and the final journal entry therein are all hereto attached and made a part of this agreed statement of facts and marked Exhibits E, F, G, and H, respectively.

"That said cause No. 2123 was thereafter

(191 P.)

duly appealed to the Supreme Court of the state of Oklahoma, and was filed in said Supreme Court under No. 6618, entitled Sam Norton, Plaintiff in Error, v. Peggie Kelley, Defendant in Error.

"That on the 11th day of April, 1916, the Supreme Court of the state of Oklahoma rendered its opinion therein, a copy of the mandate and opinion of the court in said cause being hereto attached and made a part of this agreed statement of facts, and marked Exhibits I and J, respectively, which mandate aforesaid was, on the 9th day of November, 1916, by order of the district court of Seminole county, spread of record, and judgment rendered thereon in accordance with the direction of said mandate.

"It is further agreed that the reasonable rental value of said land per annum is \$50.

"It is further agreed that the defendants are not in possession of the land under any agreement, contract, or arrangement with the plaintiff, Sam Norton, or any one authorized by him to make such an arrangement or contract.

"This agreed statement of facts is made in open court pending the trial thereof."

We ascertain from the agreed statement of facts that on the date of the execution of the deed, Peggie Jackson, the allottee, was the wife of Barrett Kelley, and that they were living together as man and wife, and also that Peggie had been living on the land prior to the allotment and up to the time of the agreed statement of facts, claiming the land as her homestead. After the death of Barrett Kelley, Peggie intermarried with her codefendant, Joseph Shanks, and that from the date of her marriage with Joseph, she and Joseph had resided upon the land, claiming the same as their joint homestead.

On the 26th day of September, 1911, Peggie, in the name of Peggie Kelley, filed in the district court of Seminole county an action, No. 1797, against the plaintiff, Norton, seeking to have the deed set aside, charging that the same had been procured by fraud, and that the means used in securing the deed had amounted to forgery. The answer of Norton was in the nature of a general denial.

On February 14, 1912, a judgment was rendered, finding the issues in favor of Norton. There was no appeal from this judgment, and the same became final.

On October 31, 1912, Peggie Kelley filed another action in the district court of Seminole county, No. 2123, against Norton, in which she sought to have the deed canceled. The allegations contained in the petition in the last action were practically the same as in the first action, except the grounds for cancellation of the deed were more fully stated in the latter action. To the last petition Norton answered, denying the allegations of fraud, and further alleged that on the 14th day of February, 1912, in the district court of Seminole county, the matters in controversy were fully litigated and determined between the parties, and that the

judgment in that case was there rendered and entered of record, and that said judgment was conclusive and res adjudicata as to all matters set forth in the last petition. Judgment was rendered in favor of Peggie, canceling the deed. From this judgment Norton appealed to this court. On April 11, 1916, in a judgment rendered by this court, the judgment of the trial court was reversed and remanded, with instructions to set aside the judgment rendered by the trial court and render judgment in favor of Norton.

The instant action was filed by plaintiff for possession. The authorities in this jurisdiction are uniform to the effect that if the homestead character had attached to the land at the execution and delivery of the deed, then Barrett Kelley was entitled to all the protections and safeguards pertaining to the homestead, and in that event any deed executed by Peggie alone would be void.

If the title to the land had been in Barrett, the deed executed by him alone would have been invalid, and since the act of 1905, if the title to the same was held in the wife, the deed executed by Peggie to the homestead would be invalid, unless Barrett had joined therein.

[1] Section 2, article 12, of the Constitution of Oklahoma provides that the owner, if married, shall not sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law. Section 1143, Rev. Laws 1910, provides that no deed, mortgage, or contract relating to the homestead, exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced or legally separated, except to the extent provided in subsequent sections.

In *McWhorter v. Brady*, 41 Okl. 383, 140 Pac. 782, the fourth and fifth paragraphs of the syllabus are as follows:

"4. A homestead, the title to which is in the husband, cannot be sold or otherwise alienated by the husband, without the wife joining in the conveyance, unless the wife has voluntarily abandoned the husband, or, for any cause has taken up her residence out of the state for a period of one year or more. A deed to a homestead, executed by a husband, without such abandonment or removal of residence on the part of the wife, is void.

"5. Where, in a divorce case, a decree had been denied both parties, but the wife had been enjoined from interfering with the husband's possession of the homestead, she was not thereby divested of her right or title to and in the homestead, but was yet the legal wife of the husband, and any attempt by the latter to sell the homestead without the wife's consent or without her joining in the conveyance, was void."

In the case of *Whelan v. Adams et al.*, 44 Okl. 696, 145 Pac. 1158, L. R. A. 1915D, 551,

Jas. D. Whelan executed a deed purporting to convey to P. O. Adams certain land. The deed was not signed by the wife, and was given without her knowledge. The land sold was the homestead of Whelan and wife. We quote from the body of the opinion as follows:

"The sale, having been made in direct violation of the express provision of our organic law, was void; hence Adams acquired no rights by reason of his purchase. The constitutional inhibition is plain, unambiguous, and admits of no exceptions which would destroy its obvious design. If the owner be a married man, the consent of the wife, given in such manner as may be prescribed by law, is essential to the valid alienation of the homestead, unless (it may be) the conveyance be made to her. No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity; nothing that he can do or suffer to be done can cast a cloud upon the title; it remains absolutely free from all grants and incumbrances, except those mentioned in the Constitution."

In *Morris v. Ward*, 5 Kan. (2d Ed. Ann.) 141, the court said:

"No alienation of the homestead by the husband alone, in whatever way it may be effected, is of any validity; nothing that he alone can do, or suffer to be done, can cast the slightest cloud upon the title to the homestead; it remains absolutely free from all liens and incumbrances, except those mentioned in the Constitution."

The land conveyed, having been impressed with the homestead character during the lifetime of Barrett Kelley, then in order to make the deed of any force or effect, it was necessary for Barrett to join therein. Having failed to do so, then when Peggie and Joseph Shanks intermarried, the deed being void, and the land absolutely free from all grants and incumbrances, Joseph being married to Peggie, living upon the land, claiming the same as their joint homestead, the homestead rights existing at the time the deed was executed continued, and Joseph Shanks, by reason of his marriage to Peggie, was entitled to all the homestead rights in the land to the same extent as if the deed had never been executed.

It must be borne in mind that the action brought by Peggie to cancel the deed was almost three years after her intermarriage with Joseph Shanks. In this action Joseph was not made a party; neither was he made a party in the second action brought by Peggie. Assuming without deciding that Peggie is concluded by the judgment rendered in the case of *Norton v. Kelley*, 57 Okl. 222, 156 Pac. 1164, still Joseph would not be concluded, or in any manner bound, by the judgment therein rendered, for the reason he was not a party to that action. Had both he and Peggie been parties, then there would be no

question as to the conclusive effect of the judgment as to each.

We have been unable to find any decisions of this court directly in point. However, we are assisted in our conclusions by the decisions of other courts.

In the case of *Larson v. Reynolds & Packard*, 13 Iowa, 579, 81 Am. Dec. 444, Larson was occupying certain property as a homestead with his wife and children. He executed a mortgage to the homestead property. This mortgage was not signed by his wife. An action was commenced to foreclose the mortgage. The decree of foreclosure was entered by default. The first wife died after the execution of the mortgage, but before the institution of the foreclosure suit. Larson married again. The second wife was not made a party to the action. It was there held that the right of the second wife to the homestead was not affected by the mortgage foreclosure. The court said:

"If the complainant's present wife had been made a party to the bill to foreclose, we think the controversy would have been at an end. A failure to set up the homestead exemption at that time would have concluded and estopped them from making the claim against one holding under the sale. The order of foreclosure would have settled the homestead right, and in an action for the possession, it could not be again adjudicated. This seems to us to be in accordance with familiar and well-settled law, as applied to analogous questions, and is sustained by the following direct adjudications: *Lee v. Kingsley*, 13 Tex. 68; *Tadlock v. Eccles*, 20 Id. 782. Where there is personal service, and a party from his own fault fails to make his defense, he is as much concluded as if the question had been expressly determined.

"And so, again, if complainant had not been married at the time of the foreclosure, he could not now raise the question. For, if unmarried, he was the only person who could defend, or insist upon the homestead right. And though the mortgage was invalid for want of the wife's signature, yet he might or not insist upon such invalidity. It is as if he had been sued upon a note declared void by statute, or one that he had fully paid, or one obtained by fraud, and had failed, after personal service, to make his defense. In such a case, the judgment concludes him of course, and we see no reason why the same rule does not apply in the present case.

"The mortgage being invalid at the time of its execution, the subsequent death of the wife would not change its character. \* \* \*"

The case of *Chambers v. Cox*, 23 Kan. 392, was one where the wife never had been a resident of the state, and had been abandoned without cause. The husband conveyed the homestead by his deed, and took back a mortgage for the purchase price. The suit was to foreclose the mortgage. The defense was failure of title because the wife did not join in the deed. The court held that no title passed by the separate deed of the husband,



notwithstanding the wife never had lived in the state. Mr. Justice Brewer, speaking for the court said:

"The separate deed of a married man to the homestead is void; it does not divest him of title, nor estop him from recovering the land. The question is not, who will inherit from him? but, has his title been divested? And the Constitution says that his title to the homestead shall not pass unless his wife joins in the deed. While the Legislature may regulate the manner of inheritance, it cannot avoid or limit the constitutional provision for the protection of homesteads. The Constitution forbids the alienation without the joint consent of husband and wife. It does not add, 'providing they are living together and occupying the homestead,' nor 'providing they both are residents of the state'; but the prohibition against separate alienation is absolute, when the relation of husband and wife exists. Whether any exception to this absolute prohibition were wise it is not for us to inquire. The Legislature has not attempted to make any, even if it had the power, but has repeated in the statute the very terms of the constitutional prohibition."

Counsel for plaintiff in their brief say:

"Assuming for the purpose of this argument that it be true that the land was a homestead of Barrett Kelley and Peggie Kelley at the time of her deed to Norton, and that Barrett Kelley did not sign the same, that was a matter directly involving title to the land and the validity of the deed, just as much so as was the question of overreaching and inadequacy of consideration, and the judgment of Hon. Tom D. McKeown, the then district judge 'that plaintiff take nothing, and that defendant have and recover his costs,' was as conclusive against Peggie Kelley on the question of homestead as it was upon any other theory that might have been brought into the case. In both the former suits brought by Peggie Kelley, one of the questions, and the controlling one, was whether or not her deed to Sam Norton of August 5, 1908, should be canceled. In the first the district court said, 'No.' In the second this honorable court said 'No,' because she was estopped and concluded by the former judgment, which was a decision on the merits concerning the same subject-matter between the same parties. Will this honorable court, after both of the decisions above mentioned, permit her to deny the validity of said deed, and by doing so withhold from us the possession of the land which has twice been solemnly decreed and adjudged to be ours?"

In answer to the foregoing question propounded by counsel it is sufficient to say that Joseph Shanks was not a party to the actions instituted by Peggie. He was not served with process. He never had his day in court, and his homestead interest in and to the land, having attached before the institution of the actions in which Peggie sought the cancellation of the deed, he was not deprived of his rights by the judgment against Peggie.

[2] This being an action for possession of the premises covered by the deed, plaintiff must recover, if at all, upon the strength of his own title. He is required to show that he is entitled to possession, not only against Peggie, but against Joseph as well. The judgment awarding possession against Peggie would give him no relief, as Joseph's right to possession is not affected by the final judgment in the suits between Peggie and Norton.

We, therefore, conclude that the judgment of the trial court should be reversed; and it is so ordered.

All the Justices concur.

(79 Okl. 101)

### SCHANBACHER v. PAYNE et al.

(No. 9739.)

(Supreme Court of Oklahoma, June 22, 1920.  
Rehearing Denied July 24, 1920.)

(Syllabus by the Court.)

1. Pleading  $\S$  49—Petition warranting relief either at law or in equity good on general demurrer.

Where the petition of the plaintiff contains allegations sufficient to entitle the plaintiff to relief either at law or in equity, it is good as against a general demurrer.

2. Covenants  $\S$  114(1) — Complaint for breach of warranty held good.

Record examined, and held, that the trial court erred in sustaining a demurrer to the plaintiff's amended petition. The judgment is reversed, and the cause remanded, with directions.

Error from District Court, Rogers County; W. J. Campbell, Judge.

Action by Clayton A. Schanbacher against Johnathan R. Payne and another. Judgment for defendants on demurrer, and plaintiff brings error. Reversed and remanded, with directions.

C. B. Holtzendorff and P. W. Holtzendorff, both of Claremore, for plaintiff in error.

Jno. Q. Adams, Richard H. Wills, and A. W. Kelley, all of Claremore, for defendants in error.

JOHNSON, J. The plaintiff in error, as plaintiff below, on December 13, 1916, commenced an action in said court against the defendants in error as defendants below, and upon a demurrer being sustained to the petition, the plaintiff was granted time to file an amended petition, which was filed on July 5, 1917. Thereafter a general demurrer was sustained to the amended petition, and the plaintiff elected to stand upon the amended petition, and thereupon the action was dismissed by the court at the cost of the plaintiff, and error is prosecuted to this court.

The plaintiff's amended petition is quite lengthy, but a synopsis of the facts alleged is: That one Johnathan R. Payner or J. R. Payne, was the legal guardian of his minor daughter, Mary E. He was regularly appointed, took the oath, gave bond, and qualified. As such guardian, he obtained authority of the court having jurisdiction of the guardianship to exchange 30 acres of land, with a horse and orchard and other improvements thereon, belonging to him, for 80 acres of unimproved land belonging to his ward. The exchange was made upon written application of the father and mother and duly verified petition of the guardian, and with a full disclosure of the facts, and was by said court duly authorized and approved. The title to the 30 acres was duly conveyed by the guardian and his wife to the ward by a warranty deed, and the guardian executed his deed as such guardian to his wife, and the mother of the ward, for her 80 acres. The guardian and his wife afterwards mortgaged the 80 acres for \$1,275, and thereafter conveyed it by warranty deed to plaintiff in error for \$2,400. Plaintiff in error paid off the mortgage indebtedness, and paid J. R. Payne and his wife the balance of the purchase money, and took possession of the land. The ward, upon attaining her majority, brought suit against the plaintiff in error to set aside the guardian's sale to recover possession of the 80 acres of land. While this suit was pending she executed to her father and former guardian a quitclaim deed to the 30 acres which she had received in exchange for her 80 acres. She was successful in her suit to vacate the guardian's sale of the 80 acres on the ground that it had been exchanged for other real estate, viz. the 30 acres. This was done without requiring her to account for any part of the original purchase price, for the reason that she had restored it to her former guardian by conveying to him the title to the 30 acres which he had received in exchange for her 80 acres. The sole, entire, and only consideration received by the guardian for the sale of the 80 acres belonging to the ward was the conveyance of the 30 acres to the ward. This consideration was returned and restored to the guardian upon the ward's attaining her majority and electing to disaffirm the guardian's sale, or exchange, by the execution, delivery, and recording of a quitclaim deed from the ward to J. R. Payne, her father and former guardian, and at the time of the commencement of this action the record title still stood in the name of J. R. Payne to the 30 acres of land which is involved in this action.

Copies of the guardianship proceedings, including the guardian's deed, the deed of the minor to the 30 acres, and the deed from the defendants to the plaintiff of the 80 acres, and the deed from the defendants to the ward to the 80-acre tract, and the journal

entry of the district court awarding the 80-acre tract to the ward, were made exhibits to the amended petition of the plaintiff, marked from "A" to "I," inclusive.

The plaintiff's assignments of error are:

(1) That the judgment is contrary to law; (2) that the court erred in sustaining the demurrer to the amended petition of the plaintiff, and in rendering judgment in favor of the defendant and against the plaintiff; (3) erred in not overruling and denying the demurrer.

The allegations in the plaintiff's petition disclose that the defendant John R. Payne occupied the position of guardian of his ward as well as that of purchaser of the real estate of his ward, to wit; the 80-acre tract, and that the consideration attempted to be passed to his ward therefor was a conveyance by him, joined by his wife, to his ward, conveying the 30-acre tract involved herein, which was the sole consideration for such purchase or exchange. Thereafter the defendants, John R. Payne and Etta Payne, conveyed the 80-acre tract received from his ward to the plaintiff for a cash consideration paid by the plaintiff amounting to \$2,400. Thereafter, on attaining her majority, the ward, Mary E. Payne, disaffirmed the transaction of exchange of properties by executing a quitclaim deed to the 30-acre tract to her father and former guardian, and brought suit in the district court of Rogers county to cancel and set aside the probate proceedings of the county court leading up to the exchange of properties between herself and her father and former guardian, and to cancel the conveyance made to her mother, Etta B. Payne, and to recover the 80 acres, and to quiet title to the same, and against the plaintiff for the cancellation of his deed to the land, and to recover from him the rents and profits. Judgment was rendered in her favor granting such relief, including a judgment against plaintiff for rents and profits in the sum of \$380, with interest thereon at the rate of 6 per cent. per annum.

[1] From an examination of the record it is obvious that the trial court erred in sustaining the demurrer of the defendant to the amended petition of the plaintiff. Rev. Laws 1910, § 4735, provides:

"The rules of pleading heretofore existing in civil actions are abolished; and hereafter, the forms of pleadings in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this Code."

Section 4737 provides that the petition must contain: First, "The name of the court and the county in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word, 'petition,'" Second. "A statement of the facts constituting the cause of action, in ordinary

and concise language, and without repetition." Third. "A demand of the relief to which the party supposes himself entitled."

Section 4738 provides:

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of any one of the following classes: First. The same transaction, or transactions, connected with the same subject of action. Second. Contracts, express or implied."

In construing these statutes this court has frequently held that—

"It is not necessary for facts to be stated in such manner as would entitle one to recover under any particular form of action, but sufficient if they show a right to recovery under general principles of law." *Hawkins v. Overstreet*, 7 Okl. 277, 54 Pac. 472; *Watkins v. Yell*, 176 Pac. 390; *Cleveland National Bank v. Board of Education*, 179 Pac. 464; *Tancred v. Brewer*, 75 Okl. 17, 181 Pac. 490.

[2] The facts alleged in the amended petition of the plaintiff shows a breach of warranty in the deed of the defendants to the 80-acre tract of land for which he paid the defendants \$2,400 in cash, and that the district court awarded the land to the minor, and rendered a judgment in her favor against the plaintiff herein for \$380, with interest thereon at 6 per cent. per annum for rents and profits. So we think it cannot be said that the allegations of the petition failed to state a cause of action. As to whether or not the plaintiff would be entitled to any equitable relief against the defendant may, and doubtless will be, determined by the trial court under the evidence of the parties at the trial upon the merits. The court will have jurisdiction of the parties of the subject-matter, and is clothed with power to administer full justice between the parties accordingly as they may show themselves to be entitled, both at law and in equity. The judgment of the trial court is reversed, and the cause remanded, with directions to proceed in accordance with the views herein expressed.

HARRISON, V. C. J., and PITCHFORD, McNEILL, and BAILEY, JJ., concur.

(79 Okl. 17)

VANN et al. v. UNION CENT. LIFE INS. CO. et al. (No. 9836.)

(Supreme Court of Oklahoma. June 29, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⇐82(3) — Order overruling motion to vacate judgment as void on its face a "final order."

An order of the court overruling a motion to vacate a judgment on the ground that it is

void on its face is a "final order," to reverse which a proceeding in error may be prosecuted in this court under the provisions of sections 5236 and 5237, R. L. 1910.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Order.]

2. Appeal and error ⇐82(3)—Order vacating judgment to permit prosecution or defense held "interlocutory order."

An order vacating a judgment for the purpose of permitting a party against whom the judgment is rendered to prosecute or defend is interlocutory, because further proceedings are necessary in the trial court. Such "interlocutory order" is not appealable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interlocutory Order.]

3. Appeal and error ⇐82(3) — Decision on motion to vacate judgment held final order involving merits.

A motion to vacate a judgment filed under the statute is an attack upon the validity of the judgment, and the order of the court, either overruling the motion or vacating the judgment on the ground that it is void on its face, is a final order and judgment involving the merits of the action, to reverse which a proceeding in error may be prosecuted in this court.

4. Appeal and error ⇐9—Ground for vacation of decree of sale should not be urged against confirmation.

If the objections to the confirmation of a sheriff's sale are based on matters which should be insisted upon as grounds for vacating the decree of sale, then the remedy is a motion to vacate the judgment.

5. Appeal and error ⇐82(5)—Fraud and irregularities in sale ground for proceeding in error.

Although the judgment may be valid, if there was fraud or irregularities in the sale and the facts to prove the same are presented to the court, and the court overrules the objections based thereon and confirms the sale, then a proceeding in error may be prosecuted from the order of confirmation.

6. Appeal and error ⇐529(2)—Motion to vacate and order thereon not in record without bill of exceptions or case-made.

A motion to vacate and set aside a judgment and the order of the court thereon are not parts of the record, unless brought into the same by a bill of exceptions or case-made.

7. Appeal and error ⇐499(1)—Objections to confirmation not in record without bill of exceptions or case-made.

The objections and exceptions to the order confirming a sheriff's sale are not parts of the record proper, unless brought into the same by a bill of exceptions or case-made.

8. Appeal and error ⇐553(1)—Methods of bringing record to Supreme Court in support of petition in error stated.

There are two ways of bringing a record to this court in support of a petition in error:

(a) The party appealing may attach to his petition in error a case-made containing all the record, including evidence and statements of the exceptions, without the necessity of having the exceptions reduced to writing, allowed, and signed by the trial judge; (b) or the appealing party may attach to his petition in error a transcript of the record, and if he desires to bring to this court any part of the record, other than the pleadings, the process, the return, reports, verdict, orders, and judgments, as provided for in section 5148, R. L. 1910, he must incorporate the same into the record by a bill of exceptions.

**9. Appeal and error §536—Bill of exceptions must be reduced to writing during term, unless decision in vacation.**

The bill of exceptions must be reduced to writing during the term of court at which the proceedings were had, unless the ruling and decision excepted to is made in vacation or at chambers, allowed and signed by the trial judge, and filed with the pleadings as a part of the record. The bill of exceptions never becomes a part of the record until it is filed in the trial court; and unless filed in that court it cannot be incorporated into a transcript in support of the petition in error in this court.

**10. Appeal and error §801(1) — Motion to dismiss appeal not favored.**

"Experience, observation, the thoughtful consideration of the subject through many generations of men by publicists and statesmen, have produced a consensus of opinion throughout the civilized world that the final decision of grave issues should not be left to the court or judge who first hears or tries them, however learned, able, wise, and impartial he may be, but that those disappointed in the first decision should be permitted to invoke the judgment of other unprejudiced minds upon the righteousness of the conclusion." Motions to dismiss appeals are not looked upon with favor, and unless it clearly appears from the appellant's statement of his own case that the appeal is wholly without merit, or it is manifestly clear from a casual examination of the record that the only point involved is a clear and unmixed question of law, firmly and finally settled adversely to plaintiff in error by the decisions of this court, or the court is without jurisdiction, or the case is moot, a motion to dismiss will not be considered in advance of the date the case comes on regularly to be heard on its merits.

**11. Exceptions, bill of §57—Indorsement of clerk on filing of exceptions not indispensable.**

The statute does not require that the bill of exceptions, in order to be filed, show the indorsement of the clerk on the bill that it was actually filed. The clerk's indorsement is nothing more than evidence of filing, and if the bill of exceptions, after having been allowed and signed by the trial judge, was deposited in due time with the clerk, to be preserved with the pleadings as a part of the record, it was filed within the requirements of the statute.

Error from District Court, Nowata County; W. J. Campbell, Judge.

Suit by the Union Central Life Insurance Company and others against William Vann and another to foreclose a mortgage. Decree for plaintiffs, motion to vacate the foreclosure judgment overruled, and defendants bring error. On motion to dismiss. Motion overruled conditionally.

W. H. Vann, of Lenapah, for plaintiffs in error.

C. J. Sloop, of Independence, Kan., and Geo. B. Schwabe and E. J. Raymond, both of Nowata, for defendants in error.

RAMSEY, J. On March 26, 1918, William Vann and Lovey Vann, as plaintiffs in error, filed their petition in error in this court against the defendants in error, Union Central Life Insurance Company and others, wherein they allege that a judgment by default was entered against them in favor of defendants in error on February 8, 1917, in the district court of Nowata county, foreclosing a real estate mortgage; that thereafter, and on August 4, 1917, plaintiffs in error filed a motion to vacate the foreclosure judgment, and gave notice to the adverse parties, as required by section 5268, R. L. 1910; also that they objected to the confirmation of the sale of the land, which objection was overruled, and the sale confirmed. They also claim that the trial court overruled their motion to vacate the judgment, and they come to this court with their petition in error, attaching thereto what purports to be a transcript of the record.

[1] 1. The purported transcript of the record shows that plaintiffs in error did file a motion to vacate the judgment for want of jurisdiction of the subject-matter of the action. The defendants in error have filed a motion to dismiss the appeal. In the brief of counsel for plaintiffs in error, it is insisted that the motion to vacate the judgment was filed under the authority of sections 5267 to 5274, inclusive, R. L. 1910. Of course, if the court had no jurisdiction over the subject-matter of the action, and that is disclosed by an inspection of the judgment roll, the judgment is void on its face, and may be vacated at any time on motion. *Pettis v. Johnston* (decided June 1, 1920) 190 Pac. 681. An order of the court overruling a motion to vacate a judgment on the ground that it is void on its face is a final order, to reverse which a proceeding in error may be prosecuted in this court under the provisions of sections 5236 and 5237, R. L. 1910. To hold otherwise is to make the trial court the court of last resort in an attack on a judgment by a method expressly provided by statute for testing its validity. It is an order affecting a substantial right. It is not an interlocutory order. It is final. As said by Lord Alverstone, C. J., speaking for the English Court of Appeals:

"The test as to whether an order should be considered final or interlocutory is this: If the order finally disposes of the rights of the parties, it ought to be treated as final; if, on the other hand, further proceedings are necessitated, it ought to be treated as interlocutory." 2 Standard Proc. 166.

[2] When the court overrules the motion to vacate, that settles the matter, and "no further proceedings are necessitated." While an order vacating a judgment, for the purpose of permitting a party against whom the judgment is rendered to prosecute or defend, is interlocutory (*Moody & Co. v. Freeman & Williams*, 24 Okl. 701, 104 Pac. 30; *Maddie v. Beavers*, 24 Okl. 708, 104 Pac. 909; *Town of Ryars v. Sprouls*, 24 Okl. 299, 103 Pac. 1038; *Moody & Co. v. Freeman-Sipes Co.*, 29 Okl. 390, 118 Pac. 134; *Smith v. Whitlow*, 31 Okl. 758, 123 Pac. 1061), because further proceedings are necessitated in the trial court, an order overruling the motion to vacate is final, and as it affects a substantial right an appeal therefrom lies to this court. This court in *Wesley v. Diamond*, 26 Okl. 170, 109 Pac. 524, after reviewing the authorities, said:

"That the correct rule to be observed is that an appeal will lie to this court under the statute quoted prior to final judgment whenever the order which is made involves the merits of the action or any part thereof."

[3] A motion to vacate, filed under the statute, is an attack upon the validity of the judgment, and the order of the court, either overruling the motion or vacating the judgment on the ground that it is void on its face, is a final order and judgment involving the merits of the action. See *Wauchope v. McCormick*, 158 Mo. 660, 59 S. W. 970. The motion to vacate is a statutory substitute (although not exclusive) for a bill in equity, and no one would claim that a judgment of the court in equity, denying or granting plaintiff relief, was not appealable. *Stevirmac Oil & Gas Co. v. Dittman*, 245 U. S. 210, 38 Sup. Ct. 116, 62 L. Ed. 248. The weight of authority holds that an appeal lies from a judgment void on its face. 2 Standard Proc. 150; *Baker v. Newton*, 22 Okl. 658, 98 Pac. 931. If the invalidity of the judgment appears from an inspection of the judgment roll, that question may be first raised in this court, although no exceptions were taken thereto in the trial court. *International Harvester Co. v. Cameron*, 25 Okl. 256, 105 Pac. 189; *Caffrey v. Overholser*, 8 Okl. 202, 57 Pac. 206; *Goodwin v. Bickford*, 20 Okl. 91, 93 Pac. 548, 129 Am. St. Rep. 729; *Kellogg v. School District*, 13 Okl. 235, 74 Pac. 110.

[4, 5] 2. Plaintiffs in error also assign as error the court's action in overruling their objections to the confirmation of the sheriff's sale. If the objections to the confirmation are based on matters which should be insisted upon as grounds for vacating the judg-

ment under which the sale is made, then the remedy is a motion to vacate the judgment. If there was fraud or irregularities in the sale, and the facts to prove the same are presented to the court, and the court overrules the objections based thereon, and confirms the sale, then an appeal may be prosecuted from the order of confirmation. The assault on the order of confirmation, in order to present matters reviewable by this court, must be based on matters distinct from errors in rendering the judgment under which the sale is ordered. That an order confirming a sheriff's sale over objections and exceptions based upon matters arising subsequent to the rendition of the order of sale may be appealed from, see *Morrison v. Burnette*, 154 Fed. 617, 88 C. C. A. 391; *Dakota Investment Co. v. Sullivan*, 9 N. D. 303, 88 N. W. 233, 81 Am. St. Rep. 534; *Wauchope v. McCormick*, 158 Mo. 660, 59 S. W. 970; *State Nat. Bank v. Neel*, 53 Ark. 110, 18 S. W. 700, 22 Am. St. Rep. 185; *Hammond v. Calileaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167.

[6, 7] 3. There is no case-made attached to the petition in error, but there is a transcript of the record duly certified to by the clerk. The motion to vacate the judgment is not a part of the judgment roll, as defined by section 5146, R. L. 1910. The motion to vacate and set aside the judgment and the order of the court thereon are not parts of the record, unless they are brought into the same by a bill of exceptions or case-made. *Devault v. Merchants' Exch. Co.*, 22 Okl. 624, 98 Pac. 342. Neither are the objections and exceptions to the order confirming the sheriff's sale any part of the record proper, and must be made such by bill of exceptions or case-made.

[8] 4. There are two ways of bringing a record to this court on petition in error: (a) The party dissatisfied with the judgment may attach to his petition in error a case-made, as provided by the statutes. The case-made, under section 5242, R. L. 1910, as amended by the act approved March 21, 1917 (Laws 1917, c. 218), containing statements of the exceptions, shall have the same effect as if the exceptions had been reduced to writing, allowed, and signed by the judge at the time they were made. Therefore, when the petition in error has attached thereto a case-made, as provided by the statutes, there is no necessity for a bill of exceptions. (b) The party appealing may attach to his petition in error a transcript of the record, and if the plaintiff in error desires to bring to this court any part of the record, other than the pleadings, the process, the return, reports, verdicts, orders, and judgments, as provided for in section 5146, R. L. 1910, he should incorporate the same into the record by a bill of exceptions. Sections 5026 to 5032, inclusive, indicate what may be incorporated into a bill of exceptions. Unless the decision or ruling of the court excepted to is made in

vacation or at chambers, time beyond the term of the court cannot be allowed by the trial judge within which to reduce the exceptions to writing. Section 5027, R. L. 1910. Section 5030, R. L. 1910, provides that, where the decision objected to and excepted to is not entered on the record, the party excepting must reduce his exceptions to writing and present same to the judge for allowance. Of course that section does not apply when a cause is brought to this court on a case-made, because section 5242, R. L. 1910, as amended by act approved March 21, 1917, obviates the necessity of a bill of exceptions.

[8] The case-made may show the exceptions by statement therein, without the exceptions being specially allowed and signed by the judge; but where the record is not brought here on a case-made, but on a bill of exceptions, the bill of exceptions must be reduced to writing, allowed, and signed by the trial judge, "whereupon it shall be filed with the pleadings as a part of the record, but not spread at large on the journal." When the exceptions are reduced to writing, allowed, and signed by the trial judge, that document becomes what is known as a "bill of exceptions," when filed as a part of the record in the case. If the decision objected to and excepted to is made at chambers or in vacation, the judge may extend the time for writing up the bill of exceptions, not exceeding 10 days; but in any event a bill of exceptions must be allowed, signed by the trial judge, and filed in the trial court before it can become a part of the record, and until it has been made a part of the record in the trial court it becomes no part of the transcript of the record certified to by the clerk of the trial court. The transcript of the record attached to the petition in error must affirmatively show that the bill of exceptions was filed as a part of the record in the trial court. *Bruce v. Casey-Swasey Co.*, 18 Okl. 554, 75 Pac. 280; *Rice v. West*, 10 Okl. 1, 33 Pac. 706; *Shumaker v. O'Brien*, 19 Kan. 476; *A. & N. R. R. Co. v. Wagner*, 19 Kan. 335. The judgment sought to be vacated was rendered February 8, 1917. The proceedings in error were not filed in this court until March 26, 1918. There is no appeal from the order confirming the sheriff's sale, unless it was assailed in the lower court on matters arising subsequent to the decree of sale, which matters must be shown by case-made or bill of exceptions, and it therefore appears that this court has no jurisdiction to entertain an appeal based on a transcript of the record, because it was not filed within the 6 months allowed by the statute.

[11] 5. The transcript of the record contains what purports to be a bill of exceptions, allowed and signed by the trial judge. The statute does not require that the bill of exceptions, in order to be filed, show the indorsement of the clerk on the bill that it was

actually filed. The clerk's indorsement is nothing more than evidence of filing. If, however, the bill of exceptions, after being allowed and signed by the trial judge, was, during the term of court, deposited with the clerk, to be preserved with the pleadings as a part of the record, then it was filed within the requirements of the statute. 8 Ency. Pl. & Pr. 923-927. It may be that the clerk by oversight or inadvertence failed to indorse the bill of exceptions as filed, and it may be that the clerk in making up the transcript of the record failed to show by recitation that the bill of exceptions was filed, if that be a fact. It is not the disposition of this court to deprive parties of a hearing in this court.

[10] Motions to dismiss appeals are not looked upon with favor. One of the ablest judges in this nation, Judge Sanborn, speaking for the United States Circuit Court of Appeals for the Eighth Circuit in *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 68 C. C. A. 288, made these pertinent remarks:

"Experience, observation, the thoughtful consideration of the subject through many generations of men by publicists and statesmen, have produced a consensus of opinion throughout the civilized world that the final decision of grave issues should not be left to the court or judge who first hears or tries them, however learned, able, wise, and impartial he may be, but that those disappointed in the first decision should be permitted to invoke the judgment of other unprejudiced minds upon the righteousness of the conclusion. The elaborate system of appellate courts maintained in this and other nations is a demonstration of the existence and the prevalence of this opinion. Every conscientious judge, every thoughtful man, upon whom is laid the grave responsibility and the heavy burden of determining the rights of his fellows, rejoices in the thought, wherever such is the case, that his decision may be reviewed, and that, if erroneous, it will not work irreparable injustice to him whom he deems it his duty to defeat."

Therefore it is ordered that the plaintiffs in error may within 15 days from this date withdraw the record for the purpose of having it corrected, under section 5243, R. L. 1910, so as to show that the bill of exceptions was filed in due time with the pleadings in the trial court, if such be the fact. Plaintiffs in error will give counsel for defendants in error 3 days' notice of the time and place of presenting the transcript to the clerk of the trial court for his certificate, showing by recitation whether or not the bill of exceptions was filed with the pleadings in this cause in the trial court during the term the motion to vacate and the objections to the confirmation of the sheriff's sale were overruled. If the bill of exceptions was delivered into the actual custody of the clerk in due time, to be kept by him among the files, the clerk may indorse on the bill of exceptions the fact of filing, and attach his certificate

to that effect to the transcript. Otherwise, the appeal in this case will be dismissed.

6. It is contended by the defendants in error that the appeal is frivolous. Unless it clearly appears from the appellant's statement of his own case that the appeal is wholly without merit, or it is manifestly clear from a casual examination of the record that the only point involved is a clear and unmixed question of law, firmly and finally settled adversely to plaintiff in error by the decisions of this court, or the court is without jurisdiction, or the case is moot, a motion to dismiss will not be considered in advance of the date the case comes on regularly to be heard on its merits in this court.

Unless the record is returned to this court within 25 days from this date, showing that the bill of exceptions was filed in the trial court, the appeal will be dismissed.

HARRISON, V. C. J., and PITCHFORD, JOENSON, and McNEILL, JJ., concur.

(79 Okl. 92)

TELFORD et al. v. RING. (No. 9648.)

(Supreme Court of Oklahoma. July 20, 1920.)

*(Syllabus by the Court.)*

1. Specific performance ⇨28(1) — Contract must be definite.

Where the court is compelled to enlarge upon negotiations to complete a contract for the sale of real estate, specific performance cannot be had.

2. Vendor and purchaser ⇨232(9)—Possession does not put purchaser on inquiry as to lessee's negotiations for purchase.

One desiring to purchase land from its owner is not put on inquiry as to any negotiations a lessee may be carrying on with the owner for the purchase of such land, by reason of the lease or possession under such lease.

3. Specific performance ⇨23 — No relief where defendant has conveyed to one free from equities.

Specific performance cannot be enforced on a contract, where the vendor, who is a party to the contract, has conveyed the property to one who is free from equities.

Error from District Court, Alfalfa County; James B. Cullison, Judge.

Suit by Charles Ring against B. W. Telford and others for specific performance. Decree for plaintiff, and defendants bring error. Reversed, with directions.

George W. Partridge, of Guthrie, and E. W. Snoddy and J. P. Grove, Sr., both of Alva, for plaintiffs in error.

Titus & Talbot, of Cherokee, for defendant in error.

PER CURIAM. The plaintiff below, defendant in error here, commenced this action

against the defendants below, plaintiffs in error here, for the specific performance of a contract for the sale of a tract of land situated in Alfalfa county. The defendants by way of answer set up a general denial, and pleaded further that no contract had been entered into, and impossibility of specific performance because of a previous sale to innocent purchasers. The facts necessary for a decision may be summarized as follows:

The plaintiff was in possession of the land involved as a tenant of the Telfords, the owners, under a lease expiring August 15, 1917. Plaintiff had entered into negotiations with B. W. Telford for the purchase of the land, and had made at least two offers, which B. W. Telford had refused, being told by him that the price offered was too low, that he had other parties trying to buy, and that what was done must be done soon. The contract which it is sought to specifically enforce consisted of a series of letters passing between the plaintiff and B. W. Telford, none of which it is necessary to set out in this opinion.

No description of the land was given in any of the letters making up this correspondence. By these letters it was understood between the parties that the deed was to be sent by mail by the plaintiff to the defendant Telford to be signed, after which it was to be returned to the Carmen National Bank; the Telfords agreeing that the bank should pay off the mortgage out of the \$5,000 presumed to be placed there by plaintiff. After these things were done, the balance of the purchase price was to be forwarded to Telford.

While these negotiations were in progress the Telfords were also negotiating with the defendants, the McGees, with the view of selling them the same land; these latter negotiations resulting in the conveyance of the land to the McGees before the plaintiff's letter accepting Telford's terms was received by the latter, but after the letter had been mailed.

Defendants objected to the introduction of testimony on the part of the plaintiff on the ground that plaintiff's petition did not state facts sufficient to constitute a cause of action, and after the introduction of plaintiff's evidence demurred thereto on the ground that the same was insufficient to sustain a verdict in favor of plaintiff and against the defendants, which demurrer was overruled.

[1] The general rule is that, where the court is compelled to enlarge upon negotiations to complete a contract for the sale of real estate, specific performance cannot be had. *Franchot v. Nash et al.*, 62 Okl. 311, 162 Pac. 935; *Bowker v. Linton*, 172 Pac. 442; *Piante v. Fullerton*, 46 Okl. 11, 148 Pac. 87; *Powers v. Rude et al.*, 14 Okl. 381, 79 Pac. 89; *Atwood v. Rose et al.*, 32 Okl. 355, 122

Pac. 929. But if, as counsel for the plaintiffs contend, the general rule, on account of the state of the pleadings, is not applicable to the case at bar, still specific performance cannot be had, even if the contract were complete and binding on the defendant Telford, for the reason that the McGees were innocent purchasers.

Although plaintiff's letter, purporting to be an acceptance of defendant B. W. Telford's offer of August 1st, was mailed August 6th, it was not received until after defendants B. W. Telford and Mrs. B. W. Telford had made and executed a deed on August 8, 1917, to John J. McGee and Elbert S. McGee. The offer of the defendants McGee was made about July 15, 1917. At that time the only information the defendants McGee could have obtained in reference to plaintiff's intention to purchase, if they had inquired of the plaintiff, who was then in possession of the land under a lease terminating August 15, 1917, was that plaintiff was negotiating for the purchase of the land, if plaintiff had been inclined to give them this information. But the defendants McGee were under no obligation to make inquiry of this character. They were presumed to know plaintiff was in possession of the land as a tenant of Telford, but such information imposed no obligation upon them to pursue the inquiry any further than that.

[2] One desiring to purchase land from its owner is not put on inquiry as to any negotiations a lessee may be carrying on with the owner for the purchase of such land, by reason of the lease or possession under such lease.

[3] Specific performance cannot be enforced on a contract, where the vendor, who is a party to the contract, has conveyed the property to one who is free from equities. *Beatty v. Wintrod Land Co. et al.*, 53 Okl. 118, 155 Pac. 574; *Halsell v. Renfrow*, 202 U. S. 287, 28 Sup. Ct. 610, 50 L. Ed. 1032, 6 Ann. Cas. 189. For the reasons stated, specific performance cannot be had.

The cause is reversed, with directions to enter judgment for the defendants McGee for possession of the land.

RAINEY, C. J., HARRISON, V. C. J., and PITCHFORD, JOHNSON, McNEILL, and RAMSEY, JJ., concur.

(79 Okl. 24)

STOVALL et al. v. BREEDLOVE et al.  
(No. 9774.)

(Supreme Court of Oklahoma. June 29, 1920.)

(Syllabus by the Court.)

1. Stipulations ¶19—Court will carry out stipulation properly made.

The court, by its general superintending power over all proceedings before it, will take

notice of stipulations properly made out, and will act upon them in such a way as to carry them specifically into effect; but a court of equity will not decree the specific performance of a stipulation which is in conflict with a valid statute, or concerning the execution of which it appears that there was some accident, surprise, or excusable mistake as to its meaning and effect on the part of one of the parties, and the court will disregard an agreement concerning which a controversy has arisen.

2. Stipulations ¶19—Defendant's answer to plaintiff's motion to enforce a stipulation held to entitle defendant to a hearing.

In an action by the plaintiff to cancel a contract of sale of land, to have a sum of money placed in escrow by defendant declared forfeited to the plaintiff and for a permanent injunction; and where the defendant's answer sets up valid defenses which the plaintiff's reply controvert, and the plaintiff and the defendant and another, who is plaintiff in three other suits against this plaintiff as defendant, enter into a stipulation for settlement of the litigation involved in all four of the cases, and for a dismissal thereof, and such stipulation is approved by the court during the trial of such action, and spread of record in the case, the trial arrested and the cause continued, and the other causes ordered dismissed, and where the said stipulation prescribed many things to be done in the future by the respective parties that were necessary to carry out the terms of the stipulation within a given time, and after the expiration of the time the plaintiff filed a motion to enforce the stipulation, which the court denied, and ordered that the causes be reinstated and the plaintiff be granted a jury trial, and the cause was set for trial for a day certain, at a subsequent or adjourned term, and when the cause was called for trial upon said date without previous notice to the defendant, the plaintiff presented her motion for a judgment against the defendant upon the stipulation, and after the defendant had, by answer, challenged the truthfulness of the plaintiff's allegations in her motion that she had complied with the terms of the stipulation and that the defendant had not, and the defendant's answer, by sufficient allegations, showed that the plaintiff had utterly failed to comply with the terms of the stipulation, and that if the defendant be compelled to comply therewith he would suffer irreparable loss in a large sum, and prayed that his defenses be heard, and that the cause be regularly heard upon the issues joined, which was refused by the court and a judgment was summarily rendered in favor of the plaintiff, held, that the defendant should have been accorded a regular hearing upon his answer to the plaintiff's motion, and (b) ordered that the judgment be reversed and the same be remanded, with directions.

Error from District Court, Ottawa County; Preston S. Davis, Judge.

Action by Priscilla Breedlove against James N. Stovall. Judgment for plaintiff on motion for a judgment on a stipulation for this case and in other cases, and defend-



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ant and Frank T. Lamar, a party in the other cases appeal. Reversed and remanded.

A. C. Towne and Riddle, Bennett, Wilson & Mitchell, all of Miami, for plaintiffs in error.

Wm. P. Thompson, of Vinita, for defendants in error.

JOHNSON, J. On the 7th day of March, 1913, the defendant Priscilla Breedlove, as plaintiff, commenced an action in the district court against James N. Stovall, defendant, to cancel a contract of sale of 200 acres of land, entered into between the parties, the plaintiff alleging a breach thereof by the defendant, and the plaintiff sought to recover \$3,300 damages, and to have \$300 placed in escrow by the defendant declared forfeited to the plaintiff, and for a temporary and permanent injunction against the defendant, restraining him from entering upon the premises. On October 26, 1917, the plaintiff filed a motion in said cause which is as follows:

"In the District Court in and for Ottawa County, State of Oklahoma. Priscilla Breedlove v. James N. Stovall. No. 778. Frank T. Lamar v. Priscilla Breedlove et al. No. 954. Frank T. Lamar v. Priscilla Breedlove et al. No. 1112. Frank T. Lamar v. Priscilla Breedlove et al. No. 1113. Comes now Priscilla Breedlove, plaintiff, in cause No. 778, under the name and style of Priscilla Breedlove v. James N. Stovall, and as defendant in cases Nos. 954, 1112, and 1113, the name and style of the last three mentioned causes being Frank T. Lamar v. Priscilla Breedlove et al., and shows to the court that on the 22d day of October, 1915, solemn stipulation was entered into by and between Priscilla Breedlove and James N. Stovall and A. C. Towne, attorney for Frank T. Lamar and W. P. Thompson, attorney for other defendants, which stipulation is in words and figures, as follows, to wit: 'It is hereby stipulated and agreed that all the above-entitled cases are to be dismissed, and the costs are to be divided between the plaintiff and defendant, in case No. 778, and that James N. Stovall is to pay the sum of \$1,700 to Priscilla Breedlove upon the execution and delivery of a warranty deed to the land described in case No. 778, being 200 acres, and not including the Brown 20 acres, free and clear of all mortgages, taxes prior to year 1913, liens, and incumbrances, provided that the mortgages may be deducted from the \$1,700, and to quitclaim to James N. Stovall all of her rights and interests in and to the lands involved in the other lawsuits, numbered above, as follows, save and except the 30 acres in the possession of Will Angel, and as to that particular tract Stovall is to execute and deliver to Will Angel, or W. J. Angel, a warranty deed. As to the 10 acres near the town of Fairland, Okl., involved in suit No. 1112, now in the possession of James Blackburn, said Priscilla Breedlove is to execute a quitclaim deed and place the same in escrow with E. D. Adams, to be delivered to said Stovall by the first day of the next term of court, or sooner if instructed to do so by Priscilla Breed-

love, provided that the crops that are now on said 10 acres of land shall be retained by said James Blackburn, and that he has until January 1, 1918, to remove same from the premises. Possession of said 10 acres, to be given to Stovall by March 1, 1918. Stipulations herein to be carried out within 10 days from this date. 'Signed this October 22, 1915. Priscilla Breedlove. James N. Stovall. A. C. Towne, Attorney for Frank T. Lamar. W. P. Thompson, Attorney for the Other Defendants.' That the said Priscilla Breedlove has complied with all the conditions of said stipulation, but that the said James N. Stovall and Frank T. Lamar have failed and refused, and still refuse, to comply with their obligations under said stipulation, and that by virtue of said stipulation said James N. Stovall and Frank T. Lamar are estopped from further prosecuting the above named and styled action in this court; that said stipulation was filed in open court during the trial of case No. 778, and the court orders in said cases entered of record in open court. Wherefore said Priscilla Breedlove prays the court to enter an order herein, compelling the said James N. Stovall and Frank Lamar to carry out the terms and conditions of said stipulations within a reasonable time, and to enter judgment in the above-entitled causes in compliance with the terms and conditions of said stipulation and order execution thereon."

On the next day, and on October 27, 1917, the defendant James N. Stovall, and Frank T. Lamar filed their answer and objections to the motion of plaintiff, alleging, in substance, that the court is without jurisdiction to thus in a summary way decree the specific performance of said stipulation, because the only remedy the plaintiff has is an action at law and is a suit between the parties; that because at the adjourned sitting in February, 1917, of the regular October, 1916, term of said court, Hon. Judge George Crump sitting, passed upon the plaintiff's motion of the same character, and of the identical relief prayed for, and denied same, and set aside said stipulation, and reinstated said causes above set out, for trial, whereupon at the April, 1917, term of said court plaintiff demanded a jury, and the cause on that account was continued, and this court, on the first day of this term, set said causes for trial on the 28th day of October, 1917, at 9 o'clock a. m., and that this defendant, at the calling of said case No. 778 on said date is present in person and by his counsel and with his witnesses and with his evidence, and demanding said cause proceed to trial, and that the plaintiff presents this motion without any notice to the defendant after the cause had been called for trial and the matter is res adjudicata. Said motion comes too late, and the plaintiff by his silence, since the cause was reinstated and set for trial, has waived his right to again present the same, and if it is a matter within the discretion of the court, it would be an abuse of such dis-

cretion to grant it under the circumstances, and that said motion is insufficient, as it neither shows nor alleges a payment of the taxes on the land prior to the year 1913, as provided in said stipulation, nor does it allege the tendering of one-half of the payment of the costs in case No. 778, as provided in said stipulation, nor does it allege or tender the possession to the defendant, or offer to place the defendant in the possession of the 10 acres of land as provided in said stipulation, nor does it tender the quitclaim deeds provided in said stipulation for the Lamar land included in the other suits, Nos. 954, 1112, and 1113; that no warranty deed as provided in said stipulation has ever been tendered, nor any quitclaim deed; that the 80 acres of land in section 35, known as the Peggy grass land, are not now, nor have they for more than two years past, been in the possession of the plaintiff, nor has any rents been paid to the plaintiff within that time, but the said land has been in the possession of the owner, O. El. Fisher, for more than two years; that a large part of the land included in said stipulation has been sold for taxes that were due and levied thereon prior to the year 1913, and which the plaintiff, according to said stipulation, was to pay, and has not done so, and large costs and penalties have accrued on said sales, and said lands so sold have not been redeemed and are not clear of liens, and the plaintiff has no title of whatever kind or character to the 80 acres of said land; that said deed now proposed to be offered is illegal and invalid, because since the signing and acknowledging thereof by Priscilla Breedlove the name of Walter W. Breedlove has been inserted thereon; that the covenants and warranties in the proposed warranty deed the plaintiff now asks the court to decree the defendant to accept, wherein the plaintiff and her husband covenant that the grantors are seized of an indefeasible estate in fee simple, and has good right and full power to convey same, and that the same is clear of all incumbrances and liens, and that they warrant to the grantees, his heirs and assigns, a quiet and peaceable possession thereof, is false and untrue, and so known to the grantors, and are for the purpose of swindling, cheating, and defrauding defendant, and perpetrating a fraud by leading the court to believe the grantors have title to said premises, and that grantors are wholly insolvent, and have no property to answer in damages for the breach of said covenants, and that, by reason of said claims for taxes and the insolvency of the plaintiff and the costs of court in redeeming said lands, the defendant would suffer damage and loss in the sum of \$1,700 by the failure of the warranties and covenants in said proposed deed, if defendant would comply and accept same, and that the amount of the counterclaim the defend-

ant would be entitled to have set off against the plaintiff would fail; that said stipulation is illegal and void, and cannot be enforced in the court because the plaintiff's deed is champertous.

[1, 2] The defendant prayed that said motion be denied, and the cause proceed to trial on the issues formed by the petition, answer, and reply, or that, if the court should, over the objection of the defendant, undertake to decree in this summary way that defendant accept said deed and pay this \$1,700, the defendant have offset or counterclaim in the sum of \$1,700 against the plaintiff because of the falsity of the covenants contained in said deed as set out, and for costs. On this same date the court rendered a judgment in favor of the plaintiff for the relief asked in her said motion, and thereafter on the same day overruled the defendant's motion for new trial, and thereafter this proceeding in error was regularly commenced to reverse the same.

The answer was verified, and the plaintiff did not file any reply thereto, and no testimony was taken. The court summarily rendered the judgment complained of. The record discloses that this was a suit to release Breedlove from this contract of sale and for damages, and the answer and supplemental answer disclosed the inability of Breedlove to convey this land and their inability to procure deeds so as to be able to convey it, and that finally that suit came to trial, and after the trial had been started they entered into a contract to settle this case and three other lawsuits that had been brought by one Frank Lamar against Breedlove to recover land that Lamar had sold to Stovall, that was not included in the contract of sale between the Breedloves and Stovall, so that the contract of stipulation of settlement not only included the Breedlove suit against Stovall, but included the compromising and settling of the other suits, by Breedlove deeding whatever right they had to Stovall and Stovall deeding certain 30 acres of it to one Will Angel, and that Stovall was to be placed in possession of 10 acres of this Lamar land that was in the possession of one James, that Breedlove had transferred it to.

From the nature of the supplemental answers of Stovall it will readily be seen why this was done, as Breedlove was charged with having forged the Lamar deed to him, and also charged to have obtained it before Lamar was of age and while he was a minor, and, he being an Indian and this part of his allotment, it was a contract between the parties to settle these disputed matters in all of this litigation, and to have conveyed to Stovall the lands that they had bought, and free of taxes prior to the time the contract of sale was made, and to pay one-half of the costs. It was provided that these matters should be carried out within 10 days, which

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was not done, and in fact was never done. And in 1916 the stipulation was vacated by the court, and the cases reset for trial, and when the time came for trial Priscilla Breedlove demanded a jury trial, for which the case was continued to the October, 1917, term of the court. The court set the cases in the regular order for trial. This case, No. 778, was set for trial on the 26th of October, at the 1917 term. The parties appeared by their counsel, and Stovall was ready with his witnesses for trial when the case was reached in its order and called for trial. Priscilla Breedlove, through her counsel, filed a motion embodying the stipulation in the motion, and asked the court to adjudge that Stovall be compelled to carry it out and accept the deed that Breedlove tendered. To this motion, to which no notice had ever been had on Stovall or his counsel, Stovall filed an answer and objections, in which, by reference to the same, it will be seen that Breedlove was in default of every condition and every element of condition that the stipulation required them to perform, and that the covenants in the offered deed that they tendered were false, and were made for the purpose to defraud Stovall; that they had no title to the land; that they had never procured any; and that they had never offered to pay their portion of the costs of this suit that they agreed to pay, and they had never paid the taxes they were to pay. These were all new matters that were raised by this answer or objections and were undenied, no reply was ever filed or made, and the court simply, without any evidence to support the motion of Breedlove, undertook to render judgment, compelling Stovall to accept that worthless deed and to pay out his \$1,700, and still get no title to any of the land, and the quitclaim deeds to the Lamar lands still being unexecuted from the Breedloves. In fact, the entire substance of the performance of the Breedloves of their portion of the contract was in dispute.

Concerning the enforcement of the stipulations of parties by the courts, in 38 Cyc. 1297, the rule is thus stated:

"The court, by its general superintending power over all proceedings before it, will take notice of stipulations properly made out, and will act upon them in such a way as to carry them specifically into effect; but a court of equity will not decree the specific performance of a stipulation which is in conflict with a valid statute, or concerning the execution of which it appears that there was some accident, surprise, or excusable mistake as to its meaning and effect on the part of one of the parties, and the court will disregard an agreement concerning which a controversy has arisen. A stipulation will not be enforced after it has been wholly disregarded by the parties and the court, nor will it be enforced in favor of one who has failed to comply with the conditions under which it was made, or who has waived

the right to demand compliance by taking some step in conflict with the provisions of the agreement, unless such act is insufficient to show an intention to disregard the stipulation or to place the opposite party at a disadvantage."

In support of the rule the following cases are cited: Taylor v. Brower, 78 N. C. 8; Botts v. Martin, 44 Tex. 91; People v. Holden, 28 Cal. 123; Hughes v. Jackson, 12 Md. 450; Bank v. Hitchcock, 76 Cal. 489, 18 Pac. 648; People v. Branch, 26 Mich. 370; Consolidated Steel & Wire Co. v. Burnham, Hanna, Munger Co., 8 Okl. 514, 58 Pac. 654. In the latter case, Burford, C. J., speaking for the court, said:

"The facts were agreed to by the parties, and filed in the cause. The agreement was not qualified or limited, but was absolute and unconditional. It belongs to that class of evidence termed 'solemn admissions.' Solemn or judicial admissions, made for the express purpose of dispensing with the proof of some fact at the trial, in the form of expressed stipulations, on being filed and becoming a part of the record, are generally conclusive of all the facts involved, and may be given in evidence on any subsequent trial. \* \* \* It would seem that this class of admissions are the only class that are ever held to be conclusive, and there are exceptions to this rule; but where, as in this case, the admitted or agreed facts consist largely of record matters, there are stronger reasons for holding the parties bound by the agreed facts upon a second or new trial."

In that case it was shown in the opinion that after it had been reversed and remanded the trial court permitted the plaintiff to file a supplemental petition which presented a new issue, although without leave of the court and without notice to adverse parties. No opportunity was given to allow the plaintiff to plead to the supplemental petition. On account of this action by the court the cause was again reversed, concerning which it is stated in the body of the opinion:

"Such proceeding was certainly not warranted by any rule of procedure or practice. Even if this action should be treated as a summary proceeding to compel them to account for the funds in the custody of the law and improperly diverted, they were entitled to be informed of the charge, and to be heard in their defense. \* \* \* Where the amendments are calculated to promote the ends of justice, it is error to refuse it."

In the case of Capital Town-Site Co. v. Brown et al., 34 Okl. 568, 126 Pac. 722, Sharp, C., speaking for this court, said:

"In an action for the recovery of the possession of machinery and buildings placed upon a town lot, the title to which was at the time in controversy, where the case is tried upon an agreed statement of facts in the form of express stipulations of record, and which stipulations recited that a contest was then pending and undetermined before the Secretary of the Interior over the title or right to patent to

said lot, and the case is tried and judgment rendered for the plaintiff, which on appeal is reversed and remanded for a new trial, and where, upon a second trial, the plaintiff offers as testimony the original agreed statement of facts, but upon objection thereto, and it being shown that, subsequent to the entering into of said stipulations and the first trial, the contest over the lot to which said machinery and buildings had been attached had been decided by the Secretary of the Interior in favor of the defendants, the court excluded said stipulations. Held, not error."

In the instant case, the stipulations of the parties did not consist alone of solemn admissions of the parties, made of record, but in addition consisted of numerous important things to be done by the respective parties. The plaintiff's motion for judgment upon the stipulations alleged that she had complied with all the conditions of said stipulation, but alleged that the defendants had failed to comply therewith on their part. On the other hand, the defendants alleged that the plaintiff had failed in toto on her part to comply with such stipulations, in substance; that none of the things agreed therein to be done by the plaintiff had been done.

We think the defendants were clearly entitled to a trial of the cause upon the motion and answer, and that the court erred in sustaining the plaintiff's motion and rendering the judgment complained of.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

HARRISON, V. O. J., and McNEILL,  
PITCHFORD, and BAILEY, JJ., concur.

(79 Okl. 68)

**LAMB v. PALMER, County Treasurer.**  
(No. 9178.)

(Supreme Court of Oklahoma. July 13, 1920.)

*(Syllabus by the Court.)*

1. Appeal and error  $\S$  1009(4) — Judgment in equity case not set aside, unless clearly against evidence.

The judgment of the trial court in an equity proceeding will not be set aside on appeal, unless said judgment is clearly against the weight of the evidence.

2. Elections  $\S$  227(1)—Election in violation of statute sustained, where full and fair election had.

The general rule is, where the statute does not in express terms declare an election void for violation of certain statutory provisions, the election will be sustained, and the violation of the statute will be treated as an irregularity going to the form, instead of to the substance, where, from all the facts, the

court concludes that, in spite of the departure from statutory requirements, a full and fair ballot has been cast, and a true and fair return of the entire election has been canvassed and made.

Appeal from District Court, Grant County; W. M. Bowles, Judge.

Suit by M. G. Lamb against E. G. Palmer, as a County Treasurer of Grant County. Decree for defendant, and plaintiff appeals. Affirmed.

W. H. C. Taylor, of Medford, for plaintiff in error.

J. B. Drennan, of Medford, for defendant in error.

McNEILL, J. M. G. Lamb, a taxpayer of school district No. 90, Grant county, Okl., brought suit against the county treasurer of Grant county to enjoin the treasurer from collecting certain school taxes levied against two farms of plaintiff located within said school district. It was alleged in the petition that the school district was comprised of the city of Pond Creek, a city of the first class, and certain territory adjacent thereto, and the officers of the school district made a levy of 5 mills for school purposes and called an election to vote an additional 7 mills. The plaintiff seeks to enjoin that portion of the levy that was voted by the district at the election called for the purpose of voting the additional levy, for the reason that the election was illegal, in that the election was called to be held and was held in the City Hall at Pond Creek, and not in the different wards within the city, and further that all electors voted at one precinct, and numerous persons voted who were not entitled to vote in that precinct. It was also alleged that over two-thirds of the votes cast at the election were illegal. It is further alleged that prior to the time of calling the election the board of education failed to publish a statement of the financial condition of the school district, as required by section 7378, Revised Laws 1910. There were several other irregularities complained of in the petition, but they are unnecessary to be referred to at this time.

The defendant filed an answer, which consisted of a general denial, and pleaded affirmatively that the officers had complied with the law in making the levy, and had called an election to vote an additional levy, and at said election there were 178 votes for the levy and 149 against the levy; the certificate of the election officials showing the return of the election being made a part of the answer. It was alleged that the proper estimate was published, showing the money necessary to be raised by taxes to defray the expenses of the school district, and a copy of

the estimate published was attached to the answer, and it was further alleged that the levy was necessary for school purposes, that the election was called to be held at the City Hall, and notice of the same was published as provided by law, a copy of the notice being attached to the answer, and that all of the voters and electors of the district participated in the election, and no one was denied the right to vote, and that the majority of the electors had voted for the increased levy. The plaintiff replied, denying that all of the electors participated in the election, and further alleged that the item of \$2,270 as interest for bonds was being collected twice. With the issues thus framed the case was tried to the court.

The plaintiff, Mr. Lamb, was the first witness produced, and testified that he owned certain property in the district, and that he had paid the first half of his taxes, and the treasurer informed him he would issue a warrant for the other half of the taxes, if not paid. Mr. Hutson was next produced as a witness for plaintiff, and testified that he was a member of the board of education, and that the election was held at the City Hall, and that he saw certain ladies around the election booth. Mr. Harvel, county clerk, was next produced as a witness for plaintiff who testified that he was county clerk of Grant county, and identified Exhibits A and B as the original estimate of the county exchequer board of Grant county for the years 1913-14 and 1915-16. The plaintiff then produced Mr. Dervage, county superintendent, as a witness, who testified that he was the county superintendent of Grant county, and that 12 teachers were employed at Pond Creek. The superintendent was asked if he had in his office the reports of the Pond Creek schools for the last year or two, showing the financial condition, and the amount collected as tuition, and he replied there was a report filed by the clerk, but the same was not complete, as it did not show fully the amount collected as tuition. This, in substance, was all the evidence introduced by the plaintiff. The defendants introduced the certificate of the election officials, showing the number of votes cast at the election, and testified that practically all the voters participated in said election, and that no one was denied the right to vote; also introduced a copy of the estimate published by the school board. The case was submitted to the court upon this evidence, and the court rendered judgment in favor of the defendants and against the plaintiff. From said judgment the plaintiff has appealed.

[1] The brief of plaintiff in error does not contain any assignments of error. Counsel for plaintiff in error have, however, argued in their brief that the levy was illegal and void, for the reason that the estimate as pro-

vided for by section 7378, Revised Laws 1910, had never been published. We are unable to say, from an examination of the record in this case, whether the estimate was ever published or not. The plaintiff, in introducing his case, produced no direct evidence upon this point, except the fact that he introduced the financial statement and estimate of needs for the year 1914, which contained the affidavit of M. D. Sullivan, the clerk of the board of education, wherein it was stated that the financial statement and estimate of needs was published or posted. The affidavit is written in such a manner that it is impossible to read the same. It is impossible to tell from the affidavit whether the same was published in a newspaper or posted in five public places within the district. It pretends to disclose that the clerk had either published or posted the same, or both, but which we are unable to say.

There was no evidence produced by plaintiff in error to prove the estimate was not published or posted according to law. The burden of proof being upon the plaintiff in error, and he having failed to introduce any direct evidence to support the allegation of his petition that no estimate was ever published, and the trial court having found against him, we are unable to say without any direct evidence upon this question that the finding of the trial court upon this question was clearly against the weight of the evidence. It might be suggested that the answer of the defendant disclosed that an estimate was published, but that the same was defective. The record does not disclose whether this was the only estimate published, or whether it was the estimate published for the purpose of calling the election. The record in this case, if it contains all the evidence, and we must presume that it does, does not contain any evidence to support any of the allegations of the petition.

[2] Plaintiff next contends that the election for the extra levy was void for the reason the election was held in the City Hall, and not in the different wards in the city. Plaintiff has cited no authorities to support this contention. The defendant in error rely upon the case of *Kerlin v. City of Devils Lake*, 25 N. D. 207, 141 N. W. 756, Ann. Cas. 1915C, 624, which states as follows:

"A special city election was held to determine the question of whether such city would increase its debt limit and issue bonds to establish a city light plant. The election was held at one central voting place, instead of having a place for voting in each ward as an election precinct, as required by statute. The place of election was where city special elections for years had usually been held. A large vote was polled for a special election. Ample opportunity was afforded all electors to vote. No fraud is alleged in the calling of or in the conduct of the election. Held, as by statute

an election should have been held in each ward, the election was irregular, but not void."

This case is annotated in Ann. Cas. 1915C, 624, and the Annotator, commenting upon the law, states as follows:

"Where the statute does not in express terms declare that the election shall be void, the election will be sustained, and the violation of statute will be treated as an irregularity going to the form, instead of to the substance, where, from all the facts, the court does conclude that, in spite of the departure from statutory requirements, a full and fair ballot has been cast and a true and fair return of the entire election has been canvassed and made."

This appears to be the reasonable construction of the law, and without any authorities to the contrary we do not feel called upon to make a further investigation of the question. There was no fraud proven, or offered to be proven, and there is evidence that only qualified voters voted, and that no one was denied the right to vote.

The third contention made in the brief is that the levy was excessive in the sum of \$1,922. Upon this question there was no direct evidence, except what may be gathered from the estimate filed. The finding of the trial court was contrary to the contention of plaintiff in error, and we are unable to say from an examination of the record that the finding of the trial court is clearly against the weight of the evidence.

For the reasons stated, the judgment of the trial court is affirmed.

RAINEY, C. J., and HARRISON, PITCHFORD, and JOHNSON, JJ., concur.

(79 Okl. 39)

CITY OF TULSA v. WELLS. (No. 10586.)

(Supreme Court of Oklahoma. June 8, 1920.  
Rehearing Denied July 13, 1920.)

(Syllabus by the Court.)

1. Judgment  $\S$ 630—Torts  $\S$ 22—One joint tort-feasor not benefited by judgment against other; person injured may proceed against one or more of several tort-feasors.

Where several persons unite in an act which constitutes a wrong to another, the law permits all the wrongdoers to be proceeded against jointly, also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others. The rules regarding remedies which are applied to breaches of contracts are obviously inapplicable, but the rule is that the party injured may bring separate suits against the wrongdoers and proceed to judgment in each, and no bar arises as to any of them until satisfaction is received.

2. Municipal corporations  $\S$ 762(1), 764(1)—Must maintain streets in reasonably safe condition; duty to keep streets reasonably safe cannot be delegated.

A municipal corporation is charged with the duty of maintaining its streets in a reasonably safe condition for travel, and rests primarily, as respects the public, upon the corporation; and the obligation to discharge this duty cannot be evaded, suspended, or cast upon others by any act of its own.

3. Judgment  $\S$ 630—Suit against city for injuries from defective streets held not barred by adverse judgment in suit against street railroad.

In a legal action founded upon tort, against a municipal corporation, based upon the neglect by the defendant of the duty imposed by law to keep its streets in a reasonably safe condition for the protection of the traveling public, and where the testimony showed that such neglect of the defendant was equally chargeable to a street railway company, and that the plaintiff had brought an action against said company for damages therefor, and the cause had been tried and resulted in a verdict in favor of the defendant from which the plaintiff had appealed and the appeal was then pending, and the defendant in the instant case pleaded the verdict and judgment in the trial court as a bar, *held*: (a) The doctrine of election of remedies did not apply; and (b) that the judgment in the former action was not final as to such action, the doctrine of *lis pendens* applied.

4. Municipal corporations  $\S$ 812(10) — Infancy or physical incompetency may excuse failure to give notice of personal injuries.

While a provision of a city charter providing that, before the city shall be liable for damages, the person injured or some one in his behalf shall give the mayor or city auditor notice in writing of such injury within 30 days after the same has been received, stating where and how the injury occurred and the extent thereof, may be valid, the failure to give such notice may be excused on account of the incompetency of the injured party by reason of infancy or effect of such injuries rendering him mentally and physically incompetent to give such notice.

5. Municipal corporations  $\S$ 756, 788(1), 791 (2)—Charter provision as to liability for defects in streets in absence of notice held void; knowledge of defects in streets chargeable to city.

Where a city charter provided that the city should not be liable for damages for injuries to person or property arising from or occasioned by any defect in any public street, highway, or grounds, or any public work of the city unless the specific defect causing the damage or injury shall have been actually known to the mayor or city engineer by personal inspection for a period of at least 24 hours prior to the occurrence of the injury or damage, unless the attention of the mayor or city engineer shall have been called thereto by notice thereof, in writing at least 24 hours prior to the occurrence of the injury or damage, and proper

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diligence has not been used to rectify the defect after actually known or called to the attention of the mayor or city engineer as aforesaid, held: (a) Such provision so far departs from reasonableness as to amount to a denial of justice, and is therefore void, and may not be enforced by the courts of this state; and (b) that a city is chargeable with notice of a dangerous defect in its streets, although actual notice may not have been brought home to it; (c) if the evidence shows that such a state has continued for a sufficient length of time so that the city by exercising ordinary care might have learned of its condition, and not to know such fact would be negligence on the part of the city, and a charge to the jury to that effect was properly given.

**6. Appeal and error**  $\S$ 1001(1)—Verdict supported by evidence not disturbed.

In a civil action triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown in the instructions of the court, or its ruling on law questions presented during the trial, the verdict and the finding of the jury will not be disturbed on appeal.

**7. Trial**  $\S$ 139(1) — Demurrer to evidence overruled where competent evidence reasonably supports verdict.

The defendant's demurrer to the evidence or motion for an instructed verdict at the close of the evidence is overruled, where there is any competent evidence before the jury reasonably tending to support the verdict.

**8. Damages**  $\S$ 132(3)—New trial  $\S$ 76(4) —\$22,000 not excessive for personal injuries resulting in permanent partial paralysis; when verdict will be set aside for excessive damages, stated.

In an action for personal injury, a verdict will not be set aside for excessive damages, unless it clearly appear that the jury committed some gross and palpable error, or acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which damages are regulated.

**Error from District Court, Tulsa County;** Ernest B. Hughes, Judge.

**Action by Paul Wells, a minor, by Catherine Wells, next friend, against the City of Tulsa.** Judgment for plaintiff, and defendant brings error. Affirmed.

Edward P. Marshall, of Tulsa, for plaintiff in error.

H. B. Martin, of Tulsa, Roy F. Ford, of Oklahoma City, and J. G. Thompson, for defendant in error.

**JOHNSON, J.** This is an appeal from the district court of Tulsa county; Hon. Ernest B. Hughes, Judge.

On May 10, 1918, this action was commenced in the district court of Tulsa county, Okla., by Paul Wells, a minor, by Catherine Wells, his mother, and his next friend, as

plaintiff, against the city of Tulsa as defendant. For the sake of convenience the parties will be hereinafter referred to as they respectively appeared in the trial court.

The plaintiff brought this action to recover for certain personal injuries which he alleges that he received upon the streets of the city of Tulsa on the 14th day of July, 1917, by reason of the negligence of the defendant; the allegations contained in his amended petition being, in substance:

"That upon said East Third street, in the city of Tulsa, between Boston avenue and Main street, there are laid and maintained parallel tracks of the Tulsa Street Railway Company, and that said East Third street is paved, and that between the rails of said tracks of the street railway company and for a space of 10 or 12 inches on the outside of the rails of said tracks the paving consists of brick, and it is alleged that said brick paving was constructed in said street in a rough and uneven condition a long time prior to July 14, 1917, at the instance of the defendant and under its direction, supervision and control; and that on the said 14th day of July, 1917, the brick paving on both sides of the north rail of the north track of the said railway company on said Third street, at a certain point where the injury is alleged to have occurred, was in a rough, uneven, dangerous and unsafe condition, and that the defendant city had failed to maintain the said paving in a reasonably safe condition, and that the condition of the paving at said place was known to the city of Tulsa or could have been discovered by said defendant by the exercise of ordinary care on its part, and which conditions were unknown to the plaintiff. It is alleged that the plaintiff while riding along said street and between the tracks of the said railway company, on a bicycle, about 8 o'clock p. m. on the said 14th day of July, 1917, attempted to turn out of said street and off of said tracks to avoid an approaching fire truck which was coming westward on said street; that in so attempting to turn his bicycle across the north rail of the track and out of the path of the fire truck, the front wheel of plaintiff's bicycle came in contact with the rail and uneven paving; that he was thereby caused to swerve and turn, and as a result thereof the plaintiff was thrown to the pavement; and that in immediately attempting to regain his feet and move out of the path of the truck, the truck ran into and over the plaintiff, injuring him permanently and seriously. The plaintiff asks damages against the said city of Tulsa by reason of the negligence of the said city as aforesaid, in the sum of \$100,000. He alleged that he exercised due care and caution for his safety. The defendant for its answer denies each and every allegation in the plaintiff's petition contained; and the defendant for further answer says that if the plaintiff was injured at the place that he was guilty of contributory negligence, in this, that he neglected to use ordinary reasonable care for himself to protect himself from injury in that he knew of the alleged defect in the paving and neglected and failed to avoid it; second, that he endeavored to ride and drive his bi-

cycle across the depression in said track at an angle and in such manner at which he knew or should have known by the exercise of ordinary and reasonable care that he would likely cause his bicycle to overturn, and that the negligence of the plaintiff was the direct and proximate cause of the injury and directly and proximately contributed thereto."

For further answer to the defendant's petition, the defendant says that on the 2d day of August, 1917, this same plaintiff filed his action against the Tulsa Street Railway Company in the district court of Tulsa county, Okla., the same being No. 6543, and that said cause was tried to the court and jury in said court, and resulted in a verdict in favor of the defendant, and that said judgment was in full force and effect and has never been vacated, modified, or reversed, and it pleads and relies upon the litigation and judgment in the said cause as an estoppel and a bar against plaintiff's right to recover herein.

The cause was tried to the court and jury, which resulted in a verdict in favor of the plaintiff in the sum of \$22,000, upon which the court rendered judgment, to reverse which the defendant commenced this proceeding in error by filing its petition in error in this court on May 3, 1919, with copy of case-made attached, which petition in error contains 51 specifications of error, which are summarized as follows: (1) The court erred in overruling the amended demurrer of the defendant to the petition of the plaintiff; (2) erred in overruling the objection of the defendant to the introduction of evidence by the plaintiff in support of the allegations made in his petition; (3) erred in permitting the plaintiff to introduce certain incompetent, irrelevant, and immaterial evidence over the objection of the defendant; (4) erred in allowing and permitting plaintiff to amend his petition during the trial of the cause; (5) erred in overruling the demurrer of the defendant to the evidence offered by the plaintiff upon the trial of said cause; (6) erred in refusing to withdraw from consideration of the jury certain incompetent evidence; (7) in refusing to permit defendant to introduce certain evidence; (8) in refusing to direct the jury to return a verdict in favor of the defendant, assignments from 9 to 31, inclusive; erred in refusing to give requested instructions of the defendant, Nos. from 1 to 30, inclusive, assignments from 32 to 43, inclusive; erred in giving instructions from 1 to 12, inclusive; (44) erred in overruling the defendant's motion for new trial; (45) in rendering judgment in said cause against the defendant; (46) in matters of law upon the trial of said cause; (47) that the verdict of the jury was not sustained by the evidence and is contrary to law; (48) that the judgment of the court is not sustained by the evidence and is contrary to law; (49) that the verdict is excessive and

indicates the result of passion and prejudice upon the part of the jury; (50) that the damages awarded to plaintiff are excessive and appear to have been given under the influence of passion and prejudice; (51) the action of the plaintiff was premature and could not be maintained, and the court erred in refusing to dismiss the same upon the application of the defendant.

These assignments of error are discussed by counsel for plaintiff in error in their brief under nine subheads, the first of which is as follows:

"The judgment of the district court of Tulsa county in favor of the Tulsa Railway Company in the action brought against it by the plaintiff is a bar to this suit."

This and the second subhead will be considered together. Concerning this proposition, they say in their brief:

"One of the principal questions necessary to be determined in this case is whether a judgment in favor of the Tulsa Street Railway Company in the action heretofore commenced by plaintiff against it, which involved the same issues of negligence which are involved in this case, operates as a bar to the plaintiff's right to recover in this suit."

They say:

"Although it is a general rule that a municipality cannot assign or transfer to any person its liability for a failure to maintain its streets in a reasonably safe condition for public travel, still, it can and did, in this instance, impose upon the railway company this duty, as part consideration for the granting of the franchise, and for a failure to perform the covenants which are contained in the franchise contract, the railway company would become liable to any person injured because of its negligence in this respect. It is a fundamental rule that where any person creates a dangerous condition in a public thoroughfare by reason whereof some traveler is injured, the municipality may become liable for a failure upon its part to keep the highway in a reasonably safe condition for public travel and use and where the traveler recovers judgment against the municipality in such a case, the latter has remedy over against the person creating the dangerous condition. In other words, had Paul Wells sued the city of Tulsa in the first instance and recovered judgment against it, the city of Tulsa would then have the right to maintain an action against the railway company for the damage which it suffered by reason of the railway company's failure to abide by the conditions of its franchise obligation. But when the plaintiff has elected to sue the railway company for its primary negligence, relying upon its negligence and failure to comply with the provisions of its franchise, and has failed in recovery, then he cannot be permitted to recover judgment against the city for this identical negligence. If such were the case, the municipality would be deprived of its remedy over against the railway company because if it attempted a recovery against the latter, the railway company may plead *res adjudicata* as



to it upon this cause of action. Also, the railway company stands in privity with the municipality under the franchise contract. The duty of the railway company under the franchise was the same duty in all respects as that of the city. To say that each of the two might be sued on account of negligence of the railway company to perform its primary duty under the law, to properly maintain the paving and thoroughfare which it used in the operation of its business and its duty under the provisions of the franchise (which is expressly relied upon in plaintiff's petition against the railway company), would be to say that the rule of *res adjudicata* is abrogated where it has always heretofore applied in favor of one of two parties standing in legal or contractual privity when the other has been absolved from liability in an action brought by the third person complaining. There is, and can be, no question concerning the right of the city to contract with the railway company for the maintenance of the paving laid for the convenience of the company. It was for the accommodation of the street car company that brick paving was laid, and the city may legally lay upon it the obligation of maintaining such paving in such a condition that the public would not be hazarded by the use thereof. And there can be no question that the railway company might assume such obligation and bind itself thereby, on account of any damages which might be sustained by a dereliction of this contractual obligation. Surely if it failed in this respect, it could be made to respond in damages to the city where the latter was rendered liable because of a breach of the former's duty."

The provisions of ordinance 184, granting the franchise, and involved herein, are as follows:

"It is further provided that whenever the rails of said grantee's track traverse any street upon which the pavement is constructed, it shall be the duty of said grantee, after laying its tracks, to restore said pavement where injured or destroyed, taken or removed, to its previous condition."

"Further to maintain such pavement in good condition during the time such track may remain in and upon streets or avenues, except when the duty of the maintenance of said pavement may rest upon any contractor constructing such pavement under the employment or direction of the city of Tulsa."

And it is further provided:

"That the grantee may construct along their tracks detachable curbs or blocks of sufficient width to enable said grantee to take up and repair their tracks or rails, without disturbing any pavement of cement or asphaltic character used on any street."

Counsel contend that when plaintiff sued the railway company for its primary negligence in its failure to comply with the provisions of its franchise, and has failed in recovery, then he cannot be permitted to recover judgment against the city for this identical negligence; this contention being based upon what is known as the doctrine of election of remedies. This court has frequently

had occasion to pass upon this question. The most recent decision upon this question wherein this court reiterated the rule is in the case of *Vose v. Penny et al.*, 190 Pac. 97, decided at the present term of court and not yet officially reported, wherein Owen, C. J., speaking for the court, said:

"An election of remedies is the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts. The basis for the application of the doctrine is in the proposition that, where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. The doctrine of election of remedies is therefore generally regarded as being an application of the law of estoppel, upon the theory that a party cannot, in the assertion or prosecution of his rights, occupy inconsistent positions. 9 R. C. L. 956. In *First Trust & Savings Bank v. Bloodworth*, 70 Okl. 174, 174 Pac. 545, it was said: 'When the law gives several means of redress or kinds of relief, predicated on conflicting theories, the election of one and the prosecution to final judgment operates as a bar to the subsequent adoption of any other.' To the same effect is *Herbert v. Wagg*, 27 Okl. 674, 117 Pac. 209; *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 Am. St. Rep. 479; *Cohoon v. Fisher*, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193; *Gaffney v. Magrath*, 23 Wash. 476, 63 Pac. 520; *Gentry v. Bearss*, 88 Neb. 742, 130 N. W. 428."

The rule is further illustrated in 9 R. C. L. 958, wherein it is said:

"The doctrine of election of remedies applies only where there are two or more remedies, all of which exist at the time of election, and which are alternative and inconsistent with each other, and not cumulative, so that, after the proper choice of one, the other or others are no longer available. \* \* \* Another class of cases exists where there is but one cause of action but in which different or alternative remedies may be pursued. It is permissible to follow these remedies or reliefs independently, even in some cases to judgment, although but one satisfaction can be had."

To the same effect, 15 Cyc. 257, wherein it is said:

"In order that election must be made the party must have at his command different co-existing remedial rights, which are inconsistent, and not analogous, consistent, and concurrent."

[1] It seems clear to us that the facts in the instant case do not bring it within the rule, as by counsel announced, because the plaintiff's right under the law to a separate judgment against the city and traction company did not proceed upon opposite and irreconcilable claims of right, but upon the contrary his right against each was identical, and therefore consistent and concurrent. If the allegations in its petition in each case

are true, he was entitled to a separate judgment against each, but to one satisfaction only.

In 14 R. C. L. 53, it is said:

"While it is generally conceded that public necessity, and the nature of their obligations, require that municipal corporations should be held liable for the safety of their thoroughfares, the doctrine of *pari delicto*, though frequently invoked against them, is not applied, because their constructive default when they have sought reimbursement from the actual authors of the trespass or nuisance which has caused them to be sued, and the federal rule is that when such corporations have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner, or in general whenever they have been compelled to pay damages for a wrongful act perpetrated by another in public highways, they become entitled to maintain an action against such person for indemnity from the liability which the wrongful act has brought upon them."

In 13 R. C. L. 318, it is said:

"According to the weight of authority, a person or corporation required by contract, franchise, municipal ordinance, or statute to perform the duty resting on a municipal or quasi municipal corporation of keeping its streets and highways in repair, and safe for the passage of the public, is liable directly to a party injured by a defect caused by the failure to perform such duty, and the same has been held to be true under a similar contract with the state. In such cases the duty is considered as having been imposed for the benefit of every individual whose rights as one of the public might be specially affected, and in this way the party injured is held to be in privity with the promisor to the extent of giving him such right of action, or, in other words, the contractor is held to have assumed a duty to the public. This rule is often applied in cases where railroad or street railway companies agree to keep streets in repair as a condition of their right to use them, or so required to do so by their charters, or by a statute or ordinance. And it has been held that a provision in an ordinance imposing such a condition, that the railway company shall respond to the city and save it harmless from damage resulting from acts and negligence of the railway company, merely secures to the city the right to be reimbursed in the event that its own liability, which, under the law, still exists, shall be enforced, and does not confine the railway company's liability to the city alone."

It will be observed from the statement of counsel that they do not controvert the doctrine of the joint and several liability to the plaintiff of the city and the traction company announced by the authorities cited *supra*; but, in support of their contention that the judgment in favor of the defendant traction company in the former action of the plaintiff is a bar to this suit, they say:

"But when the plaintiff has elected to sue the railway company for its primary negligence,

relying upon its negligence and failure to comply with the provisions of its franchise, and has failed in recovery, then he cannot be permitted to recover judgment against the city for this identical negligence. If such were the case, the municipality would be deprived of its remedy over against the railway company because if it attempted a recovery against the latter, the railway company may plead *res adjudicata* as to it upon this cause of action. Also, the railway company stands in privity with the municipality under the franchise contract. The duty of the railway company under the franchise was the same duty in all respects as that of the city. To say that each of the two might be sued on account of the negligence of the railway company to perform its primary duty under the law, to properly maintain the paving and thoroughfare which it used in the operation of its business and its duty under the provisions of the franchise (which is expressly relied upon in plaintiff's petition against the railway company), would be to say that the rule of *res adjudicata* is abrogated where it has always heretofore applied in favor of one of two parties standing in legal or contractual privity when the other had been absolved from liability in an action brought by the third person complaining."

In support of this contention counsel cite the decision of this court in the following cases, likewise the decisions of other courts of last resort in similar cases: *C. R. I. & P. Ry. Co. v. Austin*, 43 Okl. 698, 144 Pac. 1069; *St. L. & F. R. Co. v. Williams*, 55 Okl. 682, 155 Pac. 249; *C. R. I. & P. R. Co. v. Brooks*, 57 Okl. 163, 156 Pac. 362; *K. C., M. O. & G. R. Co. v. Leunch*, 60 Okl. 19, 158 Pac. 1146; *C. R. I. & P. Ry. Co. v. Reinhart*, 61 Okl. 72, 160 Pac. 51; *St. L. & S. F. R. Co. v. Dancy*, 176 Pac. 209; *Callahan v. Groves*, 37 Okl. 503, 132 Pac. 474, 46 L. R. A. (N. S.) 350.

Upon examination of the cases cited, it is disclosed that each was an action arising upon a contractual relation, such as joint makers of obligations in the nature of bonds of indemnity, in attachments and garnishment proceedings and sheriffs' indemnifying bonds, etc., and in cases where the relation of principal and surety, principal and agent, master and servant, indemnitor and indemnitee, existed, and frequently in cases where the aggression complained of was a separate and distinct act of the agent or servant, or cases where all of the parties were charged jointly with committing the act complained of, and upon the trial thereof the evidence disclosed that some one or more of said parties were innocent, and in such circumstances the rule announced by counsel is correct and the authorities cited would be in point; but, in the instant case, the facts alleged and proven upon the trial are materially different, this being an action in tort, and the record discloses that each of the alleged wrongdoers have been sued by the plaintiff in separate actions, the first of which was

against the traction company alone, in which a trial to a jury was had and a verdict returned in favor of the defendant, from which the plaintiff appealed and the cause was pending on his appeal at the time of the trial in the instant case. In these circumstances the rule is as announced by Gould on Pleadings (6th Ed.) 390, as follows:

"If several persons join in committing a trespass, or tort of any kind, the party injured may generally, at his election, sue them all jointly—or each, or either of them, in a several action—or any number of them, less than the whole together. For torts, in which several join, may be considered, in regard to the wrongdoers, either as wholly joint, or wholly several—or as joint in respect to part of them, and several as to the others; since the act of any one of the wrongdoers may be regarded in law, either as his own sole act, or as the act of either, or of all, or of any number of them."

In Cooley on Torts (2d Ed.) 153, it is said:

"But while the law permits all the wrongdoers to be proceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedies regardless of the participation of the others. While the wrong is joint it is also in contemplation of law several. \* \* \* The rules regarding remedies, which are applied to breaches of contracts are obviously inapplicable here. \* \* \* The case of wrongdoers is wholly different; the party injured has not assented to their action; he has not agreed what the consequences shall be if one or more shall trespass upon his rights, nor is he morally under obligation to pursue his remedy in any particular form because of that form being most to their convenience. Whatever course is seemingly most for his interest, it is just that he should be at liberty to select. Nor, after suit is brought, can there be any apportionment of responsibility, whether the suit be against one or against all. Each is responsible for the whole, and the degree of his blamableness as between himself and his associates is immaterial. When the contributory action of all accomplishes a particular result, it is unimportant to the party injured that one contributed much to the injury and another little; the one least guilty is liable for all because he aided in accomplishing all."

Mr. Cooley, after reviewing the rule announced in the English case of *Brown v. Broton*, which held that to recover a judgment in a suit against one wrongdoer is a bar to any further action against others, and saying that, "except in Virginia and Rhode Island, it is not met with favor in this country," at page 159, says:

"It was expressly disapproved by the Supreme Court of New York, when presided over by Chief Justice Kent, and was pronounced by him to be a departure from the earlier English decisions. The rule laid down by that eminent jurist, which has since been generally followed in this country, is that a party injured may bring separate suits against the wrongdoers,

and proceed to judgment in each; and that no bar arises as to any of them until satisfaction is received."

The Kansas City Court of Appeals, in the case of *Sutter v. Kansas City*, 119 S. W. 1084 (138 Mo. App. 105), where the precise question was involved, held that the former action could not be pleaded in bar, and in paragraph 1 of the syllabus used this language:

"A railroad company, tearing up the brick pavement in a street and piling the brick in the parkway between the curb and the sidewalk, indemnified the city against loss from injuries caused by such brick. A pedestrian, injured by tripping over a brick on the sidewalk, sued the railroad company, and judgment went for the company, and the pedestrian then sued the city for its negligence in leaving the brick on the sidewalk. *Held*, that the judgment in the first action was no defense to the action against the city, on the principle that, where the party charged primarily with the wrong is found not to be guilty, the codefendant, whose liability is dependent on the guilt of the first party, is also discharged, since the duty of the city to keep its sidewalks clear to prevent injuries to pedestrians was a primary duty, and independent of any relation with the railroad company."

This holding was cited with approval by the Supreme Court of Missouri, in the case of *Sutter v. Metropolitan Street Railway Co.*, 188 S. W. 65, construing the same accident, and involving the same state of facts. This suit was brought by the husband for his damages growing out of the same accident. He recovered \$4,500. The judgment was affirmed on appeal. (App.) 208 S. W. 851.

The contention of counsel that the judgment in favor of the defendant in the case of the plaintiff against the traction company is a bar to this action cannot be sustained for the additional reason that the record discloses by stipulation that such judgment had not become final when this case was tried, as an appeal therefrom had been taken by the plaintiff to this court. The rule in such cases is found in *Black on Judgments*, vol. 2, § 510, and is as follows:

"In many states it is held that the pendency of the appeal suspends operation of the judgment in respect to all its usual effects, and hence, the judgment, not becoming final while the appeal remains undetermined, it cannot be pleaded in bar, in the interval, nor used in evidence as an estoppel."

Such was the holding of the Supreme Court of California in *Di Nola v. Allison et al.*, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 804; also, in the case of *Purser v. Cady*, 120 Cal. 214, 52 Pac. 489. This rule was adhered to by this court, in the case of *Stuart v. Coleman*, 188 Pac. 1063, not yet officially reported, second paragraph of syllabus, which is as follows:

"Where the law gives a right of review to an appellate court, all persons are necessarily charged with notice thereof, and his pendency is adequate to give a litigant protection until he can pursue all the remedies to which he is entitled in the action, and therefore, although a judgment of final decree has been entered, the cause is deemed to be pending while the right to prosecute it further by appeal remains."

In view of the authorities cited, we are clearly of the opinion that the trial court committed no error in holding that the judgment of the court in the action brought by the plaintiff against the traction company was not a bar to his right to recover in the instant case.

The record discloses that plaintiff received the injuries complained of on East Third street, in the city of Tulsa, near the intersection thereof with Boston avenue; that said street was one of the principal business thoroughfares in the city, and was paved with asphalt except that portion thereof occupied by the Tulsa Street Railway Company by its tracks; that said traction company, at the time of the injury and for a number of years prior thereto, had maintained a double track along said street, and that part of the street occupied by the tracks of the traction company between said tracks and between the rails thereof, and for about 12 inches outside of the outer rails of said track, were paved with vitrified brick; and that the company's tracks and pavement were placed there by the authority of the defendant city some time after the street had been paved by the city.

The plaintiff alleged, and the evidence tended to show, that said brick paving was constructed in said street in a rough and uneven condition, a long time prior to the date of injury, at the instance of the defendant and under its direction, supervision, and control, and that on the date of injury the brick paving on both sides of the north rail of the north track of the said railway company on said Third street at the point where the injury occurred, and for some 25 feet along the track, the brick paving had sunk from 1 3/4 inches to 3 3/4 inches below the top of the rail, and was in a rough, uneven, and dangerous condition, and that the defendant city had failed to maintain the said paving in a reasonably safe condition, and that the condition of the paving at said place was known to the said city of Tulsa, or could have been discovered by it by the exercise of ordinary care on its part, and which condition was unknown to the plaintiff; that while riding along said street between the tracks of said railway company on a bicycle about 8 o'clock p. m. on said date, and without any negligence on his part being shown by the record, he attempted to turn out of said street and off the said tracks to avoid an approaching fire

truck which was coming westward on said street at the rate of 25 miles per hour; that, in so attempting to turn his bicycle across the north rail of the track and out of the path of the fire truck, the front wheel of plaintiff's bicycle came in contact with the rail and uneven paving; that he was thereby caused to swerve and turn, and, as a result thereof, was thrown to the pavement; and that, in immediately attempting to regain his feet and move out of the path of the truck, the truck ran into and over him, injuring him permanently, and seriously.

[2] "A municipal corporation is charged with the duty of maintaining its streets in a reasonably safe condition for travel." 2 Dill. Mun. Corp. (4th Ed.) §§ 1028, 1029; Elliott, Roads and Streets, § 633; 1 Shearm. & Redf. Neg. (5th Ed.) 164-168; *Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612; *Indianapolis v. Doherty*, 71 Ind. 5.

"As between a municipal corporation and the public, the duty rests primarily upon the corporation, and cannot be evaded or suspended by any act of its own." *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485; *Brusso v. Buffalo*, 90 N. Y. 679; *Goddard v. Harpswell*, 84 Me. 499, 24 Atl. 958, 30 Am. St. Rep. 373.

Judge Dillon, in his work on *Municipal Corporations* (5th Ed. § 1027), says on this subject:

"Whether the duty of maintaining the streets in a safe condition for public travel and use is specially imposed on the corporation or is deduced in the manner before stated, it rests primarily, as respects the public, upon the corporations; and the obligation to discharge this duty cannot be evaded, suspended or cast upon others by any act of its own."

[3] As to that part of the street occupied by the traction company the law imposes the same duties and liabilities as those imposed upon defendant city. 13 R. C. L. 262; 36 Cyc. 1402; *St. Seq. Jenree v. Metropolitan St. Ry. Co.*, 86 Kan. 479, 121 Pac. 510, 39 L. R. A. (N. S.) 1112, Ann. Cas. 1913C, 214. Therefore, the amended demurrer of the defendant to the petition of the plaintiff, and its objection to the introduction of the evidence in support of the allegations of the petition, and demurrer to the evidence of the plaintiff, were each and all properly overruled by the trial court.

The proposition contained in subhead 3 is:

"The alleged negligence of the defendant was not the proximate cause of the injuries of the plaintiff."

This contention is without merit, as that issue was determined by the jury under proper instructions of the court.

[4, 5] The proposition contained in subhead 4 is as follows:

"The notice required to be given by the city charter of the time, place and manner in which the injuries of plaintiff were sustained, together with the description of the character and extent thereof, was not given prior to the time of the commencement of this action, by reason whereof this judgment was erroneously rendered and cannot be sustained."

The propositions contained in subheads 5 and 6 go to the same question and will be considered therewith. The provision referred to is as follows:

"Before the city of Tulsa should be liable for damages of any kind, the person injured or some one in his behalf shall give the mayor or city auditor notice in writing of such injury within 30 days after the same has been received stating specifically in such notice, when, where and how the injury occurred and the extent thereof."

The defendant pleaded this provision of the charter as a defense, and the plaintiff in his amended reply alleged:

"Plaintiff for a further reply says that article 2, § 9, of the charter of the city of Tulsa, which is pleaded by the defendant in its answer as a bar to plaintiff's right to recover in this action is unreasonable in its terms and provisions and is not applicable to the facts in this case and it is void as to the plaintiff in this case for the reason that if enforced it will deprive plaintiff herein of his property without due process of law, and it is therefore unconstitutional, and void under the Constitution and laws of the state of Oklahoma and the Constitution and laws of the United States of America."

He further alleged:

"Plaintiff for further reply states that notwithstanding that article 2, § 9, of the charter of the city of Tulsa, is unconstitutional and void as to the plaintiff, as hereinbefore set out, that he is informed and verily believes, and therefore alleges the facts to be that on the — day of August, 1917, within 30 days after the 14th day of July, 1917, the date plaintiff was injured as alleged in his petition, there was filed on behalf of plaintiff herein with the mayor and the city auditor of Tulsa, Okl., a statement in writing setting forth, when, where and how the injuries complained of by plaintiff in the case occurred and the extent of his injuries, and the said notice in all respects complied with said provisions of the charter."

He further alleged:

"For further reply, plaintiff states that on the said 14th day of July, 1917, when he was injured as alleged and set out in his petition, he was a minor of tender years, to wit, the age of 13, and that on said date when he was injured as charged in his petition, his skull was fractured on each side and he immediately became unconscious and remained unconscious for a long period of time thereafter, to wit, more than 30 days, and that the plaintiff's mind ever since he was injured has been greatly affected and impaired, and he has been unable to read and concentrate his mind; that on account of

his injuries as aforesaid and his infancy he has been at all times since the 14th day of July, 1917, and is now, physically and mentally incompetent to superintend the preparation and filing of a notice or claim for damages against the city of Tulsa, and that no person was legally bound to serve said notice for him until his guardian was appointed as hereinafter alleged. That on the 12th day of November, 1918, Catherine M. Wells, mother of the plaintiff was duly appointed guardian of his personal estate and the plaintiff further states that on the 12th day of November, 1918, another notice in writing stating how, when and where plaintiff was injured and the extent of his injuries in compliance with said provision of the charter was served upon the auditor of the city of Tulsa."

He further alleged:

"That the defendant, through its mayor, auditor and various other agents, employes and officers of the city of Tulsa, was informed and had knowledge of plaintiff's injuries immediately after he was injured and before 30 days expired, and duly investigated the facts with reference to the happening of the accident resulting in plaintiff's injuries, as described in his petition, also investigated the physical condition and employed physicians to treat plaintiff and paid the said physicians the sum of \$350; that on account of said facts, the written notice required to be served became useless and of no avail and that defendant had waived the right to require plaintiff to show the filing of said notice, and was estopped from relying on said charter provision as a bar to this action."

Upon this question counsel for the defendant requested and the court refused the following instructions to the jury:

Requested Instruction No. 29. "You are instructed that even though you find and believe from the evidence that the defendant was negligent in the respect charged in the petition of the plaintiff and that such negligence, if any, directly and proximately caused the injuries alleged to have been sustained by the plaintiff, yet you are not to return a verdict in favor of the plaintiff unless you find and believe from the evidence, by a preponderance thereof, that within thirty days after the date upon which the plaintiff is alleged to have been injured, that the plaintiff, or some one in his behalf, gave to the mayor or city auditor of said city of Tulsa, a notice when, where and how the injury occurred and the extent thereof."

The court, however, instructed the jury upon that question, as follows:

"The jury are further instructed that it is provided by the charter of the city of Tulsa that before the city of Tulsa shall be liable for damages of any kind the person injured or some one in his behalf shall give the mayor or city auditor notice, in writing, of such injury, within thirty days after the same has been received, stating specifically in such notice, when, where and how the injury occurred and the extent thereof; and you are instructed that said provision of said city charter is valid and binding upon the plaintiff herein and that inasmuch as the plaintiff admits that no notice

in writing was given by him or by any one in his behalf as provided for in said charter provision, you are instructed that the plaintiff, therefore, cannot recover in this action unless he brings himself within the exception herein-after stated to you; and in this connection you are instructed that if you should find and believe from a fair preponderance of the evidence that the plaintiff was of such immature age or that his mental or physical capacity was so impaired by the alleged injury complained of that he would not be of such mental or physical capacity to seek to know his rights or understand them if stated to him or apprehended the need of searching out or enforcing his legal remedies or if his mental capacity was such that he would not be reasonably expected to take any step to ascertain what his rights were, then in such event he would be excused from giving the notice required by the charter so long as such mental or physical incapacity existed or until a guardian was appointed for him, and in the event of such finding, then the fact that the notice was not given within the time required by the charter, would not of itself prevent the plaintiff from recovering; but, on the other hand, unless you should so find as above stated, by a fair preponderance of the evidence, then your verdict should be for the defendant."

[8, 7] In view of this state of the record, we hold without deciding that, if the provision of the charter were a valid provision, the facts pleaded as excusing him from a failure to comply with such provision, if true, were sufficient for such purpose, and as the case was tried and submitted to the jury upon that theory, and the jury having returned a general finding in favor of the plaintiff, necessarily resolved that issue in his favor, and we will not, therefore, disturb such finding. R. L. 1910, § 6005.

The proposition embraced in subhead 7, of the defendant's brief, is as follows:

"Neither the mayor nor city engineer actually knew of the alleged defect in the paving by personal inspection at least 24 hours prior to the occurrence of the injuries of the plaintiff, nor had the attention of such officers been called thereto in writing at least 24 hours prior to the happening of said accident, by reason whereof the defendant is not liable."

Concerning this proposition, they say in their brief:

"It is a fundamental rule that no municipality can become liable on account of a defect in its highway unless it had notice thereof, and neglected to make the necessary repairs within a reasonable time after the receipt of such notice. If no notice of the alleged defect in the way is had, the city is not obligated to compensate the person injured because of a failure upon its part to repair. And the knowledge or notice of the municipality of the defective condition of the street is a condition precedent to recovery by the person injured because it is only after such notice or knowledge is had that the municipality can become negligent in failure to repair.

"Section 9, art. 11, of the Tulsa City Charter, provides as follows: 'The city of Tulsa shall never be liable on account of any damage or injury to person or property arising from or occasioned by any defect in any public street, highway or grounds or any public work of the city, unless the specific defect causing the damage or injury shall have been actually known to the mayor or city engineer by personal inspection for a period of at least 24 hours prior to the occurrence of the injury or damage, unless the attention of the mayor or city engineer shall have been called thereto by notice thereof in writing at least 24 hours prior to the occurrence or damage and proper diligence has not been used to rectify the defect after actually known or called to the attention of the mayor or city engineer as aforesaid.'"

The record discloses that the written notice required by by this provision was not given, but as to the first provision the record discloses that the brick paving where the accident occurred on the south side of the north rail of the north track of the traction company had become worn off inside of the rail or sunken below the rail or both, to a distance of from 1½ inches to 3¼ inches, and for a distance along the rail of something like 25 feet; that that condition had existed for a long time prior to the injury and had not been repaired at the time of the trial; photographs had been taken showing the condition and were offered in evidence upon the trial. C. P. Cline, a witness for defendant, was offered, and testified on direct examination that he had been connected with the defendant in an official capacity six years and six months, as inspector, inspecting paving, streets, and everything that they have; that he was acquainted with that portion of the street before described; that he had inspected the same about the time of the accident or some time after hearing of same; that it was in the same condition as at the time of the accident and no change had been made; that the pavement was about 1½ inches below the rail for about 8 feet on the inside of the track and that the brick was worn down; that his office was in the engineer's office and he was working with the engineer and made his reports to the engineer. He testified on the trial of the cause of this plaintiff against the traction company, and concerning the testimony given at that trial he was asked:

"Q. Did you answer this question: 'Q. You are the only representative of the city administration that does go out and investigate these tracks?' A. I had one of the inspectors with me at the time, George Harris. Q. Now, Mr. Cline, that inspection was made just prior, was it not, to the accident occurring to this boy? A. I would not say for sure, but right somewhere about that time. Q. Now, then, Mr. Cline, I call your attention to this question, 'Q. Do you remember, Mr. Cline, the condition of that paving along the north rail of the north track at the point to which I have re-

ferred, during the middle of July, last year? A. Well, I went over the tracks, just a little before that time; I don't know the dates; I could tell by going to the engineer's office; and I condemned the bad places in the track.' A. Yes, sir. Q. And you went over the track just prior to the time this boy was hurt? A. Well, just as I stated."

On re-direct examination: "Q. Mr. Cline, did you report this particular piece of track and pavement thereabouts bad? A. No, sir."

Recross-examination: "By Mr. Ford: Q. You didn't even find that piece of paving down there, did you? A. It wasn't bad enough; there was too many bad places to be fixed. Q. There were so many other worse than this that you didn't report it? A. Yes, sir."

Counsel for the defendant requested the following instruction which was refused by the court:

"You are instructed that in no event are you to return a verdict in this case for the plaintiff unless you find and believe from the evidence, by a preponderance thereof, that for a period of at least 24 hours prior to the time when the injuries complained of are alleged to have been received by the plaintiff the mayor or city engineer of the city of Tulsa, Okla., actually knew, by personal inspection, of the alleged defective and unsafe condition of the paving and street at the point where the plaintiff is alleged to have been injured and reasonable diligence was not taken by defendant to correct the defect, or unless you find from the evidence, by a preponderance thereof, that the attention of the mayor or city engineer of said City of Tulsa was called to the alleged defective and unsafe condition of the paving and street aforesaid in writing at least 24 hours prior to the time when the injuries are alleged to have been sustained by plaintiff, and that reasonable diligence was not taken by said city of Tulsa to correct such defect."

Whereupon the court gave to the jury instruction No. 7 in the general charge, which is as follows:

"You are further instructed that before the plaintiff can recover it must appear from the testimony, by a fair preponderance thereof, that the city of Tulsa, through its mayor or city engineer, or both, at least 24 hours prior to the time when the injury complained of or alleged to have been received by the plaintiff was received, knew or by the exercise of reasonable diligence could have known of the unsafe condition of the street at the point where the plaintiff is alleged to have been injured, if you find from the evidence that it was unsafe."

The first part of the provision of the charter provided that the city should not be liable for injury to person or property arising from or occasioned by any defect in any public street unless the specific defect causing the damage or injury shall have been actually known to the mayor or city engineer by personal inspection for a period of at least 24 hours prior to the occurrence of the injury or damage.

Concerning that provision of the charter, counsel for the defendant in error say in their brief:

"We think a mere reading of this portion of section 9 shows on its face it is unreasonable and, therefore, unconstitutional and void. If this provision of the charter is upheld, a person can never recover from a municipality for injuries caused by a defect in the street unless twenty-four hours before he gets hurt he goes either to the city engineer or the mayor and tells them that he expects, to be hurt, or unless he is fortunate enough to find some one who called upon the mayor or the city engineer twenty-four hours before he got hurt and notified them of the defect. We do not know the author of this provision nor why it was written, but we think this practically imposes an impossibility upon a litigant. The court adopted the view of the foregoing section that actual knowledge for a period of twenty-four hours either on the part of the mayor or the city engineer was not necessary, but that constructive notice would be sufficient. \* \* \*"

With this contention of counsel we are in perfect accord, and additional reasons might be given in this connection. But we are not without authority to sustain this conclusion. This precise question was before the Supreme Court of the state of Washington in the case of *Born v. City of Spokane*, 27 Wash. 719, 68 Pac. 389, and in passing upon the question, Dunbar, J., speaking for the court, said:

"It also appears that there is a charter provision to the effect 'that the city shall not be liable for any damages for injuries sustained \* \* \* in consequence of any street \* \* \* or sidewalk being out of repair, unsafe, dangerous or obstructed \* \* \* unless actual notice of such defect or want of repair shall have been given to the superintendent of streets or the city council twenty-four hours before such injury is sustained.' It is contended that, inasmuch as such notice was not given, the plaintiff cannot recover. It seems to us that this provision of the charter, upon its face, is unreasonable, and that to hold it good would be to couple a remedy with a frequently impossible condition. The person injured naturally could not give notice to the city before the injury, for in such an event he would be held to have had notice of the dangerous condition, and would be debarred from recovery. And if notice had been given by any one else, he would have no knowledge of such notice, and would be unable either to plead or prove it. As was said by this court in *Durham v. City of Spokane* (filed March 12, 1902) 68 Pac. 383, in discussing the reasonableness of a charter provision somewhat of this character: 'Manifestly, unless it is to be held that the city can by this form of enactment prevent a recovery against itself for personal injuries, it cannot, by requiring claims for injuries to be presented within a given time, prevent a recovery for troubles arising from such injuries which do not develop within the given time. But it is not the rule that a city may say whether or not it shall be held for personal injuries caused by its neglect of duty.

Charter provisions of the character in question, whether enacted by the Legislature, or, as in the present case, by the city itself, are to be upheld only so far as they are reasonable and tend to the due administration of justice. When such provisions so far depart from reasonableness as to amount to a denial of justice, they are void.' The right to prosecute a claim for personal injuries is a common-law right, which has been sustained by this court in a long line of causes, extending from *Sutton v. City of Snohomish*, 11 Wash. 24, 39 Pac. 278, 48 Am. St. Rep. 847, down to the present time. Such cases have also held the city chargeable with notice, and if it is true that it is not the rule that the city may say whether or not it shall be held for personal injuries caused by its neglect of duty, as was said in the case just above cited, this provision must be held to be unreasonable and void. Hence the instruction complained of, that a city is chargeable with notice of a dangerous opening and trench or ditch, and its condition, in the sidewalk or street, although actual notice may not have been brought home to it, if the evidence shows that such a state has continued for sufficient length of time, so that the city, by exercising ordinary care, might have learned of its condition, and not to know such fact would be negligence on the part of the city, was properly given."

We think, as was said in the *Washington* case, *supra*, that this provision of the *Tulsa* charter so far departs from reasonableness as to amount to a denial of justice, and is therefore void. The testimony, as we have seen, tended to show that the defect in the street charged by the plaintiff had existed for a long time prior to the injury complained of, and that the jury was fully warranted in so finding. If so, the city, by exercising ordinary care, might have learned of its condition, and not to know such a fact would be negligence on the part of the city for which it would be liable under the law. This was the effect of the instruction of the court complained of, and we think sufficiently advised the jury upon that question, and that the trial court committed no error in giving the same, nor in refusing the requested instruction of the defendant.

The provision contained in subhead 8 is as follows:

"The court below committed error in permitting the plaintiff to amend his petition and alleging that the brick paving was constructed on East Third street in a rough and uneven condition, a long time prior to the date of the occurrence of the accident, at the instance of the defendant and under its direction and supervision and control."

There is no merit in this contention. The statutes of this state permit such amendments in furtherance of justice to conform to the proof, leaving the question to the discretion of the trial court, and the action of the trial court, in this respect, will not be disturbed on appeal unless it appears from

the record that there was a clear abuse of such discretion. Rev. Laws 1910, § 4790.

[8] The proposition contained in subhead 9 is as follows:

"The verdict of the jury is clearly excessive in the amount of recovery awarded plaintiff and indicates that it was the result of passion and prejudice, and the court below erred in refusing a new trial."

The record discloses by the uncontradicted evidence that the plaintiff, at the time he received the injuries complained of, was about 14 years of age; that he was a bright, studious, and industrious boy; that he had reached class A of the seventh grade in school; that he was a constant reader at home; that the time of the injury was during vacation, and he was working for a drug store as deliveryman by bicycle and was earning on an average of about \$3 per day; that he was on a trip to deliver a package at the time he received the injury, traveling westward on East Third street. A business man standing in the front door of his business house was an eyewitness to the accident. He testified that the plaintiff was going west on the street upon his wheel at a moderate speed, and that a fire truck came sweeping up the street behind him at a rate of speed of from 25 to 30 miles an hour, and he saw the plaintiff look back and then turn to the right as alleged in his petition, and then when his wheel struck the north rail of the north track of the traction company it swerved, the wheel going suddenly to the southwest, throwing the plaintiff to the northwest over the rail; that the plaintiff attempted to arise immediately, and while he was upon his hands and knees he was struck and run over by the truck. The testimony is to the effect that there was no fire alarm, and the purpose for which it was making the run was not discussed in the evidence. The undisputed testimony is that the boy was picked up in an unconscious condition, taken immediately to the hospital, where he remained in such condition for a period of 14 days; that he was operated upon; portions of his skull were removed from each side of his head over the ears, and his injuries resulted in complete paralysis of his left side, including his left shoulder, left arm, and left leg; that at the time of the trial, that side and members were greatly drawn and reduced in size as compared with the corresponding right side and members. The testimony shows that since his injuries his eyesight has been greatly impaired and that he is unable to read for any length of time; that his vision is dim and blurred, and reading causes severe headaches. His hearing, as a result of the injuries, has been greatly impaired. At the time of the trial he was about 15 years of age, and his mother testified that he was wholly unable to dress and undress himself;



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that she had to dress and undress him and prepare his food and place his food so that he could feed himself with his right hand. The physicians testified that his injuries were permanent and that he would never be any better, but would be a hopeless paralytic for the balance of his life and would continue to suffer physical pain as a result thereof.

The verdict of the jury assessed the plaintiff's compensation at \$22,000. The defendant urges that such amount is excessive.

In *St. L. & S. F. Ry. Co. v. Hodge*, 53 Okl. 462, 157 Pac. 60, citing many cases of this and other courts, this court said:

"A verdict will not be set aside in case of tort for excessive damages, unless it clearly appear that the jury committed some gross or palpable error, or acted on some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damage was regulated."

There is nothing appearing in the record that indicates that the jury in the instant case was influenced or actuated in any of the ways mentioned in the *Hodge Case*, supra; but, upon the other hand, the record is unusually free from anything that would so indicate.

The instructions of the court as to the measure of damages was a clear statement of the law in relation thereto. The law awards compensation in such cases for injuries sustained as to the amount thereof; the jury is the arbiter in the first instance, subject to the approval of the trial judge. The case comes to this court having passed successfully these tests. \$22,000 is a substantial amount, but in view of this record we cannot say that it is more than that, or that it is excessive.

The judgment is affirmed.

RAINEY, C. J., and KANE, HARRISON, and PITCHFORD, JJ., concur.

(79 Okl. 85)

STONE v. SPENCER. (No. 9564.)

(Supreme Court of Oklahoma. July 20, 1920.)

*(Syllabus by the Court.)*

1. Trial  $\S$ 405(1)—Error cannot be predicated upon findings not objected to.

While the right of a party to have the trial court make separate findings of fact and conclusions of law is a substantial right, the rule is well settled that, where the court attempts to make special findings upon the request of a party, and inadvertently fails to make special findings upon some particular matter in controversy, or makes such findings in too general terms, the court does not thereby commit substantial error, unless its attention is first called

to the omission to find, or to the defective finding, and it then fails or refuses to correct the same.

2. Evidence  $\S$ 442(1)—Parol evidence admissible where writings not complete.

When the writing does not purport to disclose the complete contract, or if, when read in the light of attendant facts and circumstances, it is apparent that it contains only a part of the agreement entered into by the parties, parol evidence is admissible to show what the rest of the agreement was; but such parol evidence must not be inconsistent with or repugnant to the intention of the parties as shown by the written instrument.

3. Appeal and error  $\S$ 1054(1)—Incompetent evidence not ground for reversal unless affecting result.

A judgment rendered in a case heard without the intervention of a jury will not be reversed on account of the admission of incompetent evidence, unless the record discloses that there was no competent evidence to support it, or in some other way shows affirmatively that the improper evidence affected the result.

4. Appeal and error  $\S$ 1009(4)—Judgment in equity case not reversed unless clearly against evidence.

The judgment of the trial court in an action of purely equitable cognizance will not be reversed on appeal, unless said judgment and finding of the court are clearly against the weight of the evidence.

5. Sufficiency of evidence.

The record examined, and held that the judgment of the trial court is not clearly against the weight of the evidence.

Appeal from District Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Suit by G. B. Stone against W. S. Spencer. Judgment for defendant, and plaintiff appeals. Affirmed.

Everest, Vaught & Brewer, of Oklahoma City, for plaintiff in error.

Keaton, Wells & Johnston, of Oklahoma City, for defendant in error.

McNEILL, J. G. B. Stone filed his petition in the district court of Oklahoma county against W. S. Spencer to dissolve a partnership existing between Spencer and Stone under the firm name of W. S. Spencer & Co. and for an accounting. It was alleged in the petition that W. S. Spencer was indebted to the firm in the sum of \$2,641, and the partnership was indebted to Stone in the sum of \$660.19. It was further alleged that the partnership acted as agent for numerous insurance companies in placing their policies and receiving commission on premiums, and acquired an interest in the expiration on said policies, and plaintiff alleged that the agency for and the expirations of the companies are worth the sum of \$4,500. It was further al-

leged that since 1914 the plaintiff and defendant had executed various bonds to the different insurance companies, whereby they bound themselves jointly and severally to pay to the insurance company all premiums upon policies which they might write, less the agent's commission thereon, and that there were premiums written by the partnership amounting to about \$4,000 uncollected, and the plaintiff is liable to the insurance company on said bonds, for such amount of said premiums as may be collected and not paid to the said companies to the extent of such balance as may be due the said companies, which balance is now in the sum of about \$1,700.

It was further alleged that said partnership had assets consisting of bills receivable, agencies for insurance companies and expirations on policies heretofore written, debts due from defendant Spencer, office furniture, all of the total value of \$10,000; that the liabilities of said partnership consisted of amount due plaintiff and amount due different insurance companies in the total sum of \$3,000.

The defendant Spencer in answer to said petition pleaded that all of the negotiations regarding the partnership agreement was made by plaintiff with Mrs. Spencer as the agent for W. S. Spencer, and admits the signing of the contract of partnership; and the same had existed, and then pleaded that at the time of entering into the contract a part of the consideration for entering into said partnership was the business of the Stone Realty Company owned by Stone, that was to be brought into the partnership, and Stone represented the returns from said business would amount to some \$500 or \$600 a month, but said representations were untrue, and that said business only amounted to some \$60 or \$70 a month. It was alleged at the time of the partnership agreement, and thereafter, there was an oral agreement, entered into between Stone and Mrs. Spencer representing Spencer, that if the plaintiff did not bring into the firm any substantial business that he would withdraw from the firm, and would take out of the firm only what he had put in the firm. It was further alleged in the answer that Stone did not devote his time and attention to the business, but devoted most of his time in attending to his own private business, and gave no attention to the partnership business. It was further alleged that the partnership had been dissolved by mutual consent on the 1st day of May, 1916, and the accounts balanced, and that on said date Stone withdrew from the firm, and that the parties had a settlement, and in support of said allegation pleaded that Stone dictated a notice of dissolution, which was later published in the Daily Oklahoman, and dictated certain letters to different insurance companies, advising them that

he was retiring from the company, and that W. S. Spencer would retain all accounts and assume all liabilities. It was further pleaded that on said date Stone made a written assignment on a certain contract, transferring his interest in the business to Spencer. The answer then by way of cross-petition alleged that the plaintiff Stone was indebted to the partnership, for certain accounts for insurance that was written on the property which Stone owned or had an interest in, and asked for a judgment against Stone for said amounts.

Upon the trial of the case to the court, the plaintiff in error requested the court to make findings of fact and conclusions of law as required by section 5716, Revised Laws 1910, and the court dictated to the stenographer the following findings of fact:

"The court finds that a dissolution of the partnership was effected in the early part of May; that at that time the accounts were balanced with the exception of the Harrah-Stone account of \$37.02 and the Vose & Stone account of \$76.38, which accounts the plaintiff in this case is only partially liable for, together with the parties named. It will therefore be the judgment of the court that the defendant have and recover judgment against the plaintiff for the costs of this action."

The plaintiff made the following exception to said findings of fact and conclusions:

"To all of which findings of fact and conclusions of law the plaintiff excepts and gives notice of appeal and the filing of a motion for a new trial, and asks that same be noted on the journal as requested."

From said judgment the plaintiff has appealed to this court. For reversal of said judgment, the plaintiff in error has briefed the case upon three propositions, and stated them as follows:

First. Errors of the court in admitting proof of an oral contract of partnership over the objection of plaintiff.

Second. Refusal of the trial judge to make findings of fact and conclusions of law as required by statute.

Third. The finding of fact that the accounts of plaintiff and defendant were balanced on May 1, 1916, was not sustained by any evidence whatever.

[1] We will first consider the question contended for by plaintiff that the trial court refused and failed to make findings of fact and conclusions of law as required by statute. It is the contention of plaintiff in error that the statement by the court which is referred to as findings of facts and conclusions of law did not amount to findings of fact and conclusions of law as contemplated by the statute, but with this we cannot agree. After the court dictated the findings of fact as above set forth, counsel for plaintiff in error did not request additional find-

ings, nor make any exception to what purported to be findings for the reason the findings did not constitute findings of fact and were not a compliance with the statute. The only exception were to the findings as being supported by the facts. This case is almost identical with the record in the case of *Gulf, C. & S. F. Ry. v. Williams*, 49 Okl. 126, 152 Pac. 395, as follows:

"Whilst the right of a party to have the trial court make separate findings of fact and conclusions of law is a substantial right, the rule is well settled that, where the court attempts to make special findings upon the request of a party, and inadvertently fails to make special findings upon some particular matter in controversy, or makes such findings in too general terms, the court does not thereby commit substantial error unless its attention is first called to the omission to find, or to the defective finding, and it then fails or refuses to correct the same."

While the findings of fact may not be as full and complete as the parties anticipated, nor as contemplated by the statute, no request for any additional findings were made, and the record discloses the findings were considered by all the parties to the case, and by the trial court as findings of fact and conclusions of law. The parties, having made no objection during the trial of the case, will not now be permitted to say that the findings were not as complete as required by statute.

We will now consider the contention of plaintiff in error that the court erred in admitting proof of an oral contract of partnership over the objection of plaintiff. It is the contention of the defendant in error, however, that no such evidence was introduced, but the court in permitting certain evidence to be introduced stated his reason as follows:

"The court will permit you to bring out the matters you desire to bring out at the time of entering into the original contract of partnership, not for the purpose of varying the terms of a written contract, but for the purpose of explaining the intention of plaintiff in this case when he wrote defendant's Exhibit 3, and to show what the parties understood at the time of the alleged dissolution of the partnership."

Exhibit 3, which was referred to, was a note written by Mr. Stone to Mr. Spencer which was as follows:

"I assigned and delivered Housel note and contract to Mrs. Spencer. I want to dissolve our partnership, so please figure up just how we stand—that same may become effective at once—giving me credit for what I have earned and charge me with everything properly chargeable against my account so that I can convey whatever interest there may be in my name and be released from any further obligations."

Was such evidence competent for the purpose for which it was introduced; if not, was it prejudicial, and would it require the reversal of the case? The trial court, no doubt, went on the theory that the written statement of Mr. Stone, to wit, "giving me credit for what I have earned and charge me with everything properly chargeable against my account," was ambiguous when construed in connection with the partnership agreement, in that Stone did not demand one-half of the earnings of the partnership, but wanted credit only for what he had earned, and the evidence was introduced upon this theory. It was contended by defendant that the written statement supported the theory of the defendant that it had been orally agreed between Stone and Mrs. Spencer that if Stone did not bring any substantial business in the firm, he was only to receive what he earned. This evidence would be inadmissible, under plaintiff's theory of the case, but the question presented, Was it admissible under defendant's theory?

In order to determine whether said evidence was admissible upon the theory of defendant in error, it will be necessary to review the history of the case from the defendant in error's standpoint. The contract of partnership in the first instance was a written contract. The substance of the same was that W. S. Spencer sold to Stone a one-half interest of all insurance, real estate, rentals business for a consideration of \$1,800, and the same was paid by Stone executing a note for \$1,800, due on demand, drawing 8 per cent. interest, and it was agreed it should be paid by applying the proceeds of Stone's one-half interest in the business on the payment of the note. This was done. It was further provided in said contract of partnership that all business and accounts of G. B. Stone Realty Company should be brought into the business to be a part of the earnings of W. S. Spencer & Co. The defendant in error contends that Stone did not devote his time and attention to the business, and the business that he brought into the firm only amounted to approximately \$60 or \$70 per month, and was not sufficient to pay one-half of the running expenses of the business. Mrs. Spencer contended that at the time of entering into the partnership contract it was agreed orally between herself and Stone, if Stone did not bring any substantial business into the company, that he would withdraw thereafter at any time, and take out simply what he had put in. Mrs. Spencer testified that in November, 1915, she talked again with Stone about him withdrawing from the firm for the reason he had brought no substantial business into the firm, and Mr. Stone promised he would withdraw as he had agreed to, but suggested he had some substantial business he expected to

be able to bring into the firm shortly, and stated if he did not, he would withdraw, but did not, and the business continued along in this manner until March, 1916.

In March, 1916, Mr. Stone and Mr. Spencer each sold a one-third interest in the partnership to Mr. Housel for \$1,500, and Mr. Housel executed two notes of \$750 each, one to Stone and one to Spencer, and they executed a written contract or agreement of partnership with Mr. Housel whereby each was supposed to own a one-third interest in the business. It appears that Mrs. Spencer, who was looking after the business for Mr. Spencer, did not know of this contract until about the 1st of May, 1916. Under the written agreement with Housel it was agreed that Housel, Spencer, and Stone might each draw \$125 a month as the earnings from the partnership, but no more. About the 1st of May, 1916, the checks were issued for this amount to each of the parties. Mrs. Spencer, when advised of this fact, took the matter up with Mr. Stone, and stated that the partnership with Mr. Housel was not satisfactory, and that she would not consent to Mr. Housel staying in as a member of the firm, and that he (Mr. Stone) was not bringing any business into the firm, and that she desired that he withdraw also as he had agreed to, and that he had nothing in the partnership to sell. Mrs. Spencer testified Stone promised he would withdraw, and at that time delivered to her the note signed by Mr. Housel and the contract between Mr. Housel and Mr. Spencer, and he wrote on the bottom of the contract the following statement:

"I hereby transfer all right to the above interest without consideration to W. S. Spencer."

It appears upon this date, or practically the same date, Mr. Stone dictated numerous letters, or at least several letters, to different insurance companies, which letters were as follows:

"This is to advise you that G. B. Stone is retiring from the firm of W. S. Spencer & Co., effective May 1st, 1916. W. S. Spencer retains all accounts and assumes all liabilities."

On said date a notice of dissolution was dictated by Mr. Stone. It was as follows:

"The partnership existing under the name of W. S. Spencer & Co. composed of W. S. Spencer and G. B. Stone, is this day dissolved by mutual consent. W. S. Spencer retaining all accounts and assuming all liabilities from May 1, 1916."

[3] It was the contention of Spencer that on the same date Mr. Stone wrote the memorandum or note to Mr. Spencer, which is heretofore referred to as Exhibit 3. The record further disclosed that when on the witness stand Mr. Stone used the expression which was frequently used throughout the trial by Mrs. Spencer. Mr. Stone, when de-

tailing a conversation with Mr. Spencer, used the expression; "I would not expect to take out any more than I put in," and then explained what he meant by the same. In view of the fact that Mrs. Spencer testified that in November, 1915, she had talked to Mr. Stone about him retiring from the firm, and that Stone reiterated the statement that he was willing to get out if he did not bring any substantial business into the firm, and that he did not expect to take out anything that he had not brought into the firm, we are unable to see how the evidence complained of could be prejudicial. If the court believed her testimony regarding the conversation had in November, 1915, it would be immaterial whether they had such a contract or agreement prior to entering into the contract.

[2] We do not believe this evidence comes within the rule that it attempted to vary or change the terms of the written contract, but comes within the rule laid down by this court in the case of *Holmes v. Evans*, 29 Okl. 373, 118 Pac. 144, wherein the court stated:

"When the writing does not purport to disclose the complete contract, or if, when read in the light of attendant facts and circumstances, it is apparent that it contains only a part of the agreement entered into by the parties, parol evidence is admissible to show what the rest of the agreement was; but such parol evidence must not be inconsistent with or repugnant to the intention of the parties as shown by the written instrument."

The written contract does not pretend to make any provision for the dissolution of the partnership, and when you read the contract in the light of the circumstances, which provide that Mr. Stone would bring certain business into the firm, and he was buying certain interest in the firm, it would not be inconsistent with nor would it be repugnant to the intention of the parties as disclosed by the written agreement for them to agree, if the business Stone intended to bring into the partnership had no material value, that they would consent to a dissolution of the partnership, and on what terms they would dissolve. While such an agreement might not be enforceable, nor binding upon the parties unexecuted, but if executed as contended by the defendant in error, it would become a binding contract. Nor could it be said that said agreement would change the terms of the contract, as the contract upon that question was silent. We do not believe the contention of plaintiff in error upon this point is well taken.

[4, 5] The next question presented is, Was the finding of the court that the parties had dissolved and settled their accounts clearly against the weight of the evidence? This must be determined by considering the following facts: The written agreement be-

tween Spencer, Stone, and Housel had the effect of superseding the partnership agreement between Spencer and Stone, and had the effect of dissolving the partnership entered into between Stone and Spencer, and created a new partnership, and that Mr. Stone assigned his interest in the new partnership to W. S. Spencer; the letters dictated by Mr. Stone to the insurance companies; the notice of dissolution dictated by Mr. Stone; the testimony of Mr. Spencer that he had furnished Mr. Stone a settlement of the accounts, and Mr. Stone at the time did not object to the same, and the testimony of Mr. Stone that he thought they had agreed upon the contract of dissolution; the fact that Stone moved his desk from the office about said time. While there is no direct evidence that the parties mutually agreed upon the settlement and balanced their books, but the many circumstances set out above we think are sufficient to support the finding of the court that such a settlement had been made. We are not unmindful of the fact that Mr. Stone has denied all the statements which the Spencers have testified he made, and has explained the reason for writing the numerous letters and the fact that he did not authorize them sent out, although he dictated them, but in view of all these circumstances we are unable to say that the judgment of the court is clearly against the weight of the evidence upon this point when considering all the facts and circumstances in this case.

For the reasons stated, the judgment will be affirmed.

RAINEY, C. J., and HARRISON, KANE, PITCHFORD, JOHNSON, and RAMSEY, JJ., concur.

(17 Okl. Cr. 580)

### TUCKER v. STATE. (No. 3269.)

(Criminal Court of Appeals of Oklahoma. Jan. 6, 1920. On Rehearing, Aug. 19, 1920.)

#### (Syllabus by the Court.)

#### 1. Gaming $\Leftrightarrow$ 97(1) — Exclusion of evidence not constituting defense proper.

In a trial for conducting a roulette wheel for money, it is not reversible error to exclude offered evidence of rules governing the operation of such gambling games and that the witnesses offered were at times in the place where said wheel was being conducted, and that they had not seen anything tending to show that the defendant was in any wise connected with the operation of said game or interested therein, as such offered evidence did not tend to show any defense to the crime with which the defendant was charged.

#### 2. Gaming $\Leftrightarrow$ 79(1)—Persons liable to conviction whether acting for compensation or not.

Any person, whether he be owner, employé, or bystander acting as a matter of accommodation, who conducts a roulette wheel played at for money, or assists in conducting the same, is subject to information and conviction for so doing, whether he acts for compensation or not. (Following *Johnson v. State*, 10 Okl. Cr. 597, 140 Pac. 622.)

#### 3. Criminal law $\Leftrightarrow$ 1186(4)—Rulings on immaterial instructions not reversible error.

Instructions given and instructions refused do not constitute reversible error, unless upon examination of the entire record it appears that the giving or the refusal to give such instruction has probably resulted in a miscarriage of justice or constitutes a violation of a constitutional or statutory right of a defendant.

#### 4. Criminal law $\Leftrightarrow$ 798(1/2)—Instruction as to necessity of agreement of jury properly refused.

It is not reversible error for a trial court to refuse to instruct a jury that they are not required to surrender their honest convictions for the mere purpose of agreeing upon a verdict.

#### (Additional Syllabus by Editorial Staff.)

#### 5. Criminal law $\Leftrightarrow$ 814(8, 9)—Refusal of instructions not based on evidence proper.

In a trial for conducting a roulette wheel for money, an instruction requested by defendants presenting a theory not based upon any evidence was properly denied.

Appeal from District Court, Jefferson County; Cham Jones, Judge.

Bert Tucker was convicted of conducting a roulette wheel for money, and appeals. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The plaintiff in error, Bert Tucker, hereinafter called defendant, was informed against for conducting a roulette wheel, found guilty, and his punishment fixed at imprisonment in the state penitentiary at Granite, Okl., for the term of 18 months, and to pay a fine of \$500. To reverse the judgment rendered, he prosecutes this appeal.

The undenied evidence is that at the time and place alleged in the information, in a tent in Jefferson county, a roulette wheel was conducted for money, and that the defendant was present where and when said gambling game was being conducted.

Clyde Coy testified: That he knew the defendant and saw him in a tent running a roulette wheel for money. That witness gambled at said wheel. An identified check

signed Lahoma Roller Mills, by Clyde Coy, for \$206.70, which was given for losses sustained by witness in playing said wheel, was admitted in evidence. That on the 14th day of November, 1917, he had a little money and got a check cashed for \$20, went to where said wheel was being operated, and lost it; then went to the defendant and told him he wanted some more chips to play the wheel. That he had been to him before, and defendant told one Johnson, the man behind the wheel, to let him have what he wanted, and when the witness got ready to quit the man Johnson figured out what he owed, and witness gave the defendant his personal check for the amount he owed the house or the game, something near \$200. That he next saw the defendant on November 22, 1917. That on November 17, 1917, he came to where the wheel was being operated and brought the said check which had been put in evidence, but defendant was not there, and he took the check back with him. That he had an arrangement with the defendant to keep his personal checks to be taken up in another way, and on said 22d day of November delivered the check in evidence to the defendant, took up his personal check, and defendant gave him the difference, some \$10 or \$20. That when he quit he was loser about \$200. That on the 14th day of November, 1917, the defendant was running the game part of the time, spinning the ball and turning the wheel on the other side of the table from him. That on November 14th, he was where the said wheel was being operated for some four or five hours, and that the defendant during that time was running the wheel about one-third of the time. The defendant might not have stood there an hour, and that the game did not quit when defendant quit operating it. That the table was some five or six feet long, with a curved place sawed out where the operator stands, and on the table was a check rack where the money and checks were kept. That the wheel is in the center of the table, and the table was so fixed that the players could stand at the ends and on the outside of the table. That he did not remember seeing the defendant behind the table handling the money, paying the people who won and taking the chips of those who lost. That he did not know that the rules of the game permitted a player to spin the ball. That he did not know that the player had such privilege. That he had never seen a man who was playing the game spin the ball. That the time defendant was rolling the ball he was not playing the game, and that he never saw any body spin the ball or roll the roulette wheel except the defendant and the said Johnson.

Thereupon the defendant demurred to the evidence, which the court overruled, and the defendant excepted.

The defendant offered to prove by several witnesses: That it is customary in the game of roulette for any player to spin the ball, or for any player to call upon a bystander to spin the ball one or a number of times, and that the dealer must permit the party playing, or the party requested by the player, to spin the ball, "for the purpose of showing the mere fact that the defendant may have on a few occasions spun the ball from among the players or as a player, or at the request of the player, would not be engaging in or conducting a game of roulette." That the place was known as Bob & Dick's place, and that the witnesses offered had never, though they had been where said game was played when the defendant was present, seen the defendant conduct said game, or be connected or interested in it.

The court excluded the said offered evidence, and defendant excepted.

The foregoing being all the evidence in the case, defendant requested the court to instruct the jury to return a verdict of not guilty, which was refused and exception reserved.

[1] The defendant insists that the court committed reversible error in refusing to permit him to introduce the said offered evidence. We are unable to see how the excluded evidence, if admitted, would in any way tend to exculpate the defendant, or in the least contradict the evidence of the state. It was certainly immaterial what the rules of the said game were. If the defendant was only a bystander or spun the ball, or did both as a mere volunteer, he was guilty as charged.

Certainly, it was entirely immaterial by what name the gambling tent was known. That the offered witness had been present with the defendant at said gambling place, and had never seen him conduct or be in any way connected or interested in running said gambling game, was not the slightest evidence that the defendant had not conducted said game.

It is next contended that the evidence is insufficient to sustain the conviction had, and hence the court erred in overruling the demurrer to the evidence, and in refusing to direct the jury to acquit the defendant. We are of the opinion that the evidence is sufficient to support the verdict of the jury, and that the court did not err in refusing to instruct the jury to acquit the defendant.

[2] In *Johnson v. State*, 10 Okl. Cr. 597, 140 Pac. 622, it is held:

"Any person, whether he be owner, employé, or a bystander, acting as a matter of accommodation, who conducts any such prohibited game or assists in conducting the same, is subject to indictment and conviction for so doing, whether he acts for compensation or not."

[3] The defendant further complains that the court committed reversible error in re-

fusing to give requested instructions numbered, respectively, 1 and 2. While it is correctly stated by counsel for the defendant that the defendant had the right to have his theory of the defense presented to the jury, this right is predicated upon the fact that there is legal evidence to support such theory. The vice of the requested instruction No. 1 is that the theory therein sought to be presented to the jury is not based upon any evidence, and hence was properly refused. *Duncan v. State*, 11 Okl. Cr. 217, 144 Pac. 629.

[3] Again, the defendant complains that the court committed reversible error in refusing to give requested instruction numbered 2, which instruction reads:

"As jurors you are instructed that you are not requested to surrender your honest convictions for the purpose of agreeing upon a verdict."

[4] This requested instruction is not only abstract, but is fully covered by the instruction given the jury that, before they would be justified in finding the defendant guilty, they must find beyond a reasonable doubt from the evidence that he is guilty as charged, and avoids the necessity for giving the refused instruction. And, besides, the refused instruction assumes, without proper basis therefor, that jurors will violate their solemn oath—"to well and truly try and true deliverance make and a true verdict render according to the evidence."

Again, if no reason appears from the record to indicate injury from the failure of the court to give this instruction, a reversal should not follow its refusal.

We have not overlooked *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829, cited in defendant's brief, but cannot assent to the law as announced in said case.

The court did not err in refusing to give requested instruction No. 2.

The motion for a new trial was properly overruled.

The judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

#### On Rehearing.

PER CURIAM. The defendant, Bert Tucker, since the rendition of the opinion filed January 6, 1920, affirming the judgment of the district court of Jefferson county imposing a fine of \$500 and imprisonment for 18 months in the penitentiary in this case, has filed a motion for rehearing.

Upon consideration of the same, and after a due and careful reconsideration of the evidence against the defendant, it is the opinion of the court that the ends of justice will be best subserved by a modification of the original judgment to provide a fine of \$500 and

imprisonment in the state penitentiary for one year, instead of 18 months, and the judgment is modified to that extent, and, as so modified, is affirmed.

Mandate forthwith.

(33 Idaho, 224)

#### STATE v. DWYER. (No. 3489.)

(Supreme Court of Idaho. July 14, 1920.)

##### 1. Burglary $\Leftrightarrow$ 3—Intent to steal a specific article unnecessary.

One who enters a building with intent to steal anything to be found therein, which he may desire to appropriate, is guilty of burglary, although he has no specific article of personal property in mind when he makes the entry.

##### 2. Burglary $\Leftrightarrow$ 45—Whether entry was with burglarious intent held for jury.

Where the evidence shows the defendant entered a building, committed a theft, and immediately went out, the question as to whether the entry was made with burglarious intent is one for the jury.

Appeal from District Court, Benewah County; R. N. Dunn, Judge.

William Dwyer was convicted of burglary in the second degree, and he appeals. Affirmed.

R. E. McFarland, Jr., of St. Maries, and McFarland & McFarland, of Coeur d'Alene, for appellant.

Roy L. Black, Atty. Gen., and James L. Boone, Asst. Atty. Gen., for the State.

MORGAN, C. J. The record discloses that appellant entered the district court room in the Benewah county courthouse and there stole a sum of money. He insists there is no evidence that the entry was made with burglarious intent and that this indispensable element of the crime with which he was charged and of which he was convicted is lacking.

[1] There is no evidence tending to show appellant knew, when he entered the building, the money he took was there. For that matter, the evidence will not justify the conclusion he knew there was any specific article of personal property therein which he desired to appropriate. Such knowledge on his part was not necessary to make his act burglary. C. S. § 8400, provides:

"Every person who enters any \* \* \* building, \* \* \* with intent to commit grand or petit larceny or any felony, is guilty of burglary."

[2] If appellant entered the building in question with intent to steal anything to be found therein which he might desire to appropriate, his act was "burglary." He enter-

ed the room, stole the money, and immediately went out, and the question as to what intent prompted him to enter was one for the jury. By its verdict it found that intent to be to commit larceny, and the finding is justified by the established facts. 9 C. J. p. 1078, § 138; State v. Johnson, 33 Minn. 84, 21 N. W. 843; State v. Ward, 116 Minn. 516, 134 N. W. 115; State v. Cash, 38 Kan. 50, 16 Pac. 144; Love v. State, 82 Tex. Cr. R. 411, 199 S. W. 623; People v. Curley, 99 Mich. 238, 58 N. W. 68.

The judgment appealed from is affirmed.

RICE and BUDGE, JJ., concur.

(33 Idaho, 198)

**BERGH et al. v. PENNINGTON et al.**  
(No. 3346.)

(Supreme Court of Idaho. July 1, 1920.)

1. Appeal and error  $\S$  430(1)—Failure to serve notice of appeal on party not affected, not ground for dismissal.

Failure to serve notice of appeal upon a party whose interest will not be adversely affected by a modification of the judgment is not ground for dismissal of the appeal.

2. Appeal and error  $\S$  655(1)—Settlement of transcript refused where appellants did not show that failure to lodge transcript with court below in time was without their fault.

Where appellants do not show that the failure of the reporter to lodge his transcript with the clerk of the court below within the time granted by the trial judge is without fault on their part, the trial judge should refuse to settle the same; and, even though settled by the trial judge, the transcript will, upon motion, be stricken from the record on appeal.

Appeal from District Court, Owyhee County; Ed. L. Bryan, Judge.

Suit by G. A. Bergh and another against O. E. Pennington and others, to quiet title. Decree for defendants, and plaintiffs appeal. On motion to strike transcript from record and to dismiss appeal. Motion to strike granted, motion to dismiss denied.

S. T. Schreiber and P. E. Cavaney, both of Boise, for appellants.

Ira E. Barber, Wm. Howard Davison, Hawley & Hawley, and O. W. Worthwine, all of Boise, for respondents.

RICE, J. In this action the respondents moved to dismiss the appeal and to strike the reporter's transcript from the files.

An action was instituted by G. A. Bergh to quiet title to certain mining claims, situated in Owyhee county, against respondents Pennington, Barber, and Burke. After that action was commenced the Murphy Lumber

Company instituted an action to foreclose a trust deed, in the nature of a mortgage, given by the Bergh Mining & Milling Company to respondent Barber as trustee. At the time the actions were instituted the charter of the Bergh Mining & Milling Company had been forfeited under the statute, and G. A. Bergh, Jennie Bergh, Charlotte Bergh, Frank A. Bayley, and W. W. Phillips were made parties defendant as trustees of the Bergh Mining & Milling Company.

Complaints in intervention and cross-complaints were filed by the other beneficiaries under the trust deed joining in the application for the foreclosure of the trust deed and praying for a distribution of the proceeds to be derived from the sale of the property therein described. G. A. Bergh, Jennie Bergh, and Charlotte Bergh, as such trustees, failed to answer the complaint of the Murphy Lumber Company, and the various cross-complaints and complaints in intervention within the time prescribed by law and the order of the court, and their default for failure to answer was entered. Thereafter, upon stipulation in open court, an order was entered consolidating the two causes for all purposes as one cause, including appeal.

The decree entered in the consolidated action recited that all parties appeared by their respective counsel, save and except the defendants G. A. Bergh, Jennie Bergh, Charlotte Bergh, Frank A. Bayley, and W. W. Phillips, as trustees of Bergh Mining & Milling Company, a corporation, and that the defaults of such defendants as such trustees had been duly entered before trial.

The decree of the court was to the effect that G. A. Bergh and Jennie Bergh, plaintiffs in the original action, take nothing by their action, and that they have no interest in the property which is the subject of the suit; that the Bergh Mining & Milling Company is the owner and holder of the title to said property, subject only to the trust in favor of the creditors secured by the trust deed, and, after ordering the sale of the property under the trust deed and the payment of the creditors secured thereby, ordered "that, after disbursing such funds as aforesaid, the said Ira E. Barber, as such trustee, shall pay or cause to be paid any residue of said purchase price into his hands coming to the said trustees of the said Bergh Mining & Milling Company, to the use and benefit of the stockholders of said company." G. A. Bergh and Jennie Bergh have appealed from the whole of the said judgment.

[1] The only one of the trustees for the Bergh Mining & Milling Company served with notice of appeal was Phillips. It is contended that the other trustees of the defunct corporation are adverse parties to the appeal, and, not having been served with notice thereof, the appeal must be dismissed.



We are unable to find in the pleadings, which are voluminous, that the appellants have set up any claim adverse to the Bergh Mining & Milling Company. Should the judgment be reversed or modified upon this appeal, we are unable to see how the interest of the Bergh Mining & Milling Company would be affected prejudicially. The corporation has not been called upon to defend against any claim of appellants, and a reversal or modification of the decree appealed from could not affect in any manner its interest in the property involved in the action.

In the case of *Holt v. Empey*, 32 Idaho, 106, 178 Pac. 703, it is said:

"That 'adverse party' means any party who would be prejudicially affected by a modification or reversal of the judgment or order appealed from."

The motion to dismiss will be denied.

[2] The motion to strike the reporter's transcript of the testimony is based upon the ground, among others, that no order of the trial court was secured extending the time for the preparation of said transcript beyond August 1, 1918, and that said reporter's transcript was not lodged until November 22, 1918. Appellants do not appear to have made any showing to the trial court as a reason why it should have settled the transcript, notwithstanding the fact that it was not lodged within the time granted. Seasonable and proper objection having been made to the trial court to the settlement of the transcript upon the grounds stated, it should have refused to settle the same. *Robinson v. St. Maries Lumb. Co.*, 32 Idaho, 651, 186 Pac. 923.

Both appellants and respondents have filed affidavits in this court in support of, and in opposition to, the motion to strike the transcript. The showing should have been made to the court below in opposition to and support of the objections to the settlement of the transcript. However, it appears that the failure of the stenographer to prepare and lodge the transcript within the time granted by the order of the trial court was due to the failure of appellants to pay the estimated fees to the reporter for the preparation thereof. One of the attorneys for appellants was notified of this fact by the court reporter, and also that the reporter would make no further effort to secure an extension of time. The other attorney for appellants states in his affidavit that he was laboring

under the impression at all times that said reporter would give said appellants ample time to procure said fees before he would complete and lodge said transcript. These affidavits are wholly insufficient to show that the failure to procure an extension of time for the reporter to prepare and lodge his transcript, and the failure of the reporter to lodge the transcript within the time granted, was without fault on the part of appellants. The statute requires the reporter to lodge his transcript of the testimony within the time granted by the trial court. The courts have no authority to disregard this statute, or to consider a transcript lodged in violation of its terms, if failure to lodge it in time is due to the fault of appellant, unless the requirements of the statute are waived by respondent.

The order of the trial judge in settling, or refusing to settle, the transcript may be a special order made after final judgment and appealable under C. S. § 7152. We are satisfied, however, that the remedy by appeal, if such remedy there be, is not exclusive. The court has power to deal with defects apparent upon the face of the record, and may take such action as is proper upon motion of one of the parties, or, in proper cases, upon its own motion.

Counsel for respondents have also moved this court to set aside and cancel a certain order made by one of the justices thereof upon the 6th day of December, 1918, wherein the time was extended for filing the record until July 1, 1919, upon the ground (1) that said order was not secured until after the expiration of six months after the appeal was perfected; and (2) that the appellants had not used diligence in causing the record upon appeal to be lodged in this court, for the reason that they had not paid the reporter and clerk of the trial court the fees due them. The reporter's transcript was not settled until January 6, 1919, and the record was filed in this court within 60 days thereafter. The order extending the time was unnecessary. Respondents have not moved to strike the entire record because not filed within six months after the perfection of the appeal without a sufficient showing of due diligence.

The motion to strike the reporter's transcript from the files will be granted; and it is so ordered.

MORGAN, C. J., and BUDGE, J., concur.

(33 Idaho, 146)

**MUIR et al. v. ALLISON et al.** (No. 3343.)

(Supreme Court of Idaho. June 22, 1920.)

**1. Waters and water courses**  $\S$  152(12)—Findings supported by substantial evidence not disturbed.

The appellate court will not disturb the findings of the lower court upon questions of allotment and date of priority of water rights, where there is substantial evidence in the record to support them.

**2. Waters and water courses**  $\S$  152(12)—Allotment to water company, instead of to users, not disturbed, without complaint by users.

Where error is assigned on account of the allotment of water rights to a water company, instead of to the individual users of water under the system of such company, the finding and decree of the lower court will not be disturbed in that particular, in the absence of complaint on the part of such users, or showing that appellant's rights are in any way prejudiced by such allotment.

**3. Waters and water courses**  $\S$  143—Extent of user's permanent right cannot be limited by character of crops.

In the adjudication of water rights, the extent of a user's permanent right cannot be limited by the character of the crops raised, unless it is shown that under existing conditions the soil is adapted to only one crop, or to limited kinds of crops.

**4. Waters and water courses**  $\S$  152(8)—Evidence not supporting a finding as to amount of water in dry period.

The lower court found that, on account of the use of a larger amount of water during the high-water part of the irrigating season, the soil absorbs and retains sufficient water, so that a smaller amount during the succeeding low-water period will afford an adequate supply, and accordingly raised the duty of water from five-eighths of an inch during the high-water period to three-eighths of an inch during the remainder of the season. *Held*, that the evidence does not support this finding to the extent of showing it to be applicable to all the lands for which water rights are being adjudicated in this case.

**5. Waters and water courses**  $\S$  152(8)—Right to use of water should not be determined on a theory not actually applying to conditions involved.

Rights to the use of the waters of the state should not be determined upon a given theory, that may or may not prevail in a particular case, unless it clearly appears from the evidence that such theory actually does apply to the conditions under investigation.

**6. Courts**  $\S$  93(1)—Rule of stare decisis held applicable to irrigation rights.

A practice having grown up among irrigation communities to the effect that, when a user of water had secured the right to divert a certain quantity of water, he was thereafter

entitled to a continuous flow of that amount of water during the irrigating season, and such practice having been sanctioned and confirmed by the Legislature and courts of the territory and state throughout a long period, and up to the time when adjudication of the rights involved in this case was sought, the rule of stare decisis must be held to apply, and the practice of rotation in the use of water cannot be imposed by the decree of adjudication upon those entitled to the use of such water, without their consent.

**7. Waters and water courses**  $\S$  152(8)—Evidence held to sustain finding establishing duty of water.

*Held*, that there is sufficient evidence in the record to support the findings of the lower court establishing the duty of water at five-eighths of an inch per acre, continuous flow.

**8. Waters and water courses**  $\S$  152(10)—Irrigation district held entitled to change place of use of sufficient water to reclaim balance of irrigable lands.

It having been shown that the appellant irrigation district has already diverted and applied to a beneficial use a quantity of water sufficient to reclaim the balance of its irrigable lands, in addition to irrigating the lands already reclaimed under the duty of five-eighths of an inch per acre fixed by the court, the district should be permitted to change the place of use of water in sufficient quantity to reclaim the balance of its irrigable lands, provided the change is made within a reasonable time, to be fixed by the court.

Appeal from District Court, Washington County; Ed. L. Bryan, Judge.

Action by John T. Muir and others against William Allison and others and the Weiser Irrigation District. From a judgment quieting title to the use of water of the Weiser river, the Weiser Irrigation District appeals. Reversed, and cause remanded.

Lot L. Feltham and James W. Galloway, both of Weiser, for appellant.

Hugh E. McElroy, of Boise, Frank Harris, of Weiser, Hawley & Hawley, of Boise, and Frank D. Ryan, of Weiser, for respondents.

J. M. Thompson, of Caldwell, amicus curiae.

COWEN, District Judge. The judgment of the district court was entered on the 9th day of May, 1918, fixing the priorities from which the various rights should date, and decreeing the amounts to which the various users of water from the Weiser river were entitled. From this judgment the appellant, Weiser Irrigation District, has appealed, assigning some 13 specifications of error.

The first specification of error refers to the ruling of the lower court upon the demurrer of the appellant to plaintiff's complaint. The ruling was probably correct; but, as the appellant has waived the question involved in

its reply brief, no further attention will be paid to it.

The second specification of error refers to the allowance of 100 inches of water to appellant under date of priority of 1888; appellant claiming that it should have been allowed 500 inches as of that date. As bearing upon this question we are cited in the briefs to the deposition of one E. M. Barton, and also to certain parts of the evidence. The evidence referred to appears to support the findings and judgment of the court, and the deposition of Barton we are unable to find. It is not in the transcript at the pages cited, and we are unable to find it among the exhibits or files in the case, nor is it referred to in any of the indexes of the clerk or reporter. The court is therefore under the necessity of refusing to consider this specification, further than to say that it is satisfied, upon consideration of the whole case, that no substantial injury is suffered by appellant from the finding complained of, for the reason that the allowances to it of subsequent dates of priority are sufficiently early in point of time and are large enough in amount to insure to it the 500 inches whenever it may require the use of that amount of water.

The third specification of error refers to the refusal of the court to give the appellant its full water right of a date not later than August 29, 1883. The action of the district court was correct in this particular. The statutes in force at that time required the prospective user of water, after posting his notice of location of water right, to commence the construction of his diversion works within 60 days from the posting and recording of his notice, and to prosecute the work to completion without interruption, unless hindered by the elements. The evidence does not disclose uninterrupted prosecution of the work in the construction of appellant's canal.

[1,2] The fifth, sixth, seventh, tenth, eleventh, and twelfth specifications of error refer to the allotments and date of priority made by the court to the Middle Valley Irrigating Ditch Company, a corporation; but we do not think that the judgment should be reversed on account of any of these matters. The Middle Valley Irrigating Ditch Company claims the inception of its rights from a location notice made in 1879. The court below did not allow its contention in this respect, but did allow its right from a second location notice, posted in 1883 by one J. H. Reavis. While the evidence is not harmonious upon the question as to whether this company prosecuted the construction of its canal system without interruption, to completion, yet there is evidence in the record to support the finding and decree, and, under the well-known rule that the appellate court will not disturb the finding of

the trial court, when there is evidence in the record to support it, the decree should not be disturbed in this particular. It is also argued that the trial court erred in permitting oral testimony to the effect that the said J. H. Reavis posted the location notice of 1883 for himself and as trustee for a large number of other persons, who were jointly interested with him in the construction of the canal; but this was not error.

The specifications of error Nos. 5, 10, 11, and 12, referring to the rights awarded to the Middle Valley Irrigating Ditch Company, are immaterial, and it is not necessary for this court to pass directly upon the question involved, because, if the decree should be reversed on account of them, the result would be to require the lower court merely to divide the amounts of water awarded to the Middle Valley Irrigating Ditch Company, and award such rights to the individual users under that system. This would merely devolve an unnecessary amount of work upon the trial court, without any prospect of changing the relative rights of any of the users from the river. If the users under the Middle Valley system are content with their articles of incorporation and the chain of title now resting in the corporation, and appellant's rights are not injuriously affected, we see no reason why this court should require the district court to segregate the various rights of the users under this system, and to divide this appropriation up among the individuals interested in the common award.

In specifications of error Nos. 8 and 13 the appellant questions the award in the decree to the Muir Bros. to Geo. F. Smith et al., and to the Sunnyside Ditch Company, claiming the evidence does not warrant any allowance of a right to any of the parties of a date of priority antedating any of the dates given to the appellant, and claiming also that a decree of the district court in Washington county had restrained these parties from interfering in any way with appellant's prior right to 3,400 inches of water.

The evidence sustains the awards to Muir Bros. and to Geo. F. Smith et al. In reference to the Sunnyside Ditch Company it is only necessary to call attention to the fact that the appellant has awarded to it some 4,000 inches of water of date long prior to any award made to the Sunnyside Ditch Company, so it is apparent that this decree in no way violates the injunction decree theretofore rendered in the Washington county district court.

The fourth and ninth specifications of error have been reserved in this discussion until the last, as they have afforded, in our opinion, the gravest questions involved in this appeal. They relate to the duty of water, and, if the decree is permitted to stand

in this respect, will affect the entire system of water law in this state, and produce such a violent and radical change that their mere consideration must cause grave apprehension and necessitate the utmost care in their determination.

It may be said the findings and decree are somewhat confusing, and we are not sure that we have comprehended their entire purpose and intent; but, if we have done so, it appears that the judgment contemplates a resort to what has been called the rotation system in the distribution of the waters of the Weiser river under the theory of economy in its use and the elimination of unnecessary waste, "a consummation devoutly to be wished." The judgment of the lower court, if unappealed, would affect only the users of the water from the Weiser river; but now, if this court gives its sanction to the rule, it becomes the authorized rule for the entire state.

The portions of the findings and decree involved in this question are as follows:

#### Findings.

(8) That the duty of water, the amounts required for the proper and successful irrigation of lands, which is hereafter allotted, is the equivalent of five-eighths of a miner's inch to the acre, continuous flow, said water to be measured at the various headgates or diversion points, with an additional allowance for seepage and evaporation only where necessary, as hereinafter stated, on account of the length and character of particular canals and water distribution systems; provided, however, that the said duty of water may be increased to the equivalent of three-eighths of a miner's inch per acre, continuous flow, measured as aforesaid, during the low-water period.

(9) That during the irrigation season of each year, to wit, during the last days of July, or the early part of August, the said Weiser river and all of its tributaries and branches fall to a minimum of less than five-eighths of an inch per acre for all of the lands irrigated therefrom, and particularly described in the complaint and various answers and cross-complaints therein; that by the continuous use of five-eighths of an inch per acre during the high-water period, a higher or increased duty of water may be obtained during the said low-water period of each year, and that during said low-water period three-eighths of an inch per acre, delivered at the various diversion points, is sufficient water to irrigate said lands, both upon the main Weiser river and those lands irrigated from the various tributaries thereof, except where an additional allowance is hereinafter made during said low-water period for loss by seepage and evaporation in carrying said water through the main distributing canal of the Weiser irrigation district; and I therefore find, with the exception above stated, that three-eighths of an inch of water, measured at the various diversion points, is sufficient water for the irrigation of said lands during the low-water period; Provided, however, that the raising of said duty of water from five-eighths of an inch to three-eighths of an inch, as here-

inafore stated, shall be changed by the commissioner or engineer, or other officer whose duty it shall be to execute this decree, only in proportion to the fall of said Weiser river and its tributary streams, until such time as the said Weiser river or its tributary streams shall only convey sufficient water to supply the allotments hereinafter made.

(10) That the canal of the Weiser irrigation district is approximately 17 miles in length, and that the amount of loss by seepage and evaporation occasioned by conveying water through said canal to the various distributing laterals is at least 25 per cent. of the amount diverted at the diversion works from the river; that there is approximately 7,200 acres of land, including town lots, in said Weiser irrigation district now under cultivation, and for the use of which water is hereinafter allotted to the said lands, and required for use thereon, and five-eighths of an inch per acre, measured at the heads or diversion points from the main canal of the various distributing laterals, is necessary for the irrigation of said lands during the high-water period, and three-eighths of an inch to the acre, measured at the heads of the distributing laterals, is necessary for the irrigation of said lands during the low-water period, and on account of the length of the said canal the said Weiser irrigation district will at all times during the low-water period require a minimum allowance for loss by seepage and evaporation of at least 1,000 inches at the diversion point and 1,500 inches during the high-water period.

(13) That the water hereinafter allotted is allotted for beneficial use only, and when not actually and necessarily used by the various parties to whom the same is allotted, the said waters shall not be diverted from the natural stream; but this finding shall not be construed to prevent a rotation system among users from any individual ditch, or rotation among different ditches from the same stream. And I further find that a higher duty may be obtained by a system of rotation, both as between ditches and when practiced by the individual user under any one given ditch or canal.

(24) That the term "high-water period," wherever used in these findings and the decrees hereunder, refer to all that period of time when the Weiser river discharges sufficient water to supply all the users thereunder with the allotments made under the findings and decree herein on the basis of five-eighths of an inch to the acre, and such additional amount as may be allotted and decreed to cover loss by seepage and evaporation, and the term "low-water period," as used in these findings and decrees hereunder, applies to that period when the said Weiser river discharges a less amount of water.

(25) I further find that by a system of rotation the duty of water may be increased during the low-water period to the extent that the equivalent to three-eighths of an inch to the acre, continuous flow, will meet all necessary demands for irrigation on the said Weiser river and each and all of its tributaries involved in this action; that a system of rotation, by which water is used in larger heads and at less frequent intervals, avoids loss both by seepage and evaporation. And I further find that irrigation of all or any of the lands

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involved in this action by rotation will save in seepage and evaporation and insure thorough irrigation, and that a continuous flow in small heads results in unnecessary waste of the water thus used. I further find that the crops usually grown by the landowners under the various ditches to which allotments have been made are diversified, and consist of the various grains, vegetables, fruit, hay, and pasture; that the grains are usually matured before the commencement of the low-water period. I further find that during the low-water period there is less loss from evaporation, on account of shorter days and cooler nights, than during the previous high-water period, and that in the years of ordinary flow of the waters of the said Weiser river and its tributaries there is sufficient water flowing therein during the low-water period to meet the necessary demands for all parties to whom allotments have been made under this decree during the low-water period, whenever the same is diverted, conveyed to its place of use and applied to the land without waste.

#### Decree.

It is further ordered, adjudged, and decreed that the foregoing allotments are made upon the basis of five-eighths of an inch per acre or its equivalent in irrigation heads during the high-water period, with the gradual increase of duty to three-eighths of an inch per acre or its equivalent in irrigating heads during the low-water period, which said amounts are hereby declared and decreed to be the duty of water during the high and low-water periods for the said Weiser river and its tributaries, and that said three-eighths of an inch per acre or its equivalent in irrigating heads is the maximum duty of water for said river and its tributaries, and whenever the commissioner or other officer charged with the execution of this decree finds the water in said Weiser river insufficient to supply the allotments as hereinbefore made on the basis of five-eighths of an inch per acre or its equivalent in irrigating heads, then and in that event the duty of water shall be gradually raised to three-eighths of an inch per acre or its equivalent in irrigating heads, and whenever the water in said stream or any of its tributaries shall prove insufficient to furnish each allotment aforesaid with the full amount of three-eighths of an inch per acre as aforesaid, measured at the various diversion points, then and in that event the last appropriator in point of time shall be denied the use of said water, except, however, there has been allotted and is hereby decreed to the Weiser irrigation district an additional quantity of water amounting to 1,500 inches and not less than 1,000 inches during the low-water period for loss by seepage and evaporation between the diversion works of its canal and the head of the distributing laterals of its canal system.

It is further ordered, adjudged, and decreed that each of the parties hereto, to whom water is allotted by this decree, be and they hereby are required to provide for the diversion of water from the said Weiser river and its tributaries in irrigation heads during the low-water period, which said irrigation heads shall be the equivalent of three-eighths of an inch to the acre, continuous flow; and it is hereby decreed

and declared to be the duty of the water commissioner or other officer charged with the execution of this decree to make or cause to be made necessary rules and regulations for the distribution of said water in irrigation heads during the low-water period, and to shut off said water from all ditches diverting the same whenever and wherever the parties thus diverting the water are not applying the same to a beneficial use, or are permitting the same unnecessarily to waste, and to that end the said commissioner or other officer aforesaid shall rotate the water in the ditches diverting from the small streams tributary to said river, whenever in his opinion the duty and efficiency of the water used may be materially increased thereby.

"As used in this decree, the high-water period shall include all that portion of the irrigating season when the river and its tributaries discharge sufficient water to supply all the allotments herein decreed on the basis of five-eighths of an inch to the acre, and the low-water period shall consist of all that portion of the irrigating season when the discharge of the river and its tributaries is insufficient to supply the last-named amount of water."

By finding 8 the duty of water is fixed at five-eighths of an inch per acre, with the proviso that this duty may be increased to three-eighths of an inch during the low-water period. By paragraph 9 it is found that the continuous use of five-eighths of an inch per acre during the high-water period will raise the duty from five-eighths to three-eighths during the low-water period, and the court finds that three-eighths is the duty during the low-water period, provided the change is made only as the river falls, and the water is insufficient, as we suppose, to supply the full five-eighths per acre.

The court further finds, in No. 25, that the duty of water may be increased to three-eighths of an inch per acre by a system of rotation; that a portion of the crops in the district are matured before the low-water season, and there is less loss from evaporation during the low-water season by reason of shorter days and cooler nights.

The decree then allots the use of the water upon the basis of five-eighths of an inch during the high-water period and three-eighths during the low, directs the water commissioner to rotate the water from the small tributary streams only, and fixes the division line between high and low water periods as being the time when the water of the river is insufficient to supply all the users therefrom with the full five-eighths per acre.

[3, 4] There are four reasons given in the findings upon which the reduction in the allowance of water from five-eighths to three-eighths is based, to wit: The use of five-eighths of an inch to the acre during the high-water period adds so much water to the soil that thereafter three-eighths of an inch is sufficient to keep the supply up; the use of the rotation system; maturing the grain crop before the low-water period; and the shorter

days and cooler nights during the low-water period. It is impossible to say just how much weight attached to each one of these conditions in the mind of the court in reaching this determination, but the last two may probably be dismissed as negligible, because in the case of the maturing of the grain crops it is only necessary to say that the users of water may change the character of crops grown at will from those that require much water to those that require little, and vice versa, and the extent of a user's permanent right may not be limited by the character of crops raised unless the soil is adapted only to one, or to limited kinds of crops.

In reference to the shorter days and cooler nights resulting in less evaporation, we take it this condition is practically a negligible factor in the court's estimate of this water duty. It would be impractical, if not impossible, to tell what the amount of such evaporation is, and other conditions may, and probably do, completely offset it. The hotter days and clearer weather that usually prevail, and the less precipitation that usually occurs, during the months of July and August, in our climate, and the increased absorption of water from growing crops, should probably be considered in this connection. The effect of a condition of shorter days and cooler nights is too trivial, or at least too uncertain, in the face of other pre-existing conditions, to have any weight in the determination of a case of this kind.

Another reason for lowering the amount of water as between the two periods is that by the use of a larger amount during the first period the soil absorbs and retains a sufficient quantity, so that a smaller amount thereafter will keep up an adequate supply. This conclusion appears to have been reached by the trial court from the testimony of those who were giving their testimony as a matter of fact as applied to a portion of the lands under investigation, and as theory to others, and with no evidence that the theory was true as applied to all of the lands. It is a well-known fact to those familiar with conditions prevailing in this state that this theory is true of some lands and that it is not true as to others, dependent entirely upon the character of the soil, its depth, the kind of subsoil, the drainage, and perhaps other conditions.

Rights to the use of the waters of the state should not be determined upon a given theory that may or may not prevail in a particular case, unless it clearly appears from the evidence that it does and should apply to the conditions under investigation. The court is here dealing with property interests so vast, and with conditions so various, as to require actual demonstration of a condition of this kind before basing any portion of its decree upon it. Our attention has not been directed to any evidence in this record that will justify this finding, so far as the lands under

appellant's system are concerned. Whether conditions may arise in other cases which might justify the court in allotting an appropriator of water a certain amount for one portion of the irrigation season and a different amount for another part, or whether the law would permit such a decree, is not passed upon in this opinion, but is left open for future determination if occasion arises. The court merely determines that the evidence in this case does not justify such a changing of the allotment.

The remaining basis for this variable duty of water is the rotation system of distribution, and it would appear that this is the principal reason the amount of water was scaled down from five-eighths of an inch to the acre in high-water season to three-eighths in low. The court here has been presented with somewhat elaborate briefs and the citation of very respectable authority in favor of the adoption of this system as the prevailing rule in the state. Learned and eminent counsel have argued with force and much logic to the effect that the title to waters of our natural streams is in the state; that the use of this water is granted to its citizens and others upon conditions; that amongst the conditions are these: That the water must be put to some beneficial use; that they may take only so much as they can use economically, to the end that the water supply—totally inadequate to the needs of the people of the state—may be made to perform the largest possible public service; that the user of water shall not waste that which everybody needs, and, in a certain sense, is a part owner of; and that he shall not take that which cannot benefit him, when it might benefit his neighbor.

[5] They say, also, that experience has demonstrated, and the court finds as a fact in this case, that by rotating the water, especially when it has been decreed in small amounts, it may be made to subserve the wants of more people and irrigate a larger acreage of land. Therefore they reason that it is the duty of the court, in the interest of economy in the use of water, to declare the rule in this state compelling the use of water by rotation.

There is no use in denying the force of this reasoning, and were it a statement of all of the facts, rules, and logic that we apprehend are applicable to the case, there would be no other conclusion to be reached in the matter; but we are not convinced that the time has yet arrived for the adoption of this rule in Idaho. There are other rules of law and other conditions to be considered, and a statement of some of them will be attempted.

[6] The Constitution has delegated to the Legislature control of the waters of the state, with the power to regulate by law its distribution. Prior to the Constitution, and probably since, in the absence of express legislative regulation, the courts have been under

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the necessity of declaring laws or regulations relating to water and its use as founded in the practice, custom, or implied understanding of the people using the water. These, of course, have been accepted by the people as the law, and they have proceeded to acquire property based upon these laws, and secured, as they supposed, by a reliance upon them. Among these rules was the one that, when the user of water had procured to himself the right to divert a certain quantity, he was thereafter entitled to a continuous flow of that amount, and practically every decree quieting title to water that has been written in this state for 50 years, or more, has been based upon this rule of continuous flow. It has been the law since the creation of the territory, and property interests of tremendous value, and affecting thousands of individuals, have had their inception and development under it. Numerous statutes have also been passed by the Legislature affecting the water law of the state, in the light of this rule of distribution and without any manifest intention or purpose to change it.

May the courts thus change this long and well established rule of property right, and set up in its place a new and different rule? We think not, for there are lacking all those elements justifying a declaration of law which existed at the time of the adoption of the original rule. This conclusion is more easily arrived at when we consider the effects of such a sweeping change. By far the larger portion of the water rights existing in the state have passed to decree based upon the rule of continuous flow. These decreed rights would at once become unsettled and disturbed, and new and expensive litigation encouraged.

We think the case to be one particularly suited to the application of the rule of stare decisis, and it is held that it does apply. But it may be added, in passing, that it is far from the purpose or intention of the court to close the door against the adoption of the rotation system in the state. Undoubtedly the courts would enforce contracts between parties involving the use of the rotation system, as has already been done by this court in the case of *State v. Twin Falls, etc., Co.*, 21 Idaho, 410, 121 Pac. 1039, L. R. A. 1916F, 236, and perhaps when property rights have grown up, or common practice and usage have made it a settled and fixed practice in a particular community, it might be the duty of the courts to enforce it. Experience seems to indicate that the use of the rotation system not only tends to conserve the already inadequate water supply, but also to contrib-

ute to larger and better crops, and to the retention of soil fertility.

[7, 8] But when and in what cases the rules for the distribution of water should be changed must be left entirely to future investigation and determination, and this opinion should not be understood as laying down rules for any prospective modification of the law. The lower court, through the reports of the referee, found the duty of water to be five-eighths of an inch per acre, continuous flow, and under the decisions its conclusions upon this question are binding upon this court, if there is evidence in the record to support it, even though the evidence be not harmonious. The evidence supports the finding, and we should not change it, and the rule that he who is prior in time is prior in right must be adhered to.

The judgment of the district court must be reversed, so far as the duty of water is in question; but it is not the purpose of the court to order a new trial, if in the opinion of the trial court a new judgment may be formulated in harmony with this opinion upon the evidence now before it.

But there is one other question that should be adverted to as involved in specifications 4 and 9: Appellant complains of the allotment of water made to it. It is found by the court that there are 8,000 acres of land under the Welser Irrigation canal capable of irrigation, and that 7,200 acres are in cultivation. The evidence shows without dispute that water under this system has been furnished at the rate of 1 inch per acre, and that its canal would carry at least 8,000 inches of water. It has thus diverted and been placing to a beneficial use a quantity of water sufficient to reclaim the balance of its irrigable land, in addition to irrigating that already reclaimed under the duty of five-eighths of an inch per acre as found by the court; and the district should be permitted to change the place of use of water heretofore used by it in sufficient quantity to reclaim the balance of its irrigable lands, provided the change is made within a reasonable time to be fixed by the court.

The judgment is reversed, and the cause remanded to the district court for further proceedings in harmony with this opinion. Each party hereto shall bear its own costs on appeal, except that the cost of the transcript shall be chargeable to the several litigants in proportion to the quantity of water finally decreed to each, to be ascertained and assessed by the trial court.

MORGAN, C. J., and BUDGE, J., concur.

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**ERICKSON et al. v. EDWARD RUTLEDGE  
TIMBER CO. (No. 3394.)**

(Supreme Court of Idaho. June 30, 1920.)

1. Evidence  $\S$  126(4)—Declarations of injured employé, made two hours after accident, held not res gestæ.

In an action to recover damages for the death of one employed in a lumber mill, statements made by the deceased to his daughter at the hospital, some two hours after the accident occurred, and in response to a question as to the cause of the accident, under circumstances which show that his statement was not so spontaneous as to be elicited by the occasion of the accident, are not properly part of the res gestæ.

2. Evidence  $\S$  125, 126(2)—Test of admissibility of declarations as res gestæ stated; declaration of employé injured held inadmissible.

The controlling test is not whether the statement made is probably true, but whether it was made at a time when the declarant was in such a calm, reflective, and deliberate state of mind as to enable him to fabricate a statement, if he chose, thereby constituting the statement a narrative of a past transaction. Where the circumstances, as in this case, show that the statement was made while the declarant was in such a state of mind, it is immaterial whether what he said is true or false. In either event it is hearsay, and is not admissible as a part of the res gestæ, and the error in admitting it is regarded as prejudicial.

3. New trial  $\S$  35—Admission of hearsay evidence warrants new trial.

Held, that the lower court committed no error in granting a motion for a new trial upon the ground that certain evidence, which had been admitted as part of the res gestæ, was not properly so admitted, but was hearsay.

Appeal from District Court, Kootenai County; John M. Flynn, Judge.

Action by Hattie Erickson and another against the Edward Rutledge Timber Company to recover for wrongful death. Judgment for plaintiffs, new trial granted, and they appeal. Affirmed.

Lynn W. Culp, of Cœur d'Alene, for appellants.

Ralph S. Nelson, of Cœur d'Alene, for respondent.

BUDGE, J. This is an appeal from an order granting a motion for a new trial. The motion was granted upon the theory that certain evidence, which had been admitted as a part of the res gestæ, was not properly so admitted, and was not a part of the res gestæ, but was hearsay.

Under the view we have taken, the correctness of this ruling is the only question we need to determine. The action is to recover damages for the death of the father of ap-

pellant Hattie Erickson and husband of appellant Gunhild Knuteson, alleged to have been caused by the negligence of respondent. The injury to deceased occurred between 7 and 8 o'clock on the morning of the 29th of August, 1916, in the mill yards of respondent, while on a conveyor carrying cars of lumber from the mill to certain stations in the yard. The statements of deceased in question were made to the daughter at the hospital during a conversation between her and deceased, some time between 9:30 and 11 o'clock the same morning. The testimony upon which the trial court's ruling is based is as follows:

"Q. Now, when you first got to your father's side, and he was on the operating table you are speaking of, was he conscious? A. Yes.

"Q. Did he say anything to you?

"Mr. Nelson: We object to this as incompetent, irrelevant, and immaterial, not within the issues and pleadings in this case.

"The Court: I will overrule the objection.

"A. Yes; he said quite a few things to me.

"Mr. Culp: Q. What was the first thing he said to you? Don't give any long detailed description of what he said, but any remarks about what caused the accident, or as to his condition.

"Mr. Nelson: Now, if your honor please, we object to that as incompetent, irrelevant, and immaterial, not within the issues in this case, not binding upon this defendant, hearsay.

"The Court: I will overrule the objection.

"A. Well, the first thing he said when I came in—I put my arms around him, and he says, 'It's going to kill me, Girlie, but take it easy.'

"The Court: That is not material.

"Mr. Culp: No; that is not material; that part of it is not material.

"Q. Go on; state what he said about the injury, if you can, please.

"Mr. Nelson: I object to it as incompetent, irrelevant, and immaterial, hearsay, not binding upon this defendant, not within the issues.

"Mr. Culp: Q. Did he make any statement to you about how the injury happened?

"The Court: I will overrule the objection.

"A. I lifted up the sheet and looked at his leg, to see what condition it was in, and I went back to him, and I asked him how it happened; but I will have to say in Norwegian, if you want me to say exactly the words.

"Mr. Culp: Q. State what he said, state it in English, the same words; that is, the same things that he said in Norwegian, state in English, if you can. A. Yes; but I was speaking in Norwegian to him.

"Q. That don't matter; just state what it was in English.

"Mr. Nelson: We make the same objection.

"The Court: Same ruling.

"A. I asked him how in the world it happened, and he said he was fixing the block underneath the wheel of the car, and lost his balance, and his foot slipped in by the wheel of the trailer.

"Mr. Culp: Q. By the wheel of the trailer? A. Yes.

"Mr. Nelson: We move to strike out the answer as hearsay, not within the issues of this



case, not binding on the defendant, incompetent, irrelevant, and immaterial.

"The Court: I will deny the motion."

There is probably no principle in law which has occasioned more judicial perplexity than the rule which admits in evidence, as an exception to the hearsay rule, statements, declarations, or exclamations on the theory that they constitute a part of the *res gestæ*. See, generally, *Walters v. Spokane International Ry. Co.*, 58 Wash. 298, 108 Pac. 593, 42 L. R. A. (N. S.) 917; *Bernard v. Grand Rapids Paper Box Co.*, 170 Mich. 238, 186 N. W. 374, 42 L. R. A. (N. S.) 980, and exhaustive note to the two cases. The underlying principles are well understood, and as to them the authorities are generally harmonious. But the application of these underlying principles to the given facts of a particular case has occasioned great difficulty, and is left pretty largely to the sound discretion of the trial court. *Coffin v. Bradbury*, 3 Idaho (Hask.) 770, 35 Pac. 715, 95 Am. St. Rep. 37; 3 Wigmore on Evidence, § 1750, p. 2257; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661; *Bernard v. Grand Rapids Paper Box Co.*, *supra*. This does not imply that the view of the trial court is necessarily final, but merely that in reviewing a ruling of the trial court as to whether or not certain evidence is part of the *res gestæ* the appellate court will examine the facts and circumstances in the light of the underlying principles, and will hesitate to reverse the ruling of the trial court, except where it is reasonably apparent that there has been either a misconception of the principles involved or a clear abuse of such discretion. In the *McDaniel Case*, *supra*, the court said:

"Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling, unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be."

These general principles have been broadly stated as follows:

"Time is not necessarily a controlling element or principle in the matter of *res gestæ*. The general rule is that a declaration sought to be proved must have been contemporaneous with the event established as the principal act; but, in order to constitute declarations a part of the *res gestæ*, it is not necessary that they shall have been precisely coincident in point of time with the principal fact. If they sprang out of the principal fact, tend to explain it, were voluntary and spontaneous, and made at a time so near it as to preclude the idea of deliberate design, they may be regarded as contemporaneous, and are admissible in evidence. Declarations made immediately preceding a particular litigated act, which tend to illustrate and give character to the act in question, are admissible, as part of the *res gestæ*. A declaration, however, which is merely a narrative of a

past occurrence, though made ever so soon after the occurrence, is not part of the *res gestæ*, and cannot be received in evidence. While the statements may be separated from the act by a lapse of time more or less appreciable, yet they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Declarations which are the result of an afterthought on the part of the declarant, made concerning a past event, are only hearsay, and not competent evidence to prove the facts of such event. When there are connecting circumstances, statements may, even when made some time afterward, form a part of the whole *res gestæ*, or if a subsequent declaration and the main fact at issue, taken together, form a continuous transaction, the declaration is admissible; but a mere subsequent declaration is not, of itself, a sufficient connecting circumstance to make it admissible. No fixed time or distance from the main occurrence can be established as a rule to determine what shall be part of the *res gestæ*. Each case must necessarily depend on its own circumstances." 10 R. C. L. 978, § 161.

The circumstances most important to consider in any case are those which tend to show the state of mind of the declarant at the time his statements were made. As already noted, time, although not controlling, is an important element entering into a determination of the fact. Other elements equally important are: (a) Space; that is, whether the statement was made in the immediate presence of the main fact or transaction in question, or made after the declarant was removed from the immediate scene of the main fact, and presumably to some extent or in some measure, at least, from its attendant influence. (b) Whether or not the statement was elicited in response to a question, although neither of the foregoing elements are controlling. (c) Any fact or circumstance immediately related, including the nature of the statement itself, tending to show the apparent state of mind existing in the declarant at the time of making the statement. In order to constitute such a statement a part of the *res gestæ*, it must, in the light of all the foregoing circumstances, appear to be so spontaneous as to leave no suspicion that the declarant was in a deliberate or reflective state of mind.

Examining the evidence above quoted in the light of what has been said, we are of the opinion that, although the statement in question was made at a place some distance removed from the place of the injury and its attendant influence, and at a time probably more than two hours thereafter, these elements could not be regarded as controlling, when we stop to consider the severity of the injury sustained by the deceased and the fact that up to that time practically nothing had been done either to dress the wound or relieve his suffering, and the further fact that he died later the same day, within a few

hours thereafter. *Dallas Hotel Co. v. Fox* (Tex. Civ. App.) 196 S. W. 647.

[1] However, the lack of coincidence as to time and space is important to consider (*Insurance Co. v. Sheppard*, 85 Ga. 751, 12 S. E. 18; *White v. City of Marquette*, 140 Mich. 310, 103 N. W. 698; *National Masonic Acc. Ass'n v. Shryock*, 73 Fed. 774, 20 C. C. A. 3; *Spiegel's House Furnishing Co. v. Industrial Commission*, 288 Ill. 422, 123 N. E. 606; *Sullivan v. Oregon R. & N. Co.*, 12 Or. 392, 7 Pac. 508, 53 Am. Rep. 364), in connection with the fact that the statement clearly was made during a conversation which, so far as the record discloses, may have extended over a period of an hour and a half. It was made in reply to a question put to him by his daughter, and after he had made a statement to her which, to our mind, clearly indicates that, notwithstanding the shock which he had received and the pain which he must still have been suffering, he had sufficiently regained his poise that he was thinking, not so much of his own misfortune and its probable consequences to himself, as he was of the effect which a realization of the extent of his injury was going to have upon his daughter. His statement, "It is going to kill me, Girlie, but take it easy," leads logically to this conclusion. After he had thus sought to bolster up her apparently failing courage she asked him "how in the world it happened." Whereupon he proceeded to relate to her his recollection of the occurrence. These circumstances show that his statement was not so spontaneous as to be superinduced by the occasion. While it may well be that there is nothing in this evidence to indicate that the statement partakes of the nature of deliberate design, as that phrase is used by the courts, that is not essential.

[2, 3] The controlling test is, not whether the statement made is probably true, but whether it was made at a time when the declarant was in such a calm, reflective, and deliberate state of mind as to enable him to fabricate a statement, if he chose, thereby constituting the statement a narrative of a past transaction. Where the circumstances, as in this case, show that the statement was made while the declarant was in such a state of mind, it is immaterial whether what he said is true or false. In either event it is hearsay and is not admissible as a part of the res gestæ, and the error in admitting it is regarded as prejudicial. As was said by the Court of Appeals of New York:

"Whatever we may consider to have been the sufficiency of the other evidence, we could, and should, not assume that a declaration, made under such circumstances, may not have had its effect upon the jurors' minds." *Greener v. General Electric Co.*, 209 N. Y. 135, 137, 102 N. E. 527, 528 (46 L. R. A. [N. S.] 975); *National Masonic Acc. Ass'n v. Shryock*, 73 Fed. 774, 20 C. C. A. 3.

The order appealed from is affirmed. Costs are awarded to respondent.

RICE, J., concurs.

MORGAN, C. J. (concurring). While I am not in accord with all that has been said in the foregoing opinion with reference to the admissibility of statements, otherwise inadmissible, on the ground that they are part of the res gestæ, the testimony of the witness Hattie Erickson, wherein is recited declarations made to her by her father as to the cause of the injury which resulted in his death, is clearly hearsay, and I concur in the conclusion reached.

(56 Utah, 351)

# STATE v. MARTINEZ. (No. 3445.)

(Supreme Court of Utah. June 19, 1920.)

## 1. Homicide $\S$ 254—Evidence held insufficient to sustain conviction for second degree murder.

In a prosecution for murder committed while deceased was attempting to arrest defendant's son-in-law, where defense was that son-in-law, and not the defendant, fired the shot that killed deceased, evidence held insufficient to sustain conviction of murder in the second degree.

## 2. Criminal law $\S$ 723(2)—Prosecuting attorney's argument as to defendant committing grave crime held not improper.

In homicide prosecution, prosecuting attorney's argument to jury that defendant has "committed one of the gravest crimes ever committed in the state" held not improper; counsel having the right to state his conclusions from the evidence, though conclusions are wrong.

## 3. Criminal law $\S$ 1119(4)—Exception complaining of remarks to jury not reviewable without record showing remarks made.

Exception complaining of remarks of counsel in argument to jury will not be considered where the record as to such assignment does not show what remarks were made.

## 4. Criminal law $\S$ 317—Failure to testify does not create presumption of guilt.

Under Comp. Laws 1917,  $\S$  9279, accused is not presumed to admit his guilt because of failure to testify.

## 5. Criminal law $\S$ 719(1)—Prosecuting attorney's statement that defendant admitted firing shot held reversible error.

In prosecution of Mexican for murder of American, where the evidence was very close and very complicated, prosecuting attorney's statement in argument to jury that defendant admitted that he fired the shot that killed the

deceased, and his reiteration thereof on objection by defendant's counsel, where in fact defendant had not admitted firing shot, held reversible error.

Appeal from District Court, Sanpete County; Geo. Christensen, Judge.

Ignacio Martinez was convicted of murder in the second degree, and he appeals. Reversed and remanded, with directions.

King, Braffet & R. G. Schulder, of Salt Lake City, for appellant.

Dan. B. Shields, Atty. Gen., and O. G. Dalby, Asst. Atty. Gen., for the State.

THURMAN, J. The defendant, Ignacio Martinez, hereafter called defendant, was convicted of the crime of murder in the second degree in the district court of Sanpete county, and sentenced to a term of 15 years in the state prison. From the judgment so entered defendant appeals. The errors assigned, as far as material, will be considered in the course of this opinion. The victim of the homicide was one Rudolph Melenthin, a forest ranger stationed at a point about ten miles east of the town of Lasal, in San Juan county. The alleged crime was committed in the county last named, and by stipulation the case was transferred to Sanpete county for trial. Previous to the trial of defendant one Ramon Archuletta had pleaded guilty to the same offense and was sentenced to imprisonment for life.

The principal question presented for our consideration and upon which defendant relies with apparent confidence for a reversal of the judgment is the sufficiency of the evidence to sustain the conviction. The testimony is voluminous. About 20 witnesses were examined and cross-examined at great length. It is necessary for this court to carefully examine all the evidence in order to arrive at a satisfactory conclusion.

The defendant and Archuletta are both Mexicans, the latter being the son-in-law of the former. It is conceded, however, that they never met or became acquainted with each other until about July 15, 1918. The homicide occurred on August 23 of the same year. As to whether or not the defendant was aware of the relationship of Archuletta at the time of the homicide the evidence is in conflict. It depends more or less upon circumstances. The defendant himself was not sworn as a witness. Archuletta testified that the defendant did not know of their relationship to each other until after they were arrested and brought to Salt Lake City. From circumstances, however, it might be inferred that the defendant was informed of the relationship between him and Archuletta when they first met about July 15, 1918.

Defendant was engaged in caring for sheep for a company in San Juan county, and was working under a man by the name of Robinson who had general charge of the sheep. Defendant appeared to be next to Robinson in point of authority concerning the sheep. The testimony shows that the defendant was a married man and had a family in New Mexico from whom he had been separated for about eight years. Correspondence, however, had been kept up between him and his family. He knew that one of his daughters had married during his absence and that her husband had joined the United States army but he had no personal acquaintance with him. This was the situation in the month of February, 1918.

One of the state's witnesses, a Mexican woman by the name of Rachel Alire, who resided at Lasal, was acquainted with the defendant, who also resided at the same place. Defendant frequently took his meals at her house, and there is a veiled suggestion, at least, in the brief of the Attorney General that the intimacy between the defendant and Mrs. Alire was more than ordinary and perhaps transcended the bounds of propriety. On the other hand, the defendant's counsel contend that Mrs. Alire was not a friend of defendant, as indicated by the circumstances and by a contest instituted by her after defendant was sent to prison concerning a piece of land in which defendant claimed to have an interest. The charges and countercharges made by counsel for the respective parties concerning this relationship is of no special significance, as we view the case. It is sufficient to say that the defendant and Mrs. Alire appeared to be on neighborly terms at the time of the incident we are about to relate, and had been so for some time previous. She had written letters for him at his dictation and request and had read to him letters received from others. Mrs. Alire testified that in February, 1918, the defendant received a letter postmarked Ignacio, Colo., and requested her to read it. The letter was not produced at the trial, but the substance of its contents, according to her recollection, is as follows:

"My Much Beloved father: You possibly know that I am fleeing or escaping. I am a deserter from the army. I am in this place—at this place of Ignacio. I would like to know if I could stay with you there, if you will give me work—to me and my companion. I would like to know if you would help me with some money, that I might go where you are and stay there if possible. You will direct my mail in the name of Ignacio Alguin. I am your son-in-law, Ramon Archuletta. I am married to your daughter. Don't forget to direct my mail Ignacio Alguin at Ignacio, Colorado." Signed by Ignacio Alguin.

To this letter the defendant dictated the following reply, which was addressed and mailed as directed in the letter above quoted:

"To Ramon, my Beloved Son: I am sorry that you are as you are. I am ready to help you if you will not bring something against me. I can help you that you might come here, but it would be better for you if you would go back again to the army, or if you will come here I will see how I can relieve you or hide you. I will send you money to help you and tell me who is your companion. I have work for you."

Nothing further is heard from any one connected with the case for a period of about five months. On or about July 15 the person now known as Archuleta called at the home of Mrs. Alire in Lasal. She was outside of her house. Archuleta inquired if she knew of the whereabouts of the defendant, calling him by name, Ignacio Martinez. She informed him that defendant was in the house, and she thereupon called defendant out. The undisputed evidence shows that was the first time Archuleta and the defendant had ever met. According to the testimony of Mrs. Alire they spoke in low tones so that she did not hear what was said. From there the two men went to defendant's home, about 200 yards distant. Later they returned to the home of Mrs. Alire who served them supper. In conversation with Archuleta at that time he informed Mrs. Alire that his name was Pantaleon Lagunas, and that he was from old Mexico. Archuleta went to work for defendant clearing a piece of land, and until the date of the homicide was known among his associates as Pantaleon Lagunas. To avoid confusion, we shall, however, refer to him as Archuleta, which undoubtedly was his true name.

At this point it is convenient to submit some facts respecting Archuleta which are not in dispute. He was a resident of New Mexico. He gave his age as 23 or 24 at the time of the trial. On or about September, 1917, he joined the United States army, and later was stationed at Kansas City, Mo. From this point he deserted from the army and returned to New Mexico, where he was captured. This was in the late fall of 1917. He shortly afterwards escaped and went to the Navajo reservation, where he worked herding sheep. According to his own testimony, which is not in dispute, he was on the reservation at one place or another until May, 1918. From there he went to Pagosa Springs, Colo. This he states was about the 1st of June. He worked there several days, and then came to Utah, arriving at Lasal, as before stated, about July 15.

As we have seen, Archuleta was employed by the defendant clearing land near Lasal. He continued in this employment until about August 11, when he was employed by defendant to herd sheep. This was done at the sug-

gestion of Mr. Robinson, who authorized the defendant to employ a herder. In payment or part payment for work done for defendant he gave Archuleta a revolver, afterwards referred to in the case. On the first day Archuleta started to herd sheep he and defendant met Frank Barnes, sheriff of San Juan county, and Rudolph E. Melenthin, for the alleged killing of whom defendant was afterwards convicted. Defendant and Archuleta were traveling in a wagon. Barnes and Melenthin were on horseback. Barnes informed the defendant that he had a telegram from the adjutant general of New Mexico authorizing the arrest of Ramon Archuleta as a deserter from the United States army. Defendant acted as interpreter between Barnes and Archuleta. Barnes testified that the defendant told him the boy was from Old Mexico, was not Ramon Archuleta, but Pantaleon Lagunas; that Melenthin and defendant engaged in some conversation which he could not hear, after which Melenthin said: "I guess everything is all right. This can't be the man." Barnes took from Archuleta the revolver heretofore mentioned, saying that aliens had no right to carry arms. After advising defendant as to the consequences of aiding a deserter and informing him that Archuleta would have to register, and learning that Archuleta was going to work for Robinson at the sheep camp, Barnes and Melenthin rode away. Before leaving, however, they asked defendant what he had in his wagon. Among other things, the defendant had a gun. He told them they could take that if they wanted to. Melenthin promised Barnes to look out for the case and if anything developed to call him by telephone. They then separated. This is the last we see or hear of Melenthin until August 22, the day before the homicide.

Before considering the event of the 22d, there are a few circumstances which should be detailed which it is contended have a material bearing upon the state's theory of the case. Mrs. Alire testified that she saw defendant at her home after the Barnes and Melenthin affair to which we have referred, and that he seemed very angry because some one was betraying this man (meaning Archuleta). She also testified that defendant said some dog of a Mexican was betraying him. Asked as to defendant's conduct on that occasion, witness said she "couldn't say anything as to his conduct at that time." Later on he told her that he liked the man and was "going to protect him in every possible way." She also testified that at that time she gave him at his request fifteen 30-30 cartridges for his gun; that defendant kept the gun in his hand all the time when he was there; that before that he always left his gun.

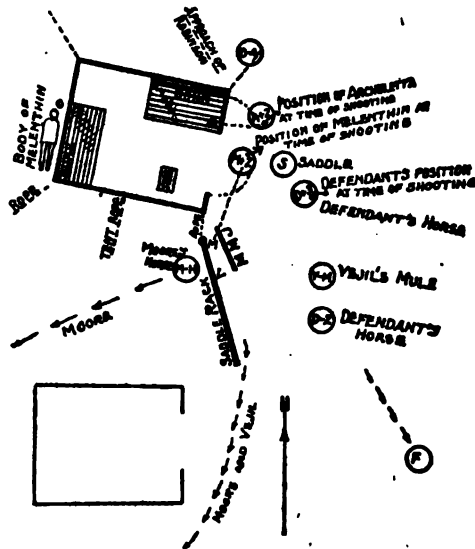
Another circumstance relied on by the state relates to an exchange of guns between the

defendant and a Mr. Franklin who was in the neighborhood on a short vacation, and who had some acquaintance with defendant. Defendant came to the Franklin camp, and the two men shook hands. Franklin said: "We want some meat. Robinson says we can have some meat." Defendant said: "All right I go. I have no gun. My gun no good." He had a gun with him which worked loosely and did not eject the cartridges. Defendant said: "I take your gun. I want some cartridges. I have no cartridges." This was on the 14th of August. Franklin took defendant's gun and stood it in the cabin and handed defendant his own gun, which was loaded with eight cartridges. It was a 30-80 Winchester. Defendant killed a mutton for Franklin, and a few days later killed another, using one cartridge on each occasion.

The foregoing incidents illustrating the demeanor, conduct, and feelings of the defendant prior to the tragedy which occurred on the 23d day of August are the main ones relied on by the state, together with the circumstances connected with the tragedy itself, in support of its contention that the defendant was the actual slayer of Melenthin.

On the 22d day of August, the day before the homicide, Melenthin called sheriff Barnes by telephone and informed him he had received further information concerning the deserter and guessed that they had made a mistake in releasing Archuleta. Barnes authorized Melenthin to arrest Archuleta and obtain such assistance as might be necessary. On the next morning Melenthin and a forest guard named James Moore proceeded to the camp of one Lopez, at which place they took lunch about 11 or 11:40 a. m. At this place they procured a Mexican by the name of Vejil, who was acquainted with Archuleta. They took Vejil along to make the identification, and arrived at defendant's camp after 1 o'clock p. m. On approaching the camp they saw defendant, Archuleta, and a Mexican named Francisco Mesta, some distance from the camp. Defendant and Francisco had horses saddled and guns on their saddles. Archuleta was on foot. Seeing the approach of Melenthin and party, they came to the camp, Archuleta first. Archuleta immediately entered the north tent and seated himself upon a bunk in the northeast corner of the tent. There was another bunk in the southwest corner upon which Melenthin, Vejil, and defendant took their seats. Francisco went into the south tent. These two tents were placed substantially east and west, about 20 feet apart. A saddle rack consisting of a pole fastened at each end to a post extended from a point about 3 feet south of the southeast corner of the north tent in a southeasterly direction to a point nearly in front of the northeast corner of the south tent. A plat or diagram of the premises reproduced by the Attorney General from an exhibit used at the

trial is here inserted. As far as we are able to determine, it is a substantial reproduction of the original. It illustrates the situation of the premises and the various objects referred to in the evidence as testified to by the witness Moore.



The diagram, as far as practicable, is self-explanatory. Additional explanation, if necessary, will be made as we proceed.

James Moore, who accompanied Melenthin to the scene of the tragedy, was the only witness called by the state who testified as to what transpired at the camp at and prior to the actual conflict which resulted in the death of Melenthin.

As before stated, Archuletta was the first to enter the north tent. Melenthin, Vejil, and the defendant followed. Melenthin said, "I have come to take that man." Defendant acted as interpreter. Archuletta said, "All right." The parties became seated on the bunks as before stated. Moore remained on the outside. Shortly thereafter Melenthin and Vejil came out of the tent. Melenthin took an affidavit from his pocket, handed it and a fountain pen to Vejil, and told him to sign the paper, which he did. Melenthin said, "This is the man we are after." There was some conversation between Melenthin and defendant about a horse and saddle. Melenthin asked defendant if he could take a horse. Defendant said he could take his grey horse, but that he needed his saddle himself. Defendant then went to the south tent and spoke to Francisco, who got on his horse and rode north. He was gone about one hour and a quarter. He came back with a saddle and laid it down in front of the north tent. Defendant had told Melenthin he thought he could get a saddle up at some cabin. Francisco went and came back with a saddle. While Francisco was away defendant made

some inquiry of Melenthin about a spring for his gun. Melenthin told him it was over at the station. Defendant said, "I wish I had it in my gun now." Melenthin told the defendant to bring his gun over and he would fix it. Defendant took a paper out of a box he was sitting on and handed it to Melenthin, who tossed it to one side. Defendant said, "This war is all damned lies." The witness Moore at this point described the position of the parties and identified the exhibit from which the above diagram was copied. The square in the northeast corner of the tent represents where Archuleta sat. The flaps of the tent were thrown back, and the tent was open. It fronted towards the east. The drawing in the southeast corner of the tent represents another bunk. The little square near the front represents a stove. The semi-circular dotted line in front of the north tent represents a yard. The letter A on the bunk in the northeast corner of the tent represents where Archuleta sat while Francisco went for the saddle. He had his gun on the bunk behind him. Witness asked Archuleta if he had a gun. He took it up, jolted it down twice, and said nothing. He then laid it behind him. During this time Melenthin was seated at point M near the southeast corner of the north tent outside. Witness sat at point J near Melenthin. Defendant sat at point D nearly east of Melenthin. Vejil stood up at point V, leaning against the saddle rack. The saddle rack was strung with pack saddles. During the greater part of the time Melenthin sat watching Archuleta. Witness said to Melenthin, "Let's do something." Melenthin said, "Don't get excited." When asked the reason for saying that, witness said he saw Archuleta was mad; that he was biting his finger nails off. Defendant's demeanor was calm. He never said anything. The point marked S in front of the tent indicates where Francisco dropped the saddle on his return. After taking the saddle off Francisco went south out of sight. The point marked F indicates where defendant's horse was tied to a tree. After Francisco went south defendant got up and started to unsaddle his horse. He first pulled his Winchester out of the scabbard and laid it on the ground north of the horse. Point D-2 represents where the defendant laid his gun after taking it from the scabbard. Defendant then took the saddle off the horse, shook the blankets, put the saddle on again, and cinched it tight. Melenthin said, "Ain't you going to let me take that horse?" Defendant said, "I will let no G—d d—n white man take my horse." Melenthin then told witness to get on his horse. The position of his horse is shown by point M—H, south of the saddle rack. Defendant then came around and picked up his gun with both hands. Archuleta then walked rapidly out of the tent to the point marked A-2, just in front of the tent, with his gun

in his hand. His course is marked by a dotted straight line. When Archuleta started off the bunk Melenthin jumped up at point M and motioned his hand and told him three times to lay down his gun. Archuleta made no response. Melenthin had his gun, a 38 six-shooter, "drawn right on Archuleta." Melenthin drew his gun as he rose up. He approached Archuleta in that position. Melenthin told witness to run. Witness was on his horse and ran. Witness saw Vejil run from where he was leaning against the pole. Vejil ran south, indicated by the dotted line. He ducked under the pole and ran out of witness' sight. Witness ran out between the two tents indicated by the arrows. As witness started off he heard a shot, looked back, and saw Melenthin stagger. Melenthin and Archuleta were facing each other. Witness saw Archuleta's gun over Melenthin's right shoulder. Witness ran in a southwesterly direction. When he last saw Archuleta, before starting to run, he was standing with his gun in an upper position, and Melenthin had him covered with his six-shooter. They were facing each other about 4½ feet apart. Witness here undertook to illustrate the exact position of Melenthin and Archuleta, and the manner in which they held their guns. The record, however, is incomprehensible to one who did not witness the illustration. Witness from there went to Lopez's camp, where he had taken his lunch at noon. Vejil had arrived there just before.

Such is the substance of the examination in chief of James Moore, the state's principal witness, as far as the actual tragedy is concerned. We have endeavored to state in substance every feature of the testimony, especially such features as tend to support the conviction.

The physician who made the post mortem examination of Melenthin's body described the wounds, in substance, as follows: No. 1 entered the body 6¾ inches from the center of the spine on a line with the right nipple and 6½ inches from it. It was 10 inches from the top of the shoulder on the right side. It came out 2¾ inches below the left nipple. No. 2 entered eight inches from the center of the breast bone on the right side 3 inches below the level of the right nipple. Its exit was 2½ inches from the center of the neck, about six inches above the left nipple. There was another wound in the right thigh which is not deemed material.

It appears from the testimony that before the last shots were fired defendant got on his horse and left the camp, passing Francisco, who was hobbling his horse some distance below the camp. He said to Francisco, "These men have killed each other." From there he went to Robinson's camp. He arrived at the camp on a fast trot about 4 o'clock. His usual habit was to ride slowly. He got off his horse and went into the house; then went out and talked to the boys. Mrs. Robin-

(191 P.)

son, a witness for the defendant, says she heard defendant say some one was shot. She asked him what the trouble was. He said, "One of the herders and Mr. Melenthin had shot one another." He said he needed help. Witness sent the boys for the horses, and they went to the camp. Witness said defendant told her Melenthin was not dead when he left the camp. When they arrived at the camp Mr. Franklin was there. He informed them Melenthin was dead. Melenthin's body was behind the north tent, as shown on the diagram. Witness asked Franklin to cover the body, which was done. The body lay on its face, the face turned up a little, and the left hand stretched out. There was no scabbard, pistol, or belt on the body. Witness was informed that Archuleta was about 50 feet from the tent, in the brush. She observed one rifle shell a little in front of the north tent. There was a cleared spot in front of the tent. Witness did not pick up the shell. She saw some blood where she saw the shell. Reference at this point to testimony of witnesses for defendant is limited solely to such testimony as is not in conflict with evidence offered by the state.

Mr. Franklin, a witness for the state, testified to the exchange of guns between him and the defendant and the subsequent killing of the two sheep, as heretofore stated. At the scene of the homicide on the afternoon of the 23d witness found Melenthin and Archuleta. Melenthin was lying west of the north tent on his stomach, face slightly turned upward, breathing his last. His toes were stuck in the ground, his spurs sticking up. His head lay close to a rock. His hat was on his head. His shirt at the back was protruding from his pants. Witness saw some blood near the corner of the tent, sprinkled on the leaves. Archuleta was about 50 feet north of northwest of the tent. The ground at Melenthin's feet was a little bit ruffled up next to his toes, and it looked like he had been digging with his heel. His tobacco can and pencil were in the left-hand jumper pocket. There was no six-shooter or scabbard on his body.

On the 24th, the day after the shooting, when the defendant was under arrest for the killing, witness Franklin asked him why they had arrested him. Defendant said, "Sh-h; they hear." There were 20 or 25 men around. They were more or less excited. Defendant made no further reply. The gun witness had exchanged with the defendant was returned by the sheriff on the 24th. There were six cartridges in the gun. The witness also testified to seeing Archuleta in the brush on the 23d, and that he had a pistol, scabbard, and a long gun. Witness recognized the pistol as Melenthin's. Archuleta was wounded also. "His left hand was all shot up." He was also shot above the knee, through the leg. Witness was at the camp when defendant and the Robinson family arrived on the 23d. There were two holes

through the back of the tent about 9 inches apart. The holes were under the bunk. The body of Melenthin lay by the side of the bunk, but outside of the tent. Witness covered the body with a tarpaulin; the defendant assisting him. The ground in front of the north tent was as "clean as this floor." When witness lifted Melenthin's body, there were four cartridge shells from a revolver and one live one, also a pool of blood. The cartridges were No. 38.

Mrs. Allre testified for the state, and, in substance, said: Defendant was brought to her house on the 24th or 25th of August. He was a prisoner. He asked for a change of clothing. He changed his shirt and told witness to burn the shirt he had taken off. She asked defendant what he had done. He said, "If he (meaning Archuleta) said he done all himself, I am going free again."

We have now detailed at considerable length the principal points and circumstances relied on by the state in support of its theory that the defendant, and he alone, fired the shots that killed Melenthin. That is the theory adopted by the Attorney General and promulgated in his brief for our consideration.

We will now briefly consider the testimony for the defendant. There are a few points of greater or less materiality that tend to reflect additional light on the situation. We have already referred to the fact that Francisco, testifying for the defendant, stated that defendant passed him leaving the camp before the shooting ended, making the remark that these men had killed, or were killing, one another, and at the same time told Francisco to look after the fold. Francisco also testified to certain things not testified to by the witness Moore because Moore could not understand the Spanish language. He testified that he and defendant were preparing to go to see some traps when Melenthin, Moore, and Vejl came to the camp; that after they had been there awhile defendant asked him to go to Franklin's camp and get a saddle; that he understood it was the saddle of Archuleta; that he went on his horse for the saddle, returned with it, and put it in front of the north tent; that when he returned with the saddle defendant requested him to go and get a horse belonging to witness, called "Baldy." Witness got on his horse and went in a southeasterly direction and found the horse. The horse and saddle were to take Archuleta away. Witness caught the horse, was returning to the camp, and when about 60 yards away he heard the first shots. He saw Archuleta "sort of lying down on the ground, but raised himself on his elbows," holding his gun in the attitude of shooting. It was after that that defendant passed him where he was hobbling his horse. Point F on the diagram indicates the direction Francisco was when he heard the first shots. Defendant passed him about three

minutes afterwards. Fifteen or twenty minutes after that Francisco heard the last two shots.

Vejl also testified for defendant. He testified to going with Melenthin to identify Archuletta. The distance was about 5 miles. Arrived at defendant's camp about 2 o'clock. Defendant and Francisco were there, about 30 feet from the tent. When he arrived Archuletta was in the tent. Witness and Melenthin shook hands with defendant and Francisco. Witness sat on the bunk by Archuletta. Melenthin sat on the west bunk. Melenthin told defendant to come on. Defendant came in and sat down next to Melenthin. Melenthin told defendant he had come for this man. Defendant interpreted it, and Archuletta said, "All right." When witness came in the tent, he addressed Archuletta, calling him by name. Defendant then went out of the tent and told Francisco to "go to the little house and bring the saddle of this man." Francisco went in the direction of his tent. Witness and Melenthin went out and witness signed the paper. Melenthin returned to the door of the tent and asked Archuletta who the rifle belonged to. Archuletta said it was his. Melenthin asked Archuletta if the boss had any of his money. Archuletta said he had a little. Melenthin then went and sat 2 or 3 yards from the southeast corner of the north tent. Witness sat down near Melenthin. Defendant was sitting 2 or 3 yards from Melenthin (direction not intelligible.) Archuletta was in the tent. Moore was at the end of the saddle rack. His horse was in front of the south tent. They all sat there until Francisco returned with the saddle. While they were sitting there, Archuletta said from where he was sitting, "On account of tattlers—babblers—they have caught me." Then Archuletta asked about the pistol they had taken away from him. Melenthin said it was at Lasal. Defendant then asked Melenthin how much he wanted for the pistol. Melenthin said \$22. Defendant went to his bed in front of the tent about 7 yards away and got some money. Archuletta asked him what he was going to do. Defendant said he was going to pay Melenthin \$22 to return the pistol. Melenthin asked defendant if it was his gun. He said yes it belonged to him. He said he sold it to Archuletta in lieu of pay for work Archuletta had done for him. Melenthin did not want to take the money and defendant put it in his pocket. Francisco returned with the saddle and threw it down in front of the tent. Then defendant sent him after the horse. Melenthin had told defendant he wanted a horse so he could take Archuletta to Lasal. Defendant said he could take his horse he had there. Defendant then started to take off his saddle. Francisco went away when defendant sent him for the horse. While defendant was taking the saddle off his horse, Archuletta said to defend-

ant, from inside the tent, "I will sell you my horse, Mr. Ignacio." Defendant said, "I will not buy it from you; Robinson will buy it from you." Defendant had told Francisco the horse he sent for was over there by the pine tree. Francisco left to get the horse. Defendant started to put the saddle on the horse again. He put it on. There was a gun in the scabbard on defendant's saddle. Defendant took the gun out of the scabbard and set it against a tree. After he put the saddle on he put the gun back in the scabbard. Defendant then went to a point in front of the corner of the north tent—a little north-east. The point is indicated on the diagram as circle D-4. Melenthin was still sitting at the place before indicated. Moore was on his horse in front of the saddle rack. Witness saw Archuletta in the tent bend over and get his rifle. Witness touched Melenthin's foot. Archuletta came out of the tent carrying his gun in his left hand and went straight from the door of the tent, indicated by the dotted line leading from the tent to A-2. He had the gun in his left hand with the barrel pointed down and the stock slightly back of his elbow. He walked about 5 yards. Defendant was still at the point indicated by circle D-4. Melenthin got up and told Archuletta to give the gun to defendant. Melenthin walked towards Archuletta. He had his revolver in his belt. Melenthin took the gun out when Archuletta fired the first shot. Witness ran away. Moore ran before witness did. Witness called to Moore to wait for him. Moore turned his horse around when Archuletta fired the first shot. Before witness ran Archuletta shot twice, Melenthin shot once. Witness heard many shots while running. Defendant was still standing at the same place when witness left. Witness did not see defendant have a gun at that time. If he had had one, witness thought he would have seen it. He did not see defendant after that. He saw Francisco coming with the horse before the shooting started about 300 yards distant. Witness went to his own camp, running all the way. Moore was there a little before witness. He thought there were about eight shots fired. He didn't hear defendant say he would "let no G—d d—n white man have his horse." On cross-examination witness said the conversation at the camp sometimes was in English, which he did not understand. He testified that Melenthin drew his revolver quickly. Later on, on cross-examination, his attention was called to the fact that on the preliminary examination he testified that Melenthin at first had some difficulty in getting his pistol out of the scabbard. He admitted saying that, and said it was correct; that Melenthin could not get his pistol out until Archuletta fired the second shot. After running to his camp, witness said Moore asked him where Melenthin was, and witness answered, "I don't know; possibly



they have killed him." Witness also stated that Archuletta handled his gun with his left hand. With the right hand he held the gun and with the left he pulled the trigger. Both men were on their feet when witness last saw them, but Melenthin twisted to the right.

Archuletta, a witness for defendant, testified concerning his former life, the substance of which we have already related. He denied writing to defendant, as testified to by Mrs. Allre. Stated that he never wrote him any letter; that about the 27th of June, 1918, he saw some men while coming to Utah who had a letter of recommendation to Ignacio Martinez (defendant). They said they were not thinking of coming to Utah any more, and asked witness if he wanted the letter. Witness said "Yes." The letter was addressed to Ignacio Martinez, Lasal, Utah. Witness took the letter and came to Lasal and inquired for defendant. He asked an American before he arrived at Lasal. He inquired of Mrs. Allre and defendant came out of her house. That was the first time witness had seen him. Witness asked defendant his name, and on being answered told him he had a letter of recommendation. Witness gave defendant his name as Pantaleon Lagunas, and told him he was from Old Mexico and gave him the letter. Witness asked defendant for work. Defendant said he had no work, but would try to get work at another place. Defendant finally gave witness work clearing a ranch at \$50 a month and board. Witness started to work with the sheep August 10 or 11. He received from defendant a revolver as part payment, the price being \$22. He related the incident in which the sheriff and Melenthin figured wherein he was suspected of being a deserter. The pistol referred to was taken from him on that occasion, as testified to by Sheriff Barnes. Witness never told defendant that his name was Ramon Archuletta prior to August 23. He also identified the rifle in question; said it was furnished him by Mr. Robinson. It was on the bunk closest to the door. He said Melenthin's party got off their horses, spoke to defendant, and came into the tent. Witness was seated on the bunk. Defendant told witness Melenthin had come for him, and witness said, "All right." Melenthin asked Vejil if that was the man, and Vejil said "Yes." They went outside. Melenthin told witness if he was Pantaleon Lagunas or Ramon Archuletta he was going to take him. Melenthin and the others sat down outside. Vejil signed the paper. Melenthin and the defendant sat close together. Vejil stood up at the saddle rack. Jim Moore stood up about five feet from the others in front. Francisco was in his tent. Defendant told Francisco to get witness' saddle. It was at Franklin's camp. Francisco went away on horseback and returned in about an hour and a half with the saddle. He placed it in front

of the north tent. Witness related the incident of the revolver, and the offer of defendant to pay Melenthin for it. Witness objected and told them to pay him. The money was not given to witness. After Francisco returned with the saddle defendant asked him to lend him the Baldy horse so they could take witness to Lasal. Francisco said all right and went after it. Witness told defendant he would sell him his horse, and defendant said he would not buy it, but that possibly Robinson would. Witness saw defendant go to his horse and take the saddle off. He had a gun on his saddle. He took off the gun and put it against a quaking asp. Defendant then put the saddle on again. Witness could not tell why. Defendant then put the gun back in the scabbard. He then returned and sat down by Melenthin. Witness was still in the tent. Defendant told witness Melenthin said the horse was coming, and that witness should fix his saddle and get it ready. Witness went out of the tent with his rifle in his left hand with the muzzle of the gun slightly up in front of him and the stock of the gun down near the side of his leg. Defendant was then on the north side of the tent indicated by D-4 about five feet from the northeast corner of the tent. Witness walked straight out in front towards his saddle. He at that time heard Melenthin speak to him, but he did not understand. Melenthin made signs with his right hand. He was then standing up. He took out his pistol. He made one or two steps toward witness. After pulling out his pistol his right arm was extended from his shoulder straight (witness illustrates; not intelligible). Witness turned around, Melenthin shot. The shot entered witness' left hand, in which he held his gun. Witness' gun was still by his side. Witness then shot with his right hand (illustrating; not intelligible). Witness shot as quick as he could. Before shooting however Melenthin shot again, striking witness in the leg, breaking it. Witness fell forward on his face and shot at Melenthin again from that position. Witness shot about three times in front of the tent. After witness shot, Melenthin made a move (illustration not intelligible). Witness said: "He went this way, abruptly throwing himself to his left side." He did that when witness fired the first shot. After witness was shot and was on the ground Melenthin went along the south side of the tent. After he moved out of witness' sight witness heard another shot from the north tent. Witness was still in front and shot two more shots through the tent. He could not see Melenthin. During the shooting, defendant was still near the northeast corner of the north tent (circle D-4). He had no gun. Nobody but witness fired at Melenthin. Witness saw defendant pass behind him in the direction of his horse, which was out in front of the tent where he had taken the saddle off. His horse was a lit-

the south of a line extended from the south side of the tent probably four steps. Witness had not fired through the tent when defendant went away. Defendant got on his horse and went in the direction Francisco went for the horse. Witness later saw defendant pass in a northerly direction. That was after witness fired through the tent. After the last shots, in about ten minutes, witness went around the tent on the north side. Melenthin had fallen behind the tent, face downward. His revolver was close to his hand. Witness took off the cartridge belt and put it on himself, scabbard and all. He took the shells out of the revolver and reloaded it. There were five empty shells—one not discharged. It was knicked or misfired. Witness said when he went out of his tent to his saddle he did not expect any shooting to occur. He would not have fired at Melenthin if Melenthin had not fired first at him. When witness fired he believed his life was in danger and that he was in danger of great bodily harm. Witness fired for the purpose of saving his own life. The first time witness ever told defendant he was his son-in-law was after they were taken to the penitentiary. He never advised defendant that he was a deserter. There never was any agreement or arrangement between witness and defendant that defendant would prevent his arrest.

Mrs. Minnie Franklin, testifying for defendant, said she knew of defendant's getting her husband's gun and getting mutton for them; remembered Francisco's coming on the 23d for a saddle and taking it away. He came on horseback. Witness and her husband were then preparing to leave the mountains the following morning. Her husband went to defendant's camp to get his gun. He returned and informed her of the shooting. She went with him to defendant's camp. Witness stated that on the night of the homicide James Moore came to their tent. He inquired where Melenthin was and asked who shot him. Her husband answered: "Pantaleon Lagunas." Moore said: "No; Albina shot him."

Bronson, a witness for defendant, testified that he was acquainted with James Moore; that on the day of the trouble he saw Moore at his sawmill; that Moore appeared to be excited and said Melenthin was dead. He said Albina had come up behind him and "cut loose." He said when he last saw the defendant he was standing by his horse, and that his gun was partly in the scabbard. Witness, on cross-examination, said that Moore stated when he last saw defendant he had his gun in his hand.

W. E. Robinson, a witness for defendant, testified that defendant was in his employment. Witness was manager of the Indian Creek Cattle Company. On the 10th day of August, 1918, witness authorized defendant to employ a sheepherder. On the morning of the 12th defendant informed him he had em-

ployed one. On the 16th he went to the herd and saw the man defendant had employed. The man was called Pantaleon Lagunas. Witness recorded him by that name. Defendant and Francisco were also at the herd. Lagunas asked for a gun. Witness told him he did not have to buy the gun; that the gun belonged to the camp, but that he would have to buy his own cartridges; that if he lost the gun, or broke it, or traded it off, it would cost him \$12. There was a box of cartridges for the gun which witness delivered to him and charged them to his account. The company furnished guns to their employes to kill animals, but they were required to pay for their cartridges. The company gave them a bounty for each animal killed. That is the way they pay for their cartridges. That was the first time witness had seen the man. On the 23d of August witness met Melenthin and James Moore. Melenthin asked witness if that fellow (meaning Archuleta) was still working with Ignacio (defendant). Witness told him he was. Melenthin said he had information that he was a deserter, and that he was going after him, and wanted to know who was at the camp. Witness told him that Ignacio and Francisco were there, and that the man had a .25-35 gun and a box of cartridges. Melenthin referred to the man as Ramon Archuleta, and said if he was the man he would bring him back with him. That was the first time witness had heard that name or had heard anything about it. Melenthin asked if defendant was at the camp; if so, he could do the talking for him. Witness told him the man had a horse and saddle of his own, and that, if he did not find the horse, he could have any horse that was there; that there were plenty of horses. Witness told Melenthin to tell defendant to get him a horse. Witness then testified to telling Franklin he could have some meat; that he could get it at defendant's camp; that the cartridges referred to for the 25-35 gun were soft point bullets.

We have now stated at considerable length the history of this lamentable affair. The evidence in some respects is fragmentary and disconnected, but the writer has attempted to detail every material feature of the transaction with scrupulous regard for accuracy and truth.

The question is: Is the evidence sufficient to support a judgment of conviction? The Attorney General on behalf of the state has supplied us with an able and comprehensive brief, and, notwithstanding his conclusions drawn from the evidence may be at variance with our own, it must be admitted that no point in the least degree favorable to the state or unfavorable to the defendant has been overlooked. The most possible that could be made out of every circumstance detailed in the evidence has been made and pre-

sented for our consideration with consummate ability.

Waiving preliminaries for the present and coming at once to the scene of the fatal encounter, the state contends that it was impossible that the fatal wounds could have been inflicted by shots from the gun of Archuletta; that they must have been inflicted by the defendant, and by him alone. As to what occurred at the time of the shooting, the state relies almost entirely upon the testimony of James Moore, its only witness. In the light of the testimony of Moore and the location of the wounds as described by the post mortem physicians it is contended that the wounds were in such position on the body as to preclude the possibility of their being made by Archuletta; that they must have been made by defendant, who stood almost at right angles from Melenthin and on the side from which the shots must have been fired. It is unquestionably the strongest circumstance in favor of the state's contention to be found in the entire record of the case, and if it is so connected as to constitute an unbroken chain, it should be well-nigh conclusive of the question we are endeavoring to determine. Moore places defendant just before the shooting began at circle D-3, a little to the rear of a line drawn at right angles from where Melenthin stood. Without referring in detail to the evidence, it is admitted that, if Melenthin, who stood at circle M-2, was facing Archuletta, who stood at circle A-2, the shots which inflicted the fatal wounds could have been fired by one standing in the position of defendant, but could not have been fired by Archuletta. At this point let us briefly consider the testimony of Moore. Moore says when Archuletta started off the bunk Melenthin jumped up at point M and told him three times to lay down his gun; that Archuletta made no response. Melenthin had his gun, a 38-caliber six shooter, drawn right on Archuletta. Melenthin drew his gun as he rose. He approached Archuletta in that position. Melenthin then told witness to run. Witness was on his horse and ran. As witness started off he heard a shot, looked back, and saw Melenthin stagger. Melenthin and Archuletta were facing each other. Witness saw Archuletta's gun over Melenthin's shoulder. No witness at any time saw defendant holding his gun in a menacing attitude; no witness heard him threaten to shoot or heard him say anything indicative of an intention to shoot. It is true, according to Moore's testimony, after defendant had resaddled his horse, he picked up his gun from the place where he had laid it. He picked it up with both hands, and thereafter held it with both hands, but it is evident it was not held in a menacing manner, or Moore would certainly have testified to a fact of such grave signifi-

cance. In these circumstances what right has this court, or even a jury, to assume that defendant fired the shots that killed Melenthin? Moore did not see, nor could he see, the position Melenthin was in when the fatal shots were fired. When he last saw Melenthin before the shooting Melenthin was facing Archuletta; when he next saw him a few seconds later, he was staggering, evidently from the effects of a shot. Just what position he was in when that shot was fired is a missing link in the chain of evidence as far as Moore's testimony is concerned. We cannot indulge in speculation or conjecture; the jury had no right to do so. It will not do to presume that defendant fired the fatal shot just because when last seen he was in a position from which the shot might have come. Especially is this true in the absence of positive evidence as to what position Melenthin's body was in when the shot was fired. This court is bound to give full force and effect to every material fact as to which there is any evidence in the case, but it is not bound to give effect to assumptions and conclusions not based upon established facts. There is, however, other testimony positive and direct as to who fired the shots that killed Melenthin. The testimony covers the period during which the witness Moore did not see and could not tell just what the attitude of the parties was or who did the shooting. The witness Vejil went with Melenthin to identify Archuletta. He was there when the shooting began. He says Archuletta fired the first and second shots before Melenthin shot at all. He says Melenthin had trouble getting his gun out of the scabbard, which, if true, accounts for Melenthin's delay in shooting. Vejil says that when the second shot was fired by Archuletta Melenthin "twisted to the right." He also says that while these shots were being fired by Archuletta defendant was at circle D-4 near the northeast corner of the north tent. He saw no gun, and thinks if defendant had had a gun he would have seen it. Archuletta testified that he alone did the shooting, that defendant did not shoot at all, and places him at circle D-4 while the shooting was going on. The testimony of Archuletta is diametrically opposed to that of Vejil as to who fired the first shots. He says they were fired by Melenthin, wounding him in the hand and knee, and that thereupon he fired in self-defense. It is not our intention to undertake the difficult role of trying to determine which of these stories is correct. It is not our province to do so. Where the evidence is in conflict, it is a question for the jury to determine. In so far as the testimony is not in conflict, it is our duty to consider it and determine its effect. If the testimony of Vejil is true as to who fired the first shot, defendant ought not to have been convicted. Ve-

Jil claims to have seen the parties at the very moment of the shooting, and swears that Archuleta, and not the defendant, fired the shot. Vejil's testimony on that point is not inconsistent with that of Moore. Moore did not see who fired the shot, but he knows it struck Melenthin, for he saw him stagger. Moore says Vejil ran just before he did. Vejil says Moore ran first. Upon this point Vejil is corroborated, inferentially at least, by the fact that each of them arrived at Lopez's ranch about the same time, and Moore asked Vejil where Melenthin was. If Vejil left the scene of the shooting before Moore, Moore had no reason to ask him for the whereabouts of Melenthin.

The uncontradicted evidence shows that within two or three minutes after the first shots were fired the defendant went from near circle D-4, passed behind Archuleta, who was standing at circle A-2, and went south to where Francisco was hobbling his horse south of the tent. He said to Francisco, "These men have killed each other." He then told Francisco to look after the flock. He then turned and went north to Robinson's camp for help. He told Mrs. Robinson that one of the herders and Mr. Melenthin had shot each other, and that he had come for help. Mrs. Robinson and members of her family went with defendant to the scene of the shooting. Mr. Franklin was there. Defendant assisted Franklin in covering the body of Melenthin with a tarpaulin. Some testimony tending to impeach Moore was produced by defendant. The testimony is not only conflicting, but it is not of sufficient importance to justify consideration.

The state contends there is much in the testimony tending to show a motive on the part of defendant for that which afterwards occurred. In view of what we have already said, it is probably of no consequence whether he had a motive or not. In order, however, that every point relied on may be duly considered and our views thereon faithfully recorded, we will briefly review the points which are deemed material. It is contended that defendant at all times after July 15, 1918, knew the relationship between him and Archuleta, and also that Archuleta was a deserter from the United States army. Notwithstanding Archuleta swears that such is not the fact, we are inclined to the belief that the state's contention is well supported by numerous circumstances developed during the course of the trial. But his knowledge of these facts is very far from being evidence of a motive to take the life of a human being, especially one with whom his relations had been friendly and intimate up to the very time of the tragedy. Even if we go farther and find that defendant not only had knowledge of the facts above stated concerning Archuleta, but also had a deep sym-

thy for him in his trouble, still we find no evidence of malice or ill will on the part of defendant towards Melenthin. Sympathy for Archuleta and a disposition to hide him, keep him under cover, or even to endeavor to screen him from the officers by deception or disingenuousness, is but the manifestation of human frailty with which a large percentage of mankind is more or less afflicted. We see no significance whatever in the incident wherein Sheriff Barnes and Melenthin had their interview with Archuleta and defendant. The Attorney General professes to see a feeling of resentment in the defendant when he told the sheriff he could take "his gun also if he wanted it." What is there in the incident to justify the deduction made by the state? When the sheriff inquired what defendant had in his wagon, how did defendant know but that firearms or weapons were the very things which prompted the inquiry? Indeed, it is difficult to imagine just why the sheriff made the inquiry at all, unless it was for something of that kind. If that be true, then the answer of defendant was perfectly consistent with good feeling and respect. The defendant was a Mexican, and perhaps not the most enlightened as to his legal rights. The defendant had already promised the sheriff and Melenthin that Archuleta was going to work with him in Robinson's employment, thus conveying the idea that if Archuleta was wanted he would be found at defendant's camp. The promise was not violated, nor was the trust betrayed. It is admitted that there was no special significance in the exchange of guns between defendant and Franklin.

The Attorney General says in his brief:

"It is not altogether certain that the purpose of sending for the saddle horse by the defendant Ignacio was done solely at the solicitation of Melenthin and for the purpose of permitting him to take Archuleta to Lasal. On the contrary, there is at least the suspicion that it was done for the purpose of permitting Archuleta to escape."

The only comment we deem it necessary to make as to this contention is that there is not a syllable of testimony in the entire record to justify the suspicion that the horse was sent for for any other purpose than to take Archuleta to Lasal. Robinson testified that on the morning of the 23d he met Melenthin and Moore, and, after Melenthin told him where he was going and what he was going for, he told Melenthin he could have a horse; that there were plenty of horses there. Moore testified that Francisco went for a saddle, returned with it, and then went off in another direction. He also testified that defendant told Melenthin he could have the grey horse. Vejil testified to Francisco being sent for a horse. Archuleta testified to it, and every circumstance connected with

Francisco on the day of the homicide shows conclusively that at Melenthin's request defendant had first sent Francisco for the saddle and then for the horse.

The state also makes the point that Mrs. Alire said on one occasion defendant told her he liked that man (speaking of Archuleta), that some dog Mexican was trying to betray him, and that he was going to protect him in every way possible. There is here some indication of feeling towards his own countrymen, but none against Melenthin. His uniform course of conduct towards Melenthin and Melenthin's towards him was that of friendship, confidence, and trust. At defendant's camp on the day of the homicide, while they were waiting for the saddle horse, defendant understood perfectly what Melenthin had come for; he had complied with every request made by Melenthin; they chatted and smoked and apparently were on the best of terms. According to the witness Moore, however, just before the shooting began, and when defendant was resaddling his horse, Melenthin asked, "Ain't you going to let me have that horse?" Defendant answered by saying, "I will let no G—d d—n white man have my horse." If this language was uttered by defendant, it is the first offensive remark heard from his lips. Moore, on cross-examination, admitted that in the preliminary examination he may have testified that defendant said, "I will let no damn man have my horse." He, however, said his statement as made at the trial was correct. Witness Moore admits that up to this time not an offensive word had been uttered, and nothing had been said or done by either party evincing the slightest feeling of hostility. Admitting that the defendant used the language as stated by Moore at the trial, it had no tendency, in the mind of the writer, to establish a malicious intent to murder a man with whom he had always before been on friendly terms.

Other incidents are relied on by the state. After defendant was arrested he was taken to the home of Mrs. Alire for a change of clothing. Mrs. Alire says that defendant pulled off the shirt he had been wearing, handed it to her, and told her to burn it. She does not say that anything was the matter with the shirt, whether it was bloody, dilapidated, or unfit for further use. The incident, without further explanation, seems to be entirely without point or significance.

Mrs. Alire also testified that on this same occasion she asked defendant what he had done. Defendant replied: "If he (meaning Archuleta) said he done it all himself, I am going free again." Considering the awkward manner of expressing his meaning, this language may well be construed to mean, "If Archuleta tells the truth and admits he did

it all, I am going free again." If a reasonable interpretation can be made suggesting a meaning consistent with innocence, the defendant is entitled to such interpretation.

Mr. Franklin, a witness for the state, says that on the 24th of August he was up at defendant's camp. There were 20 or 25 people around, more or less excited. Defendant was there under arrest. Witness asked defendant, "Ignacio, what have you done; why do they arrest you?" Defendant answered: "Sh-h; they hear." This statement was introduced by the state and relied on as an indication of guilt. It may or may not be. It is only ordinary prudence on the part of any man, whether guilty or innocent, to decline to talk about his case, especially when he is under arrest. If he says nothing, there is no language to be distorted or misconstrued. If he talks, especially in the presence of those who are prejudiced against him, he may, ordinarily, expect his language to be twisted into some sort of an admission. Defendant's precaution in this respect should not be construed as evidence of guilt.

Defendant, during the time Francisco was gone for the saddle, drew a paper from his box, passed it to Melenthin and said: "This war is all damned lies." It was an awkward expression, and his meaning not altogether intelligible. The incident suggests, that he was somewhat of a pacifist and not altogether in sympathy with the war. It indicated no malice toward Melenthin, or any living man.

Every incident above set forth and relied on by the state to establish a motive for the killing is susceptible of a construction consistent with the defendant's innocence. Where such is the case, guilt cannot be presumed. This is a fundamental principle of criminal law, and cannot be disregarded without grave injustice to the man charged with crime. Much of the conduct of defendant immediately after the homicide was not only inconsistent with guilt, but strongly indicative of innocence. Within two or three minutes after the first shots were fired he mounted his horse, rode to where Francisco was, and said to him, "These men have killed each other." He then said to Francisco, "Look after the flock." It is not easy to conceive of a murderer, his hands reeking with the blood of his victim, rushing immediately from the scene of his crime and telling his subordinate to look after a flock of sheep. The mind of such a man would be engrossed with matters of greater moment. The incident savors of innocence rather than guilt. Besides this, the remark, "These men have killed each other," was part of the res gesta, spoken without deliberation or premeditation. It was just as competent as evidence as if some witness on the trial had sworn that

he saw Melenthin and Archuletta shooting at one another, and perhaps more satisfactory. The defendant then went on to Robinson's camp for help, procured it, returned, and assisted Franklin in covering the body of Melenthin. These circumstances point strongly to defendant's innocence.

[1] The court is of the opinion that the evidence was insufficient to sustain a conviction.

Defendant excepts to the giving of certain instructions, also to certain language used in other instructions, and to the refusal of the trial court to instruct as requested by defendant. We have carefully examined all the alleged errors in these respects, and have carefully read the instructions as a whole. We are of the opinion the rights of the defendant were carefully safeguarded by the instructions, and that in all cases where the refused requests correctly stated the law the matter was sufficiently covered by the instructions given.

[2] Defendant also excepts to a statement made in the argument to the jury by one of the state's counsel who tried the case to the effect that "this man (meaning the defendant) committed one of the gravest crimes ever committed in the state of Utah." This was simply a statement of counsel's opinion made in the course of argument. Counsel had the right to state his conclusions from the evidence even though his conclusions were wrong. There was no error in this regard.

[3] Defendant also excepts to alleged remarks made by the state's attorney to the effect that the defendant had not denied the shooting. The record as to this assignment is insufficient. It is not shown just what the state's attorney said. The exception is not well taken.

Finally, defendant excepts to a certain statement alleged to have been made by the district attorney in his argument to the jury. The record as to that assignment is as follows:

"Mr. King: I except to the statement of counsel that defendant admits himself that he fired the shot. The defendant does not admit it. It is misconduct on the part of the district attorney.

"The Court: Counsel did not say he admitted it.

"Mr. King: If there is any dispute about it, I want the record right at this time as to what counsel did say. Did you (addressing Mr. Patterson, the district attorney) state the defendant said he fired the shot?

"Mr. Patterson: That is correct.

"Mr. King: I except to that as misconduct

on the part of the district attorney in this case."

From the foregoing record it appears the district attorney did make the statement, and that defendant's attorney made seasonable objection and took an exception thereto.

[4, 5] The writer of this opinion has read with scrupulous care every word of the evidence produced at the trial. He has been unable to find that defendant ever at any time admitted that he fired a single shot in connection with the tragedy. Just why the district attorney made the statement and after his attention was specifically called to it, in effect, reiterated it in the presence of the jury, is incomprehensible. If he conceived the idea that because the defendant did not offer himself as a witness he was deemed to have admitted his guilt, such conception was clearly erroneous. The statutes of this state safeguard a man accused of crime who fails to become a witness in his own behalf against every such presumption. Comp. Laws 1917, § 9279. In the case at bar, because of the peculiar nature of the case, the prosecuting attorney who tried the case ought to have been more than ordinarily careful to see that no injustice was done. The defendant was a Mexican appearing at the trial in the attitude of a man who was related to, and in sympathy with, a deserter from the United States army. The jury was composed of American citizens having no particular love for Mexicans, and more or less prejudice and race feeling was to be expected. The prejudice would not only exist against the defendant, but against his witnesses, who were of the same race. The district attorney stood before the jury representing the majesty of the law, and no doubt had the implicit confidence of the jury, which was well deserved. The case at best was exceedingly close, and the evidence complicated and difficult to digest. In these circumstances the defendant was at a decided disadvantage. When the district attorney said that the defendant had admitted the shooting, and reiterated the statement in the presence of the jury, they must have thought that by some implication of law an admission by defendant had actually been made. In view of the circumstances, we think the statement was prejudicial error.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court, with directions to grant the defendant a new trial.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(56 Utah, 420)

**FOWERS v. LAWSON et al. (No. 3466.)**

(Supreme Court of Utah. July 1, 1920.)

**1. Vendor and purchaser ⇨77—Installment contract obligated buyers to pay only \$15 a month.**

A contract by buyers of realty to pay \$200 cash and \$15 a month thereafter until whole of price had been paid, with interest on deferred payments at 8 per cent. per annum, obligated buyers to pay \$15 each month in extinguishment of the interest for that month, balance of payment to be applied on principal.

**2. Vendor and purchaser ⇨46—Construction of contract by parties binding.**

Where the buyers of land agreed to pay \$200 in cash and \$15 a month thereafter until the whole price was paid, with interest on deferred payments at 8 per cent. per annum, an engagement possibly ambiguous, construction of parties for nine years, effected by buyers making, and the sellers accepting, a payment of \$15 each month in extinguishment of the interest due, balance for application on the principal, was binding on the parties.

**3. Mortgages ⇨257 — Transferee charged with notice of rights of persons in possession.**

The transferee of a note and the mortgage securing it was charged with notice of all the rights of prior purchasers from the mortgagor, in possession.<sup>1</sup>

**4. Appeal and error ⇨747(1)—Cross-appeal must be taken to reverse or modify judgment in favor of party assigning cross-error.**

Where the purpose of a cross-assignment is to reverse or modify judgment in favor of the person assigning cross-errors, it is necessary to take cross-appeals.<sup>2</sup>

Appeal from District Court, Weber County; A. W. Agee, Judge.

Action by Elizabeth Fowers against David C. Lawson and others. From judgment for plaintiff, Andrew C. and Emily Rasmussen, two defendants, appeal. Reversed, and cause remanded, with directions.

Geo. Halverson, of Ogden, for appellants.

John A. Sneddon, of Ogden, for respondent.

**FRICK, J.** The plaintiff, as indorsee of a promissory note in favor of one Ralph E. Hoag and the assignee of the mortgage given to secure said note, brought this action to foreclose said mortgage. The complaint is in the ordinary form of such actions. It is therein alleged that the defendants claim some "interest in or lien upon" the mortgaged premises, but the plaintiff avers that such interest or claim is subject to the mortgage. The defendants Andrew C. and Emily

Rasmussen answered the complaint, and admitted that they claimed some interest in the premises, setting forth the same and to which we shall refer later, and averred that their interest is superior to said mortgage. The defendant Evona Investment Company also answered the complaint, and set forth its claim, to which it is not necessary to refer, however. Upon a hearing the court entered judgment in favor of the plaintiff, in which certain conditions were imposed, from which judgment Andrew C. and Emily Rasmussen appeal.

In order to fully understand the real questions presented for determination, it will be necessary to refer to the court's findings of fact and conclusion of law somewhat in detail.

The court in substance found the following facts:

That on the 24th day of March, 1911, the defendant David C. Lawson was the owner of the real estate described in the mortgage, and that on that date he entered into a contract with Andrew C. and Emily Rasmussen, hereinafter, for convenience, styled appellants, whereby said Lawson agreed to erect a certain dwelling house on the real estate described in said contract and in the mortgage aforesaid, and the appellants agreed to purchase said dwelling house and said parcel of ground for the agreed price of \$2,150, to be paid as follows:

"\$200 in cash, the receipt of which is hereby acknowledged, and \$15 per month thereafter until the whole of said purchase price has been paid, with interest on all deferred payments at the rate of 8 per cent. per annum."

That thereafter said Lawson completed said dwelling house, and the appellants, on the 20th day of June, 1911, went into possession of said dwelling and said parcel of ground and paid said sum of \$200 and the sum of \$15 "each and every month thereafter" as specified in said contract.

That on the 23d day of June, 1911, the defendants David C. and Orrilla Ann Lawson duly executed and acknowledged a deed whereby they conveyed said parcel of ground to the appellants, and thereafter, on the 6th day of July, 1911, said deed, together with the contract of purchase entered into between said Lawson and appellants, was placed in escrow with the Utah National Bank of Ogden. After referring to the papers left in escrow, the material portions of the agreement read as follows:

"The said Utah National Bank is hereby empowered and directed to deliver the above-described papers to Andrew C. Rasmussen, party of the second part, or order, only upon payment to them of the sum of \$2,150 and interest as specified below, for account of said D. C. Lawson, payable as follows: As per contract here-

<sup>1</sup> Shafer v. Killpack, 173 Pac. 948.

<sup>2</sup> Distinguishing Railroad v. Board of Education, 35 Utah, 12, 99 Pac. 283.

with, payments to date from June 20, 1911. In case the terms of this escrow shall be fulfilled, then this agreement shall terminate and be null and void, but, however, in case the party of the second part shall fail to make the payments at maturity, as aforesaid and for a period of — days thereafter, then and in that case the said party of the first part shall have the option, if he so desires, to withdraw the above-described papers; and shall retain any and all sums of money which may have been paid thereon by the said party of the second part as liquidated damages, and the Utah National Bank shall be released from the trust herein created, and from any further responsibility in this matter."

That on the 23d day of June, 1911, after the appellants had entered into and were in possession of the premises aforesaid, and without their knowledge or consent, the Lawsons executed and delivered to Ralph E. Hoag their certain promissory note for the sum of \$1,000, the payment of which they secured by executing and delivering to him a mortgage upon said parcel of ground with the dwelling thereon, which note was payable in three years from date with 8 per cent. interest.

That when said note became due said Lawsons executed and delivered to said Hoag a renewal note for said sum of \$1,000, payable August 24, 1917, with 8 per cent. interest, and secured the payment thereof by executing and delivering to said Hoag a mortgage on the premises aforesaid, which mortgage was duly recorded, and which note and mortgage were executed and delivered without the knowledge or consent of the appellants.

That on the 26th day of August, 1914, said Hoag duly indorsed and delivered said note and assigned said mortgage to the plaintiff herein.

That said Lawsons did not pay said note or any part thereof except the accrued interest up to the 3d day of April, 1917, which interest was paid out of the \$15 monthly payments made by the appellants on said contract, and which payments were made to the bank aforesaid.

That there is due on said note and mortgage the sum of \$1,177.75.

That appellants "have made default in the payments of the installments to be paid by them upon the contract hereinbefore set out, and that there is now owing and unpaid on said contract the sum of \$1,649.33, of which sum \$1,229.13 is past due."

We have omitted all the findings and conclusions of law we do not deem pertinent to the question to be decided.

The court also found as conclusions of law that the appellants "were required to pay on said contract the sum of \$15 principal and interest at 8 per cent. on the unpaid portion of the purchase price each month." The court therefore found that

they were in default as before stated, and found that they should pay said \$1,229.13 within 60 days, and in case they failed to do so that said premises be sold and the proceeds of sale applied first to the payment of costs and second to the payment of the amount found due on plaintiff's mortgage. The court also found that the Lawsons were personally liable for the debt secured by said mortgage. The court also adjudged the mortgage to be inferior to the rights of appellants, but, as before stated, held that, in view that they were in arrears in the payments on their contract of purchase, plaintiff was entitled to the money which is due and unpaid thereon as before stated.

A decree was entered in accordance with the findings of fact and conclusions of law, from which this appeal is prosecuted.

[1] The appellants contend that the court erred in finding that they are in arrears or "in default" in making the payments on the contract of purchase. The objections made by them, however, really relate to the court's conclusion of law in construing the contract of purchase entered into between Lawson and the appellants and under which they are in possession of the premises. The so-called finding of fact is entirely based upon the construction the court placed on said contract. The portion of the contract construed by the court relates to the payment of the purchase price stipulated in the contract of purchase. The terms with regard to the payments are:

"Two hundred dollars in cash, the receipt of which is hereby acknowledged, and \$15 per month thereafter until the whole of said purchase price has been paid, with interest on all deferred payments at the rate of 8 per cent. per annum."

While to the writer the foregoing language seems reasonably clear and free from doubt, yet such may not be true as to all minds. The language is that \$15 shall be paid each month until the principal and interest are paid. To my mind this language means that both principal and interest shall be paid at the rate of \$15 per month. The principal and interest, so far as the payment thereof is concerned, are treated as though the interest were a part of the purchase price; that is, in making the payments the \$15 monthly payments include both the principal and the interest the same as though both were expressed as part of the purchase price. The court, however, held that the contract means that \$15 was to be paid upon the principal, and in addition thereto the appellants were required to pay 8 per cent. interest upon the entire principal each month. The contract does not so specify. Neither does the contract mean that the appellants should pay the \$15 and in addition thereto 8 per cent. interest on the \$15 for



the past month. Nor did the court so construe it, and yet the language is more susceptible of that meaning than it is of the meaning the court placed upon it, namely, that it means that the appellants were required to pay \$15 each month, and in addition thereto a sum equal to 8 per cent. interest on the whole of the unpaid purchase price. If that were the intention of the parties, the language used does not clearly express such intention.

[2] Let it be conceded, however, that the language respecting payments is not free from ambiguity or doubt. The parties to the contract, from the very beginning, commencing in 1911, until the bringing of this action, and for a period of practically nine years, always construed the contract to mean that \$15 was the maximum monthly payment that could be required thereunder, and payments in that amount have always been made by the appellants and accepted by Lawson and the bank to which the payments were made. So much of the \$15 as was necessary was each month applied to the payment of the accrued interest, and the remainder was applied on the principal. We thus have a contemporaneous, a continued, and a practical construction of the contract by the parties thereto. Let it also be remembered that the construction was not a hasty, or, perhaps, an illy considered construction. Upon the contrary, it was one which had been continued for years and was applied very many times in making payments. The law is well settled that, where the language used in a contract is ambiguous, and where the parties have construed it, and such construction is not clearly contrary to the ordinary and usual meaning of the language, the courts will follow and enforce the construction the parties have given the contract. The rule is well and clearly stated in 2 Elliott, Contracts, § 1537, under the heading "Practical Construction," in the following words:

"It is a familiar law that, when a contract is ambiguous in its terms, a construction given to it by the parties thereto and by their actions thereunder, before any controversy has arisen as to its meaning, with knowledge of its terms, is entitled to great weight, and will, when reasonable, be adopted and enforced by the courts. The construction placed on the contract by parties thereto prevails when the language used will reasonably allow such construction, even though the court would probably adopt a different construction were it not for the practical construction already placed by the parties on their agreement. The construction placed upon the contract by the parties themselves is of great value in determining its correct interpretation. The reason underlying this rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction plac-

ed by the parties upon the instrument is the best evidence of their intention."

To the same effect are *North Boulder, etc., Co. v. Leggett D. & R. Co.*, 63 Colo. 522, 168 Pac. 742, and *Board of Com'rs v. Henderson (Okla.)* 168 Pac. 1007.

[3] Lawson would thus be bound by the construction he himself had placed upon the contract. Plaintiff is in no better plight. The note and mortgage in question were executed and delivered by Lawson to Hoag long after appellants went into possession of the mortgaged premises, and, as the court found, they were so executed and delivered without their knowledge or consent. Plaintiff, by reason of their possession, was charged with notice of all of their rights. The law is well and tersely stated in 2 Ballard, Law of Real Property, § 44, as follows:

"Where the holder of the legal title is out of possession, those who deal with him as to the title, without making inquiry of the one in possession, do so at their peril."

In 4 Ballard, Law of Real Property, § 588, it is said:

"Possession of land by a contract purchaser is constructive notice of his rights."

In 7 Ballard, Law of Real Property, § 619, it is said:

"Actual possession of land is notice to the world of the ownership or interest therein. \* \* \* Such possession is constructive notice of everything which a party interested in the premises would get by inquiring of the party in possession."

While there are exceptions to the rule just stated, which are referred to by this court in the case of *Shafer v. Killpack*, 173 Pac. 948, the case at bar does not come within any of the exceptions, but falls within the general rule. Moreover, the plaintiff has sacrificed nothing, since her security is ample, and if she needs the money she no doubt may obtain it by selling the security, precisely as did Hoag. Upon the other hand, the court's construction may seriously affect appellants. They may lose their home by being compelled to make the payments in a much shorter period of time than they had agreed to make them in case they are financially unable to do so. Had the payments been required to be made by Lawson on entering into the contract as they are now required to be made by the court, it is quite probable that appellants would not have entered into the contract, but would have purchased a home from some other person.

While the court was clearly right in ruling that the rights of the plaintiff as mortgagee are subsequent and inferior to the rights of the appellants under their contract, yet, in our judgment, the court erred in holding that the appellants had breached the terms of their contract and are in ar-

rears in making the payments on the purchase price.

[4] The plaintiff has, however, assigned cross-errors, and contends that the court erred in holding that the rights of appellants under the contract of purchase are superior to her rights as mortgagee, and she assails the judgment and asks that it be reversed and modified in that particular. In view of the conclusion we have reached respecting the terms of the contract of purchase entered into between Lawson and appellants, plaintiff's contentions are untenable. We desire to add here, however, that in view that plaintiff seeks to reverse or modify the judgment the cross-assignment of errors is of no avail. Where, as here, the purpose of the cross-assignment is to reverse or modify a judgment in favor of the party assigning cross-errors, it is necessary to take a cross-appeal. It is true that in the case of *Railroad v. Board of Education*, 35 Utah, 13, 99 Pac. 263, and on which case plaintiff's counsel relies the writer of this opinion used language which would justify counsel in making the foregoing contentions. The judgment in that case, however, was not reversed or modified upon the cross-assignment of error, and this court, since that case was decided, has in no case reversed or modified a judgment in favor of the party assigning cross-errors upon such cross-assignment of errors. Appeals in this jurisdiction are permitted only from final judgments, and in case it is intended to reverse or modify a judgment a cross-appeal is as necessary by the party seeking the reversal or modification of a judgment in his favor as is the principal appeal. True, as pointed out in the case referred to, the cross-appellant may avail himself of the bill of exceptions and of the whole record, if the same is brought to this court, which is prepared and filed by the principal appellant. It, however, is not true, as there intimated, that he may also reverse or modify the judgment in his favor upon his cross-assignment of errors without a cross-appeal. If he desires to reverse or modify the judgment in his favor, he must serve notice of his cross-appeal and assign his errors in support thereof. As a matter of course, if he does not desire to reverse or modify the judgment, but merely intends to point out errors which neutralize, modify, or meet the assignment of errors of the principal appellant, he may assign such cross-errors for that purpose without serving a notice of cross-appeal. The taking of a cross-appeal in this jurisdiction is so simple, and, withal so free from labor, trouble, or expense that it is always safer and more prudent to serve notice of a cross-appeal than merely to rely on cross-assignments of error. We have made the foregoing observa-

tions and do so unhesitatingly, so as not to mislead the profession by relying on what is said in the case of *Railroad v. Board of Education*, supra.

For the reasons stated, the judgment is reversed, and the cause is remanded to the district court of Weber county, with directions to set aside its findings of fact and conclusions of law in which it found that the appellants are in default in the payments on the purchase price under their contract and to substitute findings and conclusions in harmony with this opinion, and, further, to modify the findings, conclusions of law and judgment of foreclosure so as to make plaintiff's rights subject to the rights of appellants in the mortgaged premises; appellants to recover their costs on this appeal.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

(56 Utah, 430)

**VAN ORDEN v. BOARD OF EDUCATION  
OF CACHE COUNTY SCHOOL DIST.  
et al. (No. 3496.)**

(Supreme Court of Utah. July 2, 1920.)

**1. Prohibition ☞25—General demurrer tests sufficiency of plaintiff's allegations.**

General demurrer to plaintiff's affidavit and petition for writ of prohibition tests the sufficiency of the grounds complained of as invalidating proposed bond issue and sale.

**2. Schools and school districts ☞97(4)—Time for keeping polls open at bond election not controlled by general election statute.**

In view of Comp. Laws 1917, § 5839, providing the revised statutes establish the laws respecting the subjects to which they relate, section 2111, fixing time for which polls shall be opened at the general election, does not control a special election under section 4627 for bonding a school district of the first class, and the school board may provide polls shall be opened between 1 and 7 o'clock p. m., it being incumbent on board to give notice of time and place of election, and to exercise a reasonable discretion as to how long the polls should remain opened.<sup>1</sup>

**3. Schools and school districts ☞97(4)—Resolution and notice for bond election held not to invalidate it.**

Resolution of school board of district of the first class calling for election on question of a bond issue, and notice of the election as published and posted, providing the question should be submitted to the qualified voters and taxpayers, did not invalidate the election; a qualified voter and taxpayer, under Comp. Laws 1917, § 4630, being one who has registered and paid taxes.

<sup>1</sup> *Whitmore v. Carbon County*, 36 Utah, 394, 104 Pac. 222.

**4. Schools and school districts §97(1)—Bond issue to improve schoolhouses and make additions held authorized; "Improvement."**

Bond issue by school district of first class for making improvements to present schoolhouses and for additions held authorized by Comp. Laws 1917, § 4627, authorizing such issues for improving the grounds, etc., "improvement" meaning a valuable useful addition, as buildings, fences, etc., are improvements of real estate, and repairs and additions are improvements of buildings.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement.]

Original application for writ of prohibition by Peter E. Van Orden against the Board of Education of Cache County School District and others. Application denied.

C. W. Boyd, of Salt Lake City, for plaintiff.  
J. C. Walters, of Logan, for defendants.

CORFMAN, C. J. This is an original proceeding commenced in this court by the plaintiff as a citizen, resident, and taxpayer of Cache county school district to prohibit the latter from issuing and selling its bonds voted at a special bond election held in said district February 17, 1920.

The question submitted at the election to the voters of the school district, in so far as may be necessary for consideration here, was:

"Shall the board of education of Cache county school district, Cache county, Utah, be empowered to issue and sell its negotiable bonds in the sum of four hundred thousand (\$400,000.00) dollars for the purpose of purchasing school sites, building schoolhouses, supply the same with \* \* \* furniture and the necessary apparatus, and improving buildings and grounds, said bonds to be issued in denomination of \$1,000.00," etc.?

At an election held pursuant to notice, 778 votes were cast in favor and 327 against the issuance of said bonds. The board of education of said district thereupon proceeded, after the necessary preliminary steps had been taken, to negotiate the sale of the bonds as voted for at said election.

The plaintiff's affidavit and petition for a writ of prohibition challenge the legality of the bonds and the right of issuance and sale thereof by the said school district upon three grounds, namely:

"(1) That the notice calling such election provided that the polls should be open between the hours of 1 o'clock p. m. and 7 o'clock p. m. of said day, and the polls were actually open only between said hours, whereas the laws of the state of Utah require that at all elections the polls shall be open between the hours of 7 o'clock a. m. and 7 o'clock p. m. (2) That the resolution calling said election and the notice of election provided that the question of issuing said bonds should be submitted to the 'qualified voters and taxpayers,' whereas the

laws of the state of Utah require that such question shall be submitted to the 'registered voters residing in the district who shall have paid a property tax in the year preceding such election.' (3) That the resolution calling such election and the notice of election as published and posted provide that a portion of funds to be derived from the sale of said bonds shall be used for the purpose of making improvements to existing schoolhouses, whereas there is no authority under the laws of the state of Utah whereby a board of education may issue and sell bonds for any other purpose than purchasing school sites, building or purchasing one or more schoolhouses, and supplying the same with furniture and the necessary apparatus, for improving the grounds, and for the refunding and redemption of all or any portion of the outstanding bonds in any district."

[1] To the plaintiff's affidavit and petition the defendants have filed a general demurrer, thus testing the sufficiency of the grounds complained of by plaintiff as invalidating the proposed bond issue and sale.

1. The first question presented by the plaintiff, therefore, is whether or not the resolution of the school board calling the election and the notice of election as posted and published providing that the polls should be open between the hours of 1 o'clock p. m. and 7 o'clock p. m., and the fact that the polls remained open only during said hours, invalidated the election.

Cache county is a school district of the first class.

Practically all the laws of our state appertaining to the establishment and maintenance of our public school system are to be found under title 90, Comp. Laws, Utah 1917, as amended by the provisions of chapter 84, Laws Utah 1919. With respect to special elections for the purpose of bonding a school district of the first class, section 4627, Comp. Laws Utah 1917, provides that the board of education may submit the question of bonding to the registered voters who are taxpayers of the district. Section 4628 prescribes the manner in which such an election may be called and that the notice of the election shall contain, among other things, "the time and place of holding the same" and "the time during which the polls will remain open." The section of the statute under consideration being silent as to the hours, the defendant contends that the time the polls shall remain open is to be determined by the board of education and fixed by them at the time of calling an election. The plaintiff makes the contention that the provisions of title 27, Comp. Laws Utah 1917, with respect to general elections, should govern. Section 2111 under said last-mentioned title provides:

"At all elections, the polls shall be opened at seven o'clock a. m., and continue open until seven o'clock p. m. of the same day."

Both parties agree that by reason of section 4628, *supra*, providing that the notice of the election shall prescribe the time during which the polls shall remain open, said section presupposes that the hours should be fixed, either by action of the board or by some statute in order to hold a valid election. That must be conceded.

The provisions of title 27, c. 1, *supra*, relied on by the plaintiff, deal with a "general election." Under the aforesaid title and chapter, it is provided by section 2100 thereof that—

"There must be held throughout the state on the first Tuesday after the first Monday in November in the year 1898, and biennially thereafter, an election to be known as the general election."

[2] Section 2101 of the same chapter defines a general election to be "for the purpose of choosing in the proper years therefor as specified by the Constitution and the laws, one or more of the following officers, to wit," (naming public officers and not including municipal or school officers). Sec. 2111, *supra*, provides that at all elections the polls shall remain open from 7 o'clock a. m. until 7 o'clock p. m. of an election day. A mere cursory reading of the provisions of chapter 1 under said title 27 ought to convince the most critical that the Legislature is there dealing with general elections held for the purpose of electing public officers as distinguished from all other elections. So, too, we think it is apparent that under title 90, *supra*, the Legislature is dealing solely and independently with matters concerning the public schools, under which title is found section 4627, providing for a "special election for bonding district," and section 4628, providing how an election shall be called for that purpose. As a matter of interpretation of statutes, it is provided by section 5839, Comp. Laws Utah 1917, that "the Revised Statutes establish the laws of this state respecting the subjects to which they relate." In view of the foregoing section, 5839, we would, in our opinion, be going far afield to attach any weight or importance to the provisions of section 2111, *supra*, when it is so patent that the Legislature by that act was dealing with the election of officers, an entirely different subject from the bonding of a school district. As we read the provisions of section 4628, it was incumbent upon the school board, the time not being fixed by the statute relating to special school bond elections, to give notice of the time and place of holding the bond election under consideration. Further, we are of the opinion that the requirements of said section 4628 that the notice of election shall prescribe the time which the polls shall remain open imposes upon the board the duty of exercising a sound and reasonable discretion as to what hours the polls shall remain open in order to best subserve the interests and convenience of the

qualified voters within the district. We are not prepared to say, at least in the absence of some showing to the contrary, that the hours fixed in the notice, from 1 o'clock p. m. to 7 o'clock p. m., were not reasonable and best suited to subserve the interests and accommodate the voters of the district. We therefore hold that the validity of the bonds voted for cannot be questioned by reason of the first objection urged against them by the plaintiff.

2. We shall next consider whether the fact that the resolution calling an election and the notice of the election as published and posted providing that the question of issuing bonds should be submitted to the "qualified voters and taxpayers" render the election an illegal one.

The qualifications of the electors are prescribed by section 4630, Comp. Laws Utah 1917, which provides:

"Every registered voter residing in any school representative district in which any election is held for the purpose of determining the question of issuing bonds for such school district, and who shall have paid a property tax therein in the year preceding such election, shall be entitled to vote at any such election. Challenges for cause by any qualified voter shall be allowed at such election, and promptly decided by the judges conducting the same."

We think the term "qualified voters and taxpayers" as employed in the notice was equivalent to "registered voters, \* \* \* who shall have paid a property tax, \* \* \* as provided in the statute." Necessarily a qualified voter and taxpayer must be one who has registered and paid a property tax. *McLaurin v. Tatum*, 85 S. C. 444, 87 S. E. 560; *Whitmore v. Carbon County*, 36 Utah, 394, 104 Pac. 222. Moreover, in the case last above cited this court held:

"The statute itself prescribes the qualifications of such electors. It was not essential to set them forth in the notice. \* \* \* The function \* \* \* of the notice is, not to notify the public \* \* \* what the law is, but to notify them of the proposed action to be taken," etc.

[3] We find no merit in plaintiff's contention that the submission of the question to be voted upon and the notice given invalidated the election.

3. Lastly, the plaintiff questions the validity of the bond issue for the purposes designated by the board of education in the resolution calling the election and in the notice posted and published.

[4] It is provided by section 4627, Comp. Laws Utah 1917, that—

"The board of education may \* \* \* call an election in each school representative precinct of the district, and submit to the taxpayers of the district whether bonds of such district shall be issued and sold for the purpose of raising money for purchasing school sites,

for building or purchasing one or more schoolhouses, and supplying the same with furniture and necessary apparatus, for improving the grounds, and for the refunding and redemption of all or any portion of any bonds outstanding in such district."

The resolution passed and the notice posted and published designated, among other purposes expressly authorized by statute, the purposes of making "improvements to present schoolhouses" and also "for additions to present schoolhouses," and, we think, rightly so. Counsel for plaintiff concedes that additions to present schoolhouses may be considered within the meaning of the statute under consideration wherein it is provided that one of the purposes may be "building a schoolhouse," but he contends that the statute does not authorize the issuance and sale of bonds for the purpose of "improving existing buildings." The term "improvement," as defined by the Standard Dictionary, means "a valuable or useful addition to or modification of something; as, buildings, fences, etc., are improvements of real estate; repairs or additions are improvements of buildings." Webster defines the term as a "betterment." We think the expression "for improving the grounds," found in the section last referred to, when taken in its ordinary and general acceptance, must be held to mean and include such improvements as "additions" and "improvements to existing buildings" upon school grounds. As we view the phrase "for improving the grounds," found in section 4627, it necessarily has a comprehensive meaning, and, if the expression is to be given effect at all, it must be held to include all those objects or purposes which tend to make a school ground fit and serviceable for the proper care and housing of school children and the conducting of the school work. It would indeed be a senseless thing to say that the district may bond for new buildings or new additions, but may not, under the statute, bond for the improvement of existing buildings so that they may become more convenient and serviceable when the same may be done, as is oftentimes the case, at a mere nominal expenditure as compared with the cost of building new structures.

After a careful review of the proceedings of the defendant board of education, and duly considering all the questions raised by plaintiff's petition and the contentions made by his counsel, we have become convinced that the proposed issuance and sale of bonds by the defendant is legal. It is therefore ordered that plaintiff's application for a writ of prohibition be, and the same is hereby, denied. Costs of the proceeding to be taxed to plaintiff.

FRICK, WEBER, GIDEON, and THURMAN, JJ., concur.

(56 Utah, 403)

BERGER v. SALT LAKE CITY. (No. 3458.)

(Supreme Court of Utah. July 1, 1920.)

1. Municipal corporations  $\S$  1016—Legislature may impose conditions on right to sue cities and towns.

The Legislature may impose such conditions on the right to sue municipalities as in its judgment may seem wise and proper.<sup>1</sup>

2. Municipal corporations  $\S$  816(11)—No recovery in excess of claim in notice to city without pleading excuse.

Plaintiff suing city could not recover for permanent injuries an amount in excess of that claimed in notice to city, under Comp. Laws 1917,  $\S$  816, 817, not indicating that she was permanently injured, in absence of allegations and proof of an excuse for the failure to allege injuries to be permanent and to claim larger amount.<sup>2</sup>

3. Municipal corporations  $\S$  816(11)—Pleading held to authorize recovery of excess of that claimed in notice.

Claimant against city by alleging and proving that he did not know, and could not in exercise of reasonable diligence have discovered, the serious consequences of the injury within the 30 days in which he was required to give the city notice, under Comp. Laws 1917,  $\S$  816, 817, and that failure to fully describe consequences at such time was through no fault or negligence on his part, may recover an amount in excess of that claimed in notice, in view of section 6619.

4. Municipal corporations  $\S$  771—Not liable for ordinary accumulations of snow and ice on sidewalk.

A city is not liable for injuries from ordinary accumulations of snow and ice on sidewalk, the failure to remove such accumulations not constituting negligence.

5. Negligence  $\S$  1—"Negligence" in general defined.

Negligence consists in doing or omitting to do any act which an ordinarily prudent and careful person under the same circumstances would do or omit to do, but not in doing or omitting to do an act which can only be done or prevented by the exercise of extraordinary exertion or care or by the expenditure of extraordinary sums of money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

6. Municipal corporations  $\S$  771—Liable for injuries from snow and ice placed on streets or sidewalks.

Cities and towns are liable for injuries from snow and ice placed on streets or sidewalks by their own acts.

<sup>1</sup> Sweet v. Salt Lake City, 43 Utah, 306, 134 Pac. 1167; Dahl v. Salt Lake City, 45 Utah, 544, 147 Pac. 622.

<sup>2</sup> Mackay v. Salt Lake City, 39 Utah, 247, 81 Pac. 81, 4 Ann. Cas. 824; Connor v. Salt Lake City, 38 Utah, 248, 78 Pac. 479; Sweet v. Salt Lake City, 43 Utah, 306, 134 Pac. 1167.

Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.

Action by Emma S. Berger against Salt Lake City. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. H. Folland, City Atty., and H. H. Smith, Asst. City Atty., both of Salt Lake City, for appellant.

Frank B. Scott and Willard Hanson, both of Salt Lake City, for respondent.

FRICK, J. The plaintiff obtained judgment against Salt Lake City for damages for personal injuries which she sustained by falling on one of the sidewalks of said city, and the city appeals.

The plaintiff, in her third amended complaint, after stating the necessary matters of inducement, alleged that during the winter of 1916-17 "large quantities of snow and sleet had fallen and banked upon the said sidewalk, and had partially melted, and had become packed and frozen in such a manner as to leave an uneven surface, and to lay in ridges in rounded form and bumps, so that said sidewalk was slippery and dangerous to pedestrians, \* \* \* and by reason of pedestrians tramping over the same, and by reason of the freezing and thawing of the said snow and sleet, the surface became rough and full of ridges and depressions which were several inches in depth"; that the appellant had negligently failed to remove said snow and ice from said sidewalk, and had failed "to exercise reasonable care to keep said sidewalk in a reasonably safe condition for pedestrians"; that on the 15th day of January, 1917, while walking on said sidewalk, "and while in the exercise of due care and caution," the plaintiff, "by reason of said unevenness and roughness of said snow, ice, and sleet," slipped and fell and fractured both bones of her left arm; that on January 25, 1917, plaintiff filed her verified claim against said city, "stating the particular time at which the injury happened, and designating and describing the particular place in which it occurred, and also particularly describing the cause and circumstances of said injury and damages, and so far as known to claimant the name of the person, firm, or corporation who created, or brought about or maintained, the defect, obstruction, and condition causing such accident and injury, and also stating the nature and probable extent of such injury, and the amount of damages claimed on account of same"; that said claim was disallowed; that by reason of such injuries plaintiff had sustained damages in the sum of \$5,000, for which she demanded judgment.

The appellant filed its answer to the complaint, in which, after admitting the matters of inducement, and denying all negligence, it, as affirmative defenses, averred: (1) Con-

tributory negligence; (2) that the injuries were caused by natural causes over which appellant had no control; and (3) that the plaintiff had not presented her claim for damages as provided by our statute, stating the particulars.

A great many errors are assigned on the part of appellant, which are exhaustively argued in its brief. The first assignment we shall consider relates to the filing of plaintiff's claim for damages.

Our statute (Comp. Laws Utah 1917, § 816), which was in force when this action was commenced, so far as material here reads as follows:

"Every claim against an incorporated city or town for damages or injury alleged to have been caused by the defective, unsafe, dangerous, or obstructed condition of any street, alley, crosswalk, sidewalk, culvert, or bridge, \* \* \* or from the negligence of the city or town authorities in respect to any such street, alley, crosswalk, sidewalk, culvert, or bridge shall, within *thirty days* after the happening of such injury or damage, be presented to the city council \* \* \* in writing, signed by the claimant or by some person by claimant authorized to sign the same, and properly verified, stating the particular time at which the injury happened, *and designating and describing the particular place in which it occurred, and also particularly describing the cause and circumstances of the said injury or damages, \* \* \* and also stating the nature and probable extent of such injury, and the amount of damages claimed on account of the same; \* \* \** and no action shall be maintained against any city or town for damages, or injury to person or property, unless it appears that the claim for which the action was brought was presented as aforesaid to the city council \* \* \* and that such council \* \* \* did not within ninety days thereafter audit and allow the same." (Italics ours.)

The succeeding section provides that unless the claim is presented to the city council "in the manner and within the time in section 816 specified" it shall be barred.

We call special attention to the parts that we have italicized, which, as will appear hereinafter, are very material, for the reason that certain decisions of this court are relied upon. At the time those decisions were rendered, however, the words in italics were not in the statute, but were thereafter inserted by amendment.

The particular question on this appeal respecting the statute arose as follows:

The plaintiff, within the time provided by statute, filed a claim duly verified, in words as follows:

"Salt Lake City, a Municipal Corporation, to Emma S. Berger, Dr.

"Jan. 15, 1917.

"To broken left forearm suffered by the claimant by reason of slipping and falling on sidewalk in front of 167 North Main street, of which a Mr. Jensen was the occupant, Tuttle Bros.

agents, and Mr. W. E. Smelles. Such falling was caused by the dangerous condition of such sidewalk by reason of four inches of ice and frozen snow being allowed to accumulate thereon, and to remain on same for several weeks last past, contrary to the provisions of the city ordinance in regard to the removal of snow from sidewalks. Both the radius and ulna bones being broken completely off, and there being the possibility of it being six weeks at least before the claimant will be able to use the arm at all. The accident happened about three or four o'clock in the afternoon of January 15, 1917. \$1,000.00."

It will be observed that there is no claim or intimation that the result or effects of the injury would be permanent, and the amount claimed is limited to \$1,000. Notwithstanding that fact, however, the court permitted the plaintiff to recover upon the theory that the effects of the jury were permanent, and also permitted her to claim the sum of \$5,000 in her complaint, and allowed a recovery and entered judgment for a sum in excess of \$1,000.

Appellant's counsel, with much vigor, argue that under our statute the injured claimant is limited in her recovery to the amount specified in her claim. Upon the other hand, plaintiff's counsel contend that such is not the law, and in support of their contention cite *Mackay v. Salt Lake City*, 29 Utah, 247, 81 Pac. 81, 4 Ann. Cas. 824, and *Connor v. Salt Lake City*, 28 Utah, 248, 78 Pac. 479.

While it is true that in the *Mackay Case* it was held that the plaintiff was not limited in his recovery to the amount stated in his claim, yet it is also true that at the time the injury arose in that case the statute did not require the claimant to state the "amount of damages claimed." After that case was decided, however, the statute was amended so as to require the claimant to state the amount of damages that he claimed. The changes in the statute since the *Mackay Case* was decided are indicated by the italicized words. It would, therefore, be folly to contend that by the amendments to the statute no change was intended or effectuated. The statute now requires the claimant to state the "amount of damages claimed." The change in the statute was no doubt effectuated for the express purpose of obviating the conclusion reached in the *Mackay Case*. The change having been made, it is our duty to give it effect. To that effect is the holding in a later case. *Sweet v. Salt Lake City*, 43 Utah, 306, 134 Pac. 1167.

While it is true that in the *Sweet Case* the question arose in a somewhat different form, yet the principle was the same there as it is here. In the *Sweet Case* the decision in the *Mackay Case* is referred to, and the changes in the statute are pointed out.

[1] The decisions of this court (*Sweet v. Salt Lake City*, supra, and *Dahl v. Salt Lake City*, 45 Utah, 544, 147 Pac. 622) are in har-

mony with the overwhelming weight of authority, which is to the effect that it is within the power of the Legislature to impose such conditions upon the right to sue cities and towns, which are merely arms of the state government, as in its judgment may seem wise and proper, and that the conditions which are thus imposed are conditions precedent, and cannot be ignored either by the claimants or by the courts.

In determining the effect of a particular statute upon this subject it is of the utmost importance to keep in mind its terms and provisions. An examination of the cases will disclose that the terms of the statutes in the different states vary to a considerable extent, which fact is frequently overlooked by counsel in citing cases in support of their respective views. In many statutes it is not made essential to state the amount of damages claimed; and hence a failure to do so is not controlling. Under such statutes, if the amount be stated judgment may, nevertheless, be obtained in excess of the amount stated. There are statutes, however, like ours, in which it is provided that the amount of damages claimed shall be stated, and, where such is the case, the courts have held that the recovery must be limited to the amount stated, unless for good and sufficient cause an amendment to the claim has been allowed to be filed. The statute of the state of Iowa is in effect like ours. In the case of *Marsh v. Benton County*, 75 Iowa, 469, 39 N. W. 713, it was held error to permit the plaintiff to recover an amount in excess of the amount claimed, although the judgment was based "on the ground that her injuries were much more serious than at first supposed." The court held that the amount stated in the claim controlled unless an amendment of the claim was first made and filed. The Iowa statute, like ours, provides that no action shall be brought or maintained unless a claim has been presented and payment demanded and the amount of damages claimed stated therein. The court, in the course of the opinion, says:

"Such amount must be stated, and the payment thereof refused, before an action can be maintained. If, after an action has been commenced, something occurs which the plaintiff believes entitles him to a larger amount, such claim must be presented to the board. \* \* \*

The Supreme Court of Iowa, in two later decisions, approved and followed the decision in the case just referred to, namely, *Van Camp v. City of Keokuk*, 130 Iowa, 716, 107 N. W. 933, and *Buchmeyer v. City of Davenport*, 138 Iowa, 623, 116 N. W. 695. In a recent case from Montana (*Berry v. City of Helena* [Mont.] 182 Pac. 117) the Supreme Court held that the provisions of the statute must be complied with. The court said: "It is not an answer to say that the city officials obtained correct information from

other sources and were not misled. The only right which plaintiff can assert against the city is the right granted by statute. Compliance with the law on her part is a necessary prerequisite on her part to institute this action. \* \* \* To the same effect are *Walters v. City of Ottawa*, 240 Ill. 259, 88 N. E. 651; *MacMullen v. City of Middletown*, 187 N. Y. 87, 79 N. E. 863, 11 L. R. A. (N. S.) 391; and *Ridgeway v. City of Escanaba*, 154 Mich. 68, 117 N. W. 550. Numerous other cases could be cited to the same effect, but it is unnecessary to do so.

[2] As pointed out, the plaintiff in this case stated the amount claimed by her, but after doing so was permitted, without showing any cause or reason therefor, to recover an amount in excess of the amount claimed. In her claim she did not indicate that she was permanently injured, nor did she claim anything in excess of \$1,000. In her complaint, however, without alleging any cause or excuse for so doing, she alleged that she had sustained permanent injuries, and that she had suffered damages in the sum of \$5,000; and, notwithstanding the statement contained in her claim and the objections of the appellant, the court, without pleadings or proof of any cause or excuse for the departure, permitted her to recover for permanent injuries an amount in excess of what she had stated in her claim. The court thus in effect ignored the legislative requirement that the amount of damages must be stated in the claim. We say ignored the requirement advisedly, for the reason that if the amount stated in the claim may be disregarded without proper cause or excuse, then there is no reason whatever for requiring the amount to be stated in a claim. The provision in the statute to that effect is therefore treated as a nullity. That amounts to a judicial repeal of an important provision of the statute.

[3] We are of the opinion that, as suggested in the case of *Sweet v. Salt Lake City*, supra, namely, that in case the claimant, within the 30 days given him by the statute, is unable, or, in the exercise of reasonable diligence, does not, discover and know, and hence cannot state, all of the consequences of the injury, and that he thereafter discovers that the natural and proximate consequences of the injuries stated in his claim have developed to be more serious than was known at the time he filed the same, he should not be prevented from recovering for such consequences, provided he fully and fairly pleads and proves the facts, and fully and fairly states the reasons why he could not at the time state all the consequences of the injuries described in his complaint, and also states in what particulars the consequences are more serious, and that they have not been made so through his negligence or fault. The city will thus be given ample opportunity to inquire into the reasons advanced by the claimant, and will

have the same opportunity to investigate the condition of the injuries described in the claim as it had when the claim was first filed, and can in no way be legally prejudiced in the premises, while, upon the other hand no injustice will result to the claimant. Moreover, the provisions of the statute will thus be observed and complied with in that the amount claimed will control, unless for the reason stated the consequences have developed to be more serious than they were when the claim was filed, and for that reason could not be stated within the time required by the statute. The amendment to the pleadings suggested, if allowed, is permitted in the interest of justice and for good cause, and does no violence to any provision of the statute, but is in harmony with our Comp. Laws Utah 1917, § 6619.

There is nothing to the contrary in any of the cases, not even in those from Iowa. Counsel for plaintiff have, however, cited some cases which they contend permit a recovery in excess of the amount claimed without showing any cause or excuse therefor. Among others they cite five decisions from the Supreme Court of Washington. Counsel have evidently overlooked the fact that after all of those cases were decided the Washington statute was amended, and that the Supreme Court of Washington thereafter followed the decisions we have hereinbefore referred to.

We think the rule herein laid down is practical, and if properly applied will reflect justice in all cases without in any way impairing either the purpose or the spirit of the statute.

We are of the opinion, therefore, that in view of the statement contained in the claim as filed, and in the absence of the suggested averments in the complaint, the court erred in permitting plaintiff to recover an amount in excess of the amount stated in the claim as filed.

It is next contended that the court erred in overruling appellant's motion for a nonsuit; that the court erred in overruling appellant's motion for a new trial; and that the evidence, for various reasons stated, does not sustain the verdict and judgment. These assignments may be considered together.

The evidence on the part of the plaintiff is to the effect that on Christmas Day preceding the accident there was an unusually heavy fall of snow in Salt Lake City; that much snow had fallen during the month of December, 1916, and that some more fell in January, 1917, before the accident; that the city had attempted to clear the sidewalks, including the one in question, with a snowplow; that the pedestrians had, however, tramped down the snow, and the snowplow did not clear the walks; that the accident occurred in front of a vacant house, at which place snow to a considerable depth was left



on the sidewalk for the reason that the snow had been tramped down and the snowplow had passed over it; that the surface of the snow at the point in question was rough and uneven. One of the plaintiff's witnesses testified that she had passed over the place many times; that the elevations and depressions were entirely due to the "footprints" of the pedestrians; that it was a very cold winter, with "unusual snowstorms"; that people had walked over the entire width of the sidewalk, and that it was rough from "footprints." The plaintiff, quoting from the bill of exceptions, testified that the surface was "uneven and slippery; and as I was going over further toward the middle of the sidewalk I fell"; that there were "large and small footprints, and seemed to have slanted sidewise, and the larger ones—they were between two and four inches deep." On cross-examination she said, "Well, I looked at the sidewalk, and it was all covered with snow and rough with footprints, and when the snow had been thawed the people had tramped it—made it very rough." She further testified, in answer to a certain question put to her by appellant's counsel: "No, it wasn't exactly a ridge; it was the slant on which my foot slipped; it wasn't what you might call a ridge; it was a little slanting, and with it being frozen ice and snow it was very difficult to walk over." There is much more evidence to the same effect.

On the part of the defendant (and we only refer to these facts because they are not disputed or contradicted in any way) it was shown that during the month of December, 1916, over 31 inches of snow had fallen, and that there were slight falls of snow during the first 15 days of January, 1917; that the weather was cold so that the highest temperature during the first 15 days of January was on the 5th, when the temperature rose to 38 degrees, and that after the 6th, and up to the 15th day of January, it was always below the freezing point; that at the time of the accident there were 396.97 miles of paved, that is, concrete or cement, sidewalks in Salt Lake City, and approximately 1,000 miles, inclusive, of the paved walks; that the only way the city had of clearing the walks outside of the business section was by means of snowplows, which were constructed of wood in triangular form, and in passing over the walks, when propelled by a horse, would make a path about four feet wide. In case the snow was tramped down, however, the snowplows could not clear the snow down to the cement walks, but would clear a path for the pedestrians to walk in. It was also stipulated that at the point of the accident there was a grade or incline of  $8\frac{1}{2}$  per cent. in the walk, but plaintiff's counsel concede that it was not claimed that the incline was improper; nor was it contended that the sidewalk itself was not in good condition.

Upon substantially the foregoing facts the court submitted the case to the jury upon the usual instructions respecting the duty of cities to keep their streets and sidewalks in a reasonably safe condition, etc.

The question to be determined is, Do the ordinary rules of law respecting the duty of cities and towns to exercise ordinary care and diligence to maintain the streets and sidewalks in a reasonably safe condition and free from dangerous obstructions apply to the natural and ordinary accumulations of snow and ice?

The question, in the form that it is presented by this record, is an open one in this jurisdiction. It may be conceded that there are some decisions of courts of last resort where it was held that facts like those in this case respecting the condition of the sidewalk, independently of other considerations, were sufficient to take the facts to the jury. The difficulty with all of those cases is that in none of them is a clear and definite rule or test stated which should govern either court or jury in determining what constitutes negligence in not removing snow and ice which naturally falls and accumulates on the sidewalks. In all of them it is stated, however, that merely because snow has fallen, and snow and ice have accumulated on the sidewalks, and that thereby the walks have become rough and slippery, does not give rise to a cause of action to one who is injured in passing over them. In those cases it is also held that the accumulations must amount to "dangerous obstructions," but no rule or test is laid down with respect to what a jury may find to constitute such a dangerous obstruction. The whole question is therefore left to the whim or caprice of the jury, which may on one day find certain accumulations to be dangerous obstructions and on the next day may find one equally as bad or worse not to constitute a dangerous obstruction. The cases, therefore, establish neither a rule nor a guide, and require an extraordinary amount of care to be exercised on the part of cities and towns in our climate, and hence should not be followed. There are, however, well-considered cases in which the courts have laid down some principles that if followed will lead to reasonable, just, and fair results. In Michigan it has always been held that in the absence of a special statute, cities are not liable for injuries resulting from the usual and natural accumulations of snow and ice on streets or sidewalks. The rule was first stated in the case of McKellar v. Detroit, 57 Mich. 158, 23 N. W. 621, 58 Am. Rep. 357, and was followed in Rolf v. City of Greenville, 102 Mich. 544, 61 N. W. 3. To the same effect is Jefferson v. City of Sault Ste. Marie, 166 Mich. 340, 130 N. W. 610.

Harrington v. City of Buffalo, 121 N. Y. 147, is, in many respects, a parallel case with the one at bar. Recovery was, however, dis-

allowed as a matter of law. In *Hatch v. City of Elmira*, 142 App. Div. 174, 126 N. Y. Supp. 863, the surface of the sidewalk was described as "humpy" and "lumpy," and that it was uneven, rough, and slippery, and made so by the people tramping down the snow. Recovery was denied as a matter of law. To the same effect is *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729.

In *Dapper v. City of Milwaukee*, 107 Wis. 88, 82 N. W. 725, the decision is correctly reflected in the first headnote, wherein it is said:

"In the absence of structural defects which combine with the action of the elements in causing accumulations of ice and snow on a sidewalk, the condition of a sidewalk crossing an alley, which has become uneven by falling snow and the melting and freezing of the same while used by persons and teams, does not constitute an actionable defect."

In the opinion it appears that the sidewalk was substantially in the same condition as in the case at bar. In that case it is also pointed out under what circumstances and conditions cities may become liable for dangerous obstructions on sidewalks which are due to the accumulations of ice and snow.

In *Norwalk v. Tuttle*, 73 Ohio St. 242, 76 N. E. 617, the Supreme Court of Ohio gave the matter very careful consideration. It is there held that a city is not liable for the natural accumulations of ice and snow upon the sidewalks, but in case such accumulations are made unsafe or dangerous by reason of ice or snow which is placed there, or caused to be there, by the acts of the city, it then is responsible for such conditions. In the course of the opinion it is said:

"Recurrence to a very elementary proposition seems necessary. The proposition is that in cases of this character there is no liability where there has been no default in duty. No default of the municipality appears in cases of this character when the peril is not due to defective construction or to any other act of the city contributing to or causing the dangerous condition of the street, but where that condition is due solely to the action of the elements. In a climate where the winter brings frequently recurring storms of snow and rain and sudden and extreme changes in temperature, these dangerous conditions appear with a frequency and suddenness which defy prevention, and, usually, correction. Ordinarily they disappear before correction would be practicable by any provision which the city might reasonably be expected to make. It is within common observation that without the presence of snow or rain, from the mere alternations of heat and cold operating upon the frozen earth beneath the walk, there result dangerous conditions of pavements which it would not be possible to prevent or correct. To hold that a liability results from these actions of the elements would be the affirmation of a duty which it would often be impossible, and ordinarily impracticable, for a city to perform."

See, also, *Chase v. City of Cleveland*, 44 Ohio St. 505, 9 N. E. 225, 58 Am. Rep. 843, where the question is carefully considered, and where it is held that the cities cannot be held liable for injuries caused by natural accumulations of snow and ice.

The Supreme Court of Missouri has also given the question careful attention. In *Reedy v. St. Louis Brewing Ass'n*, 161 Mo. 536, 61 S. W. 862, 53 L. R. A. 805, it is said:

"Running through all the cases to which our attention has been called on this subject, we find the general proposition that ice or snow upon a sidewalk or in a street is not to be classed with dangerous obstructions, such as a city is required to remove. It would be more accurate to say that it is a dangerous obstruction, but that it is excepted from the category of obstructions for which the city is liable upon the ground of the impracticability of the city's removing it. There are, for example, in this city many hundreds of miles of sidewalks upon which snow falls and ice forms when the weather suits, and immediately upon its fall the snow is beaten down by the feet of thousands walking over it. To some extent the sidewalks and streets may be and are cleared of such obstruction, but to remove it entirely or to a degree that would render it not dangerous is impracticable, and therefore not embraced in the law's reasonable requirements. There is another reason for making snow or ice, on the sidewalks and in the streets, an exception to that dangerous condition for which a city is liable; that is, when that condition exists generally, it is obvious and every one is on his guard. Any pedestrian on the sidewalk or traveler in the street is warned by all his surroundings that ice and snow abound, and consequently danger of slipping and falling is to be apprehended at every step. The law is reasonable in this as in all things."

That case is approved and followed in the later case of *Vonkey v. St. Louis*, 219 Mo. 37, 117 S. W. 733.

Substantially the same rule is laid down by the court in *Albritton v. Kansas City*, 192 Mo. App. 574, 188 S. W. 239: In that case it is pointed out that the ordinary rules applying to defects in or obstructions on sidewalks do not apply to the ordinary and natural accumulations of snow and ice.

In *Wilson v. City of Idaho Falls*, 17 Idaho, 425, 105 Pac. 1057, the rule adopted by the Supreme Court of Idaho is stated in the first headnote as follows:

"In an action against a city for injuries alleged to have been caused by a slippery sidewalk occasioned by the melting and freezing of snow, the travel over the sidewalk and the melting and freezing of the ice and snow thereon having left the sidewalk in a rough and slippery condition, held that the evidence is not sufficient to show the negligence of the city or its liability."

In *City of Aurora v. Park*, 12 Ill. App. 122, substantially the same doctrine is laid down. [4] Nothing could be accomplished by fur-

ther quoting from the decided cases. It is, however, important to keep in mind the fact that in some states there are statutes requiring cities and towns to remove snow and ice from sidewalks. In some states such provisions are incorporated into the city charters. In most of those states, however, the statutes require that actual notice for a specified time be given to the city of the condition of the sidewalk before liability attaches. See *Hatch v. City of Elmira*, supra. Such is now the law in the state of Rhode Island, having been changed after the Supreme Court in that state had applied the ordinary rule. Such a law is just, fair, and rational. In the case at bar the city was found negligent for the existence of a condition which the undisputed evidence showed was practically impossible to avoid. If the cities and towns of this mountain country are to be charged with being negligent for not removing the natural accumulations of snow and ice from sidewalks, then negligence may be found to exist although the acts or omissions which are charged as negligent cannot by any reasonable effort be avoided. In this mountain country, where the cities and towns are located at an altitude of from 4,000 to 7,000 feet, and are, in some instances at least, located upon more or less steep inclines, and where the snowfall at times is great and continuous for a considerable period of time, and where the noonday sun, whose rays directly fall upon the southerly slopes and melt the snow and ice, causing water to flow over the sidewalks, which will freeze in the night and will make the walks rough and slippery, it is utterly impossible to keep all of the sidewalks free from either ice or snow. Take Salt Lake City as an example. With its concrete sidewalks covering a distance of almost 400 miles, with practically 600 miles more of open walks, the task to keep the walks free from snow and ice is exceedingly great. Moreover, it is a fact known to all that the people pass over the sidewalks constantly while the snow is falling, and as a general rule it is wet or moist when it falls, and while in that condition is being tramped down on the sidewalks. When thereafter snowplows come along they cannot remove the tramped down snow, and when it falls, as is usually the case, it freezes during the night, and the only way to remove the tramped down, frozen, and hard snow and ice is by means of pick and shovel, and, as all of us have experienced, that is a most laborious task. It should also be remembered that the snow falls upon every part of the 400 miles of sidewalk at the same time, and very many miles may be in a tramped down condition by the thousands of pedestrians who pass to and fro over it in going from and returning to their homes. To keep those sidewalks free from such accumulations of ice and snow as are described in this record

is therefore a most extraordinary task. To characterize as negligent a failure of the cities and towns of this state to keep the sidewalks free from the natural accumulations of ice and snow under circumstances which, as every one knows, are here stated entirely within the bounds of truth, is contrary to both reason and common sense.

[5] Negligence, in the eye of the law, consists in doing or omitting to do any act which an ordinarily prudent and careful person under the same circumstances would do or omit to do. The law does not condemn an act or omission as negligent which can only be done or prevented by the exercise of extraordinary exertion or care or by the expenditure of extraordinary sums of money. The law, as stated by the Supreme Court of Missouri in the case quoted from, requires only that which is reasonable.

In view of what has been said, how can it successfully be contended that the officials of Salt Lake City were culpably negligent (and that the taxpayers should respond in damages) for not accomplishing what it was unreasonable to expect? In this connection it may not be out of place to observe that it is reasonably clear that our statute under which cities and towns are required to exercise ordinary care to maintain the streets and sidewalks in a reasonably safe condition, and under which, in case a claim is filed as required by the statute, the cities and towns may be held liable for negligently failing to maintain the streets and sidewalks in such condition, was not intended to apply to the ordinary and natural accumulations of ice and snow. Under the statute the claim, together with the statements required therein, may be filed at any time before the expiration of 30 days after the injury which is complained of. This implies that the condition in the street or sidewalk of which complaint is made is not entirely ephemeral, and may be seen and examined into even after the 30 days have expired. This is not possible with the natural accumulations of snow and ice. The condition of the snow and ice, as all know, may, and most always does, change from day to day, and certainly changes in a very few days. Where the accident occurs, however, by reason of the alleged accumulations of snow and ice, and a claim is filed at or near the end of 30 days, the condition that existed at the time of the injury, and which was the alleged cause thereof, would have disappeared, and it would be useless for any city officer to make an examination of the place to ascertain the condition of the sidewalk. The statute, therefore, was not intended to meet such a condition. For that reason the statutes which require actual notice to the city, and provide that unless the condition is remedied within the time allowed by the statute the city is liable, are fair, just, and reasonable,

and are adapted to the actual conditions which they are intended to meet.

[8] We remark that by what we have said we do not wish to be understood as holding that the cities and towns of this state may not be held liable for injuries arising from the accumulations of snow and ice upon the streets or sidewalks which are placed there by their own acts. Under such circumstances the municipalities have notice of their own acts, and must respond in damages to persons injured through such negligence. We are not now dealing with such a case however.

While there are numerous other errors assigned and argued, in view of the conclusions reached those assignments are not material.

From what has been said it follows that the judgment should be, and it accordingly is, reversed, with costs.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

(56 Utah, 480)

**CHADWICK v. BENEFICIAL LIFE INS. CO.** (No. 3406.)

(Supreme Court of Utah. April 30, 1920.  
On Application for Rehearing, July 22, 1920.)

1. Appeal and error  $\S$  1099(1)—Opinion on former appeal law of case on subsequent appeal.

Opinion on former appeal is controlling on subsequent appeal as to all questions raised and passed on on former appeal.

2. Insurance  $\S$  253 — Insured held to have made statements in application.

In action on life policy, in which insurer sought to avoid policy on ground of false statements in application as to condition of his health, insured not having denied reading application before signing, he will be deemed to have made statements therein, where application expressly stated that no information with which insurer should be made acquainted had been withheld, that statements therein by insured constituted the basis of the policy, were true, and were offered to insurer as a consideration for the contract.

3. Insurance  $\S$  291(1)—Representations as to insured's health held material.

Representations in application for life policy as to condition of insured's health and as to consultation of physicians held material.

4. Insurance  $\S$  291(3)—Material representations as to health known false avoid policy.

If insured, at the time of making his application for a policy, has knowledge, or good reason to know, that he is afflicted with a disease that renders his condition serious, and that thereby his longevity will be prejudicially im-

paired, his statements and representations to the contrary, in reply to specific inquiries, constitute a fraud upon the insurer which invalidates the policy.

5. Insurance  $\S$  868(7) — Refusal to direct verdict for insurer held error.

In action on life policy, defended on ground that insured in application represented himself to be in good health, where it was conclusively established beyond the possibility of a doubt that insured was suffering from the disease from which he died at the time that he applied for the policy, and where there was uncontradicted testimony that insured himself stated shortly before making application that he was under constant care of a doctor, and that he was in serious condition, court's refusal to direct verdict for insurer on ground that false statements avoided the policy, in view of Comp. Laws 1917,  $\S$  1154, subd. 3, held reversible error.

Weber, J., dissenting.

Appeal from District Court, Weber County; J. D. Call, Judge.

Action by Maud Chadwick against Beneficial Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Young & Young, of Salt Lake City, for appellant.

A. G. Horn, of Ogden, for respondent.

CORFMAN, C. J. Plaintiff brought this action in the district court of Weber county to recover a judgment against the defendant on a life insurance policy issued by the defendant upon the life of her husband, J. Charles Chadwick, wherein she was named as the beneficiary. The policy was issued June 1, 1916, and attached thereto and expressly made a part thereof was a copy of the signed application of the insured, J. Charles Chadwick, dated May 29, 1916, containing the purported questions propounded by the defendant's medical examiner to, and the answers made by, the applicant. In compliance with Comp. Laws Utah 1917,  $\S$  1154, subd. 3, the policy contained the provision that "all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid or be used in defense under the policy unless it is contained in the written and printed application and a copy of such application is indorsed on the policy issued."

In so far as may become material for a proper consideration of the issues involved in this case the signed application indorsed or attached to and made a part of the policy contains these express agreements on the part of the insured:

"I hereby declare and agree that I am now \* \* \* in good health, and ordinarily have good health, and that in my statements and

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answers in this application, and to the medical examiners, no information has been or will be withheld touching my past and present state of health \* \* \* with which the Beneficial Life Insurance Company should be made acquainted; and that the statements and answers to the printed questions above, together with this declaration, as well as those made by the company's medical examiner, shall constitute the application and be the basis of this contract."

Also:

"I hereby agree that the foregoing statements made to the company's medical examiner are a part of my application for insurance, are declared to be true, and offered to the company as a consideration for the contract."

The insured, J. Charles Chadwick, died August 13, 1916, and thereupon, after refusal of the defendant company to pay the death loss under the policy, the beneficiary commenced this action in the usual form.

The case has been twice tried before a jury in the district court, and this is the second appeal to this court. The first appeal was by the plaintiff from a judgment entered upon a directed verdict in defendant's favor. We reversed that judgment, and ordered that the plaintiff be granted a new trial. Chadwick v. Beneficial Life Ins. Co., 181 Pac. 448. A new trial being granted, the defendant applied for and was granted permission to amend its answer, which, as amended, after admitting the issuance and delivery of the policy, the death of the insured, and its refusal to make payment, sets up the following defenses:

"(1) That the said policy of insurance was issued by this defendant and accepted by said Chadwick in the following express condition and agreement contained in said policy and made part of said contract of insurance, to wit: That the statements and answers contained in the application for insurance and in answer to the medical examiner of the defendant company, and on the faith of which said policy was issued, were in all respects true, and that no information had been withheld touching the past or present state of health of the applicant with which the defendant company should have been acquainted; and upon the further consideration, to wit, that the answers and statements so made in said application and to the medical examiner, together with the declaration contained in the said application form, should constitute the application, and be the basis of the contract between said Chadwick and the defendant company.

"(2) That the said Chadwick violated the conditions contained in said application form, and on faith of which the said policy of insurance was issued, in that he stated therein that he was in good health at the time of making application for insurance to the defendant company; and that, further, the said Chadwick in answer to said question No. 11 of the questions submitted to him as aforesaid by the medical examiner of the defendant company, to wit, 'Are you in good health so far as you know or believe?' answered, 'Yes;' whereas, the said

Chadwick at the time was, and for some time prior to applying for insurance to the defendant company had been, suffering with a disease which tended to prejudicially influence his health and impair his longevity, and from which disease the said Chadwick in fact died on or about the 13th day of August, 1916; and that at the time that the said Chadwick made his aforesaid application for insurance and answered the said question No. 11 submitted to him by the defendant's medical examiner as aforesaid the said Chadwick knew, or had reason to believe, that he was not in good health, and was afflicted with a disease which tended to prejudicially influence his health and impair his longevity.

"(3) That the said Chadwick further violated the conditions contained in said contract of insurance in that in the answer made to question No. 8 contained in the statement made to the medical examiner of the defendant company as aforesaid, which question reads as follows, to wit: 'Give name and address of physician last consulted,' the said Chadwick answered, 'None;' whereas, in fact, within the space of a few weeks prior thereto, he had consulted doctors at Afton, Wyoming, and at Ogden, Utah, in regard to the disease with which he was at such time afflicted and from which he died.

"(4) That the said Chadwick further violated the conditions contained in said contract of insurance in that in the answer made to R of question No. 5 contained in the statement made to the medical examiner of the defendant company as aforesaid, which question reads as follows, to wit, 'Have you ever had any of the following diseases? Of each illness state date, number of attacks, duration, severity, complications, and result, thus avoiding correspondence and delay. R. Rheumatism or gout'—the said Chadwick answered, 'No;' whereas, in fact, the said Chadwick was at such time suffering with a disease which he believed, or had reason to believe, tended to prejudicially influence his health and impair his longevity, and which, as the result of the opinion expressed to him by his physician, the said Chadwick then believed to be rheumatism."

Upon submission of the case to the jury on the second trial the defendant again moved the district court for a directed verdict in its favor, which was denied. The jury then returned a verdict in plaintiff's favor, and judgment was entered thereon against the defendant for the amount of the policy, interest, and costs. Motion for new trial was made and denied. Defendant appeals, and assigns as errors: (1) The denial of defendant's motion for a directed verdict; (2) the refusal to charge the jury as requested by defendant; (3) denial of motion for new trial; (4) that the evidence was insufficient to support the verdict, and that the judgment is contrary to law.

Briefly stated, the testimony shows that the insured had been a rancher by occupation, strong and vigorous until on about February 1, 1916, when he became afflicted with some malady causing him pains in the back. He then resided at Afton, Wyo., where he consulted a physician, one Dr. Reese, who

diagnosed the case and treated and advised with him about twice a week from February 1st until about the middle of March for what was supposed to be rheumatism. The malady did not yield to the treatment of Dr. Reese, and the health of insured became so seriously impaired that he could not perform his customary labors without resulting pain and distress. About the latter part of March the insured went to Ogden, Utah, and did not return to Afton until about July 1st. While at Ogden he was attended by Dr. Rich, who treated him and placed him in a plaster cast, which he was wearing on his return to Wyoming in July. He continued to grow worse, and finally died August 13th. After death an autopsy was performed on the body by Dr. Reese, who found and testified that the insured had died of tuberculosis of the spine. On the 29th day of May the insured made application for a life insurance policy to the defendant, in which application he expressly agreed and declared:

"I am now in good health, and that in my statements and answers in this application and to the medical examiner no information has been or will be withheld touching my past and present state of health \* \* \* with which the Beneficial Life Insurance Company should be made acquainted."

As appears from the application, among other questions asked of the insured by the medical examiner were the following:

"Q. Have you ever had any of the following diseases? \* \* \* R. Rheumatism or gout? A. No. Q. Give name and address of physician last consulted. A. None. Q. Are you in good health, so far as you know or believe? A. Yes."

The physician, Joseph R. Morrell, who conducted the medical examination, testified that the foregoing questions were propounded to the insured, and that the answers made were recorded in the application as given to him by the insured. The same witness testified that the usual physical examination was given the applicant, from which it was not apparent that the applicant was suffering with or had any symptoms of the disease tuberculosis of the spine. The witness also testified that, had the applicant answered the questions propounded to him in the medical examination truthfully, the information he would have obtained, if there was a presence of tuberculosis of the spine, would elicit something that would make him suspicious of such a condition. The same physician, Dr. Morrell, the testimony shows, made a confidential report to the defendant company that he was satisfied that everything had been fully stated as to applicant's physical condition in the application, and that he recommended the applicant for insurance without reservation. The witness Dr. Morrell further testified that he would not have made the recommendation he did make of the ap-

plicant had he given him the information that he had consulted physician Reese in February and March before, concerning pains in the back which became more intense and severe after performing hard labor; and that he would have used such information had he obtained it in the medical examination as a basis for finding out the ailment for which the applicant had been under treatment. Three other physicians, together with Dr. Morrell, in answer to hypothetical questions propounded to them by the defendant, in which the ailment causing the death of the insured and its symptoms were described, testified that the applicant would know, or have reason to believe, he was suffering with some disease, even if he did not know what it was, of a serious nature.

Junius Romney, a witness in behalf of the defendant, testified that he was superintendent of agencies for the defendant company, and that after the death of the insured he visited the plaintiff beneficiary at Afton to investigate plaintiff's claims under the policy, and that plaintiff then stated that—

"Her husband had been a strong, vigorous man, doing outdoor work, up until that same year in the month of March, when she said he began to complain of pains in his back and of being unable to do his work as usual, as had been his custom; that they had gone to consult the Drs. Reese, the local physicians there, who had first diagnosed his case as rheumatism, and treated him for that, but that the malady did not yield to the treatments they gave, and as a result they stated they thought it was tuberculosis of the spine, and advised him to go to the state of Utah and consult specialists in regard to his case. She said he came to Ogden for that purpose, and consulted Dr. Rich and others; that she later joined him in Ogden, and after treatment here he returned to Afton, his home, with a plaster of Paris cast, and that he later died."

Carl Cook, a witness on behalf of the defendant, testified that in the spring of 1916 he was acting as clerk of the district court at Kemmerer, Wyo., and as such clerk he issued a summons for the insured to be in attendance upon said court as a juror May 1, 1916; that the insured did not attend, but about a week or 10 days before the opening of the court he received a letter from the insured stating in substance and to the effect that he was in Ogden under the constant care of a doctor; that he was in a serious condition, and unable to leave Ogden to attend court, and asked the witness to take steps to have him excused for the term.

Maud Chadwick, the plaintiff, testified that the insured had been a strong and vigorous man, doing his customary farm labor and logging in the canyon, until the early months of 1916, when he commenced complaining of pains in his back; that he consulted the family physician, Dr. Reese, before going to Ogden in March; that she and

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the insured did not consult together as to his making the trip to Ogden to see a physician, and that "practically the only reason" for the trip to Ogden was for the purpose of a visit to friends and family relatives; that she had no personal knowledge that he consulted a physician at Ogden, but that he did consult a chiropractor, one Dr. F. J. Freenor; that she and the insured had talked over the advisability of his having chiropractic treatments for some ailment causing pain in the back which they had thought to be rheumatism; that when insured returned from Ogden in July he was wearing a plaster cast and was a very sick man. This witness further testified:

"Q. Do you remember making the statement that Dr. Reese had advised you prior to the time of your husband's coming down to Ogden that your husband was suffering from tuberculosis of the spine? A. I did not."

Some eight witnesses, neighbors of deceased, testified to the effect that they had been acquainted with the insured prior to June 1, 1916, and that they did not know of his being sick or confined to his bed prior to that time.

Counsel for defendant admits on this appeal that in so far as this jurisdiction is concerned the law applicable to this class of cases has been fully and decisively declared by the former opinion of this court. However, counsel calls our attention to the defendant's amended answer, and the additional testimony offered and received at the second trial of the case, and then proceeds to very vigorously and earnestly contend that the defendant on the present appeal has met every requirement, both as matter of law and fact, that may be found necessary for a reversal of the judgment of the district court and to have the issues finally determined in its favor.

The plaintiff meets us at the very threshold, and contends that there are no new issues presented under the pleadings as amended by defendant, and insists that the testimony is practically the same as on the former appeal; that no new testimony was offered and received in the retrial of the case before the district court, except such as would give rise to a disputed question of fact; and therefore there is nothing left for us to do but affirm the orders and judgment the defendant has appealed from. By reason of the extremely divergent views of counsel as to the result that should be readily arrived at by this court, and in order to make clear the issues involved in the second trial, we have heretofore made a more comprehensive statement of the case, both as to the pleadings and testimony, than we otherwise would have done upon the present appeal.

[1] However, it will be kept in mind that as to the law applicable to the case our for-

mer opinion is controlling on all questions then raised and passed upon.

The defendant very strenuously contends that the insurance policy in question was procured by fraud practiced upon it by the insured. The fraud relied upon by the defendant as invalidating the policy was, first, the declaration and express agreement made by the insured in his application that "I am \* \* \* now in good health, and ordinarily have good health, and that in my statements and answers in this application and to the medical examiners no information has been or will be withheld touching my past and present health \* \* \* with which the Beneficial Life Insurance Company should be made acquainted," etc.; second, that the insured made false and fraudulent representations as to material matters contained in his application, and untrue answers to defendant's medical examiner concerning the state of his health, when he knew, or should have known, them to be untrue.

Bearing on these questions much has been said, and authorities cited, in the former opinion of this case written by Mr. Justice Thurman, 181 Pac. 448. In so far as the findings and rulings made by this court on the former appeal may have any bearing on the additional facts disclosed by the record and the questions now involved it was then held:

(1) "If there was any testimony which the jury as a matter of law should have considered in order to determine the question of liability, the court had no right to direct a verdict."

(2) "The burden was on the defendant to void the policy by proving that it was procured by fraud. It was not sufficient merely to prove that the deceased made false answers to questions propounded by the medical examiner. It was incumbent upon defendant to prove that the answers were not only untrue, but that the deceased knew, or should have known, them to be untrue."

(3) "The question of good faith on the part of the insured by the defendant's answer is made the very gist of the controversy. As a matter of pleading it is made the essential element of the defense. \* \* \* In view of our statute (section 1154, C. L. 1917), \* \* \* in a case of this kind, where an insurance company relies upon false statements and answers of the insured as a defense against an action on the policy, it must not only allege, as the defendant has done in this case, that the statements and answers are untrue, but also that the insured knew, or should have known, them to be untrue at the time he made them. Not only this, but as a necessary corollary in judicial proceeding the truth of such allegations should be substantially established at the trial."

(4) "Under the issues made and the authorities referred to, assuming the deceased made the statements and answers relied on by respondent, the controlling question is, did the deceased in good faith believe he was afflicted with only a temporary ailment, or did he, on the other hand, know, or have reason to believe,

that he was afflicted with a disease which tended to prejudicially influence his health and impair his longevity? If the former, the statement, even if untrue, would not, as a matter of law, void the policy; if the latter, it would." "The same rule must be applied in considering the negative answer of deceased as to the name and address of the physician last consulted." "As the plaintiff is the beneficiary of the policy and entitled to the exclusive enjoyment of the benefits that may be derived therefrom, any admissions made by her as to the health of her husband and his consultation with physicians, under the issues presented, were clearly admissible."

The foregoing expressions made by this court in its former opinion become the law of the case. However, a retrial was had, new features were introduced by way of amendments to the defendant's answer, and additional testimony has been received not only in support of the amended pleadings, but also for the purpose of strengthening the contentions made by the defendant on the former trial. It therefore becomes our duty to again pass upon the case and review the record with conscientious consideration.

It is undisputed that the policy was applied for and that it was issued. It was brought out, however, in the testimony, that the insured, after receiving the policy, made the statement to his wife, the plaintiff, that he had not been asked the following questions contained in the application, "Give name and address of physician last consulted;" to which the answer is recorded, "None." "Are you now in good health so far as you know?" to which the answer is recorded, "Yes." The plaintiff contends that this testimony gave rise to questions of fact for the jury to pass upon, notwithstanding the record shows that the medical examiner, who did not testify at the first trial, gave positive testimony upon the second hearing of the case that the foregoing questions were actually propounded to, and answers made by, the insured precisely as he recorded them and as they now appear in the application. With respect to this testimony the contention of counsel for the plaintiff is right. It was for the jury alone, and not for the court, to determine the fact under this conflicting testimony. However, there are other phases of the testimony bearing on the question of alleged false and fraudulent representations of the insured in the procurement of the policy that present much greater difficulties. It appears from the application offered and received in evidence that it was expressly declared and agreed on the part of the insured that he was at the time of making his application "in good health and ordinarily have good health, and that in my statements and answers in this application and to the medical examiners no information has been or will be withheld touching my past or present state of health with which the Beneficial Life

Insurance Company should be made acquainted; and that the statements and answers to the printed questions above, together with this declaration, as well as those made to the company's medical examiner, shall constitute the application and the basis of this contract [policy]." (Italics ours.) It was further provided in the signed application of the insured that his statements to the medical examiner were true and offered to the company as a "consideration for the contract." In view of these express statements which are printed in the application, and the unquestioned fact that the insured signed the application, and no question being raised that he did not read the application before signing, it must be considered as fully established that the insured made the foregoing statements last above mentioned attributed to him.

[2, 3] The question arises, were they material, and, if so, were they false and fraudulent, or, in other words, did the insured know or have reason to believe they were untrue? It certainly cannot be successfully contended that they were not material, for they were made the very basis of the contract. They were offered to the defendant as a consideration for the policy. That these statements were absolutely untrue the testimony in the record before us conclusively establishes beyond the possibility of a doubt. These statements were made at the very time, May 29th, when the insured was suffering with that which is generally regarded as an incurable disease, tuberculosis of the spine. It had attacked him months before, and thenceforth continued its ravages upon him unabated until death ensued.

Touching on the question of good faith of the insured, or his not having knowledge or good reason to believe that he was suffering with an ailment that was seriously affecting, or would seriously affect, his health and impair his longevity, much of the testimony was in conflict. The plaintiff testified that she and the insured thought, up to the time insured went to Ogden, that he was suffering with rheumatism, and that the pains in his back were occasioned by a rheumatic condition. Eight of the insured's close neighbors testified in effect that they in daily association with him, did not know that he was afflicted or was other than a strong and vigorous man up to the time of his leaving home and going to Ogden in March. We remark, however, that this negative testimony is of no value, and that it can have no probative force in determining whether the insured knew, or had good reason to believe, his health to be impaired after he arrived at Ogden in March; for it is very certain these Wyoming neighbors had no opportunity of observing insured while at Ogden at the time when and where the policy was applied for. The same would be true and may be said as to the testimony of the



plaintiff; for according to her testimony, she was not with the insured at Ogden except for a very limited time before his return to Wyoming. In conflict with the statements made by the plaintiff as to what was considered the nature of the insured's ailment prior to his trip to Ogden is the testimony of the witness Booth that the plaintiff had made the statement to him after death of insured that they (the insured and herself) had consulted with Drs. Reese, and they thought the malady to be tuberculosis of the spine, and had advised the insured to go to Ogden and consult with specialists; that insured came to Ogden for that purpose, and consulted Dr. Rich and others, and later she joined her husband there, and after treatment returned with him to Wyoming, when he was incased in a plaster of Paris cast. This testimony was not before us for consideration on the former appeal. Again, it appears from the uncontradicted testimony on this appeal that some time during the latter part of April, before the application for the policy was made, the insured expressly stated in writing to Clerk Cook of the Wyoming court at Kemmerer, after he had been summoned as a juror, that his health was in a serious condition and that he was under the constant care of a doctor. Again, bearing on the question of the good faith of the insured in making application for the policy, several physicians, some of them specialists in tuberculosis and kindred ailments, gave testimony in the second trial and for the first time in the case, after hypothetical questions had been propounded to them in which the symptoms, duration, and the effect of the insured's ailment upon him were detailed, that a person so affected would know and have reason to believe that he was afflicted with some disease which would seriously affect his health and prejudicially impair his longevity, although he might not know just what the disease was. Under the issues, as reframed by the pleadings upon the second trial, the defendant alleged and proved that the insured, in answer to the question found in the application, "Have you any of the following diseases? Of each illness state date, number of attacks, duration, severity, complications, and result, thus avoiding correspondence and delay. R. Rheumatism or gout," stated "No." It is not denied in the record that the foregoing question was propounded to the insured, nor is it denied that he made the answer "No" recorded in the application. It is contended by the defendant that this too sheds light on the question of good faith of the insured when he applied for the policy. In view of the uncontradicted testimony of the examining physician, who testified that had the answer been given in the affirmative (which, according to the contention of plaintiff, the insured believed) he would, as an examiner, have made further investigation by reason

of the suspicion that an affirmative answer would have aroused in his mind, we think there is much force in defendant's contention; that had the answer been made in the affirmative the medical examiner would have made further inquiry, which, in all probability, would have led to a discovery that the insured was then suffering with tuberculosis of the spine.

As heretofore remarked, upon the former appeal the principles of law applicable to the facts then presented were fully discussed, and the law governing in this class of cases laid down for the future guidance of the trial courts within this jurisdiction. That we then endeavored to promulgate and follow such rules of law as would tend to a most liberal construction of the insurance policy, so that unless false and fraudulent practices were resorted to on the part of the applicant and clearly proven by the insurer the validity of the policy might not be successfully questioned, a mere cursory reading of the opinion will convince. However, in the light of the additional testimony that appears upon the record of this, the second, appeal, we are of the opinion that the verdict of the jury in the plaintiff's favor, when tested by all the rules of law applicable thereto, and as formerly announced by this court, should not be permitted to stand. 181 Pac. 448, supra. Aside from what appears to us to be the overwhelming weight of the other testimony that the insured had good reason to believe that his health was seriously affected by some disease that would prejudicially impair his longevity at the very time he made application for the policy in question, the case now comes to us with the uncontradicted testimony in the record that he himself stated, shortly before he made the application, that he was under the constant care of a doctor and that he was in a serious condition. Legally speaking, testimony of such great import in this class of cases cannot and should not be permitted to be successfully ignored by either court or jury. That the insured made the statement attributed to him stands in the record uncontradicted. That in itself ought to have ended this controversy.

[4] If the insured at the time of making his application for a policy has knowledge or good reason to know that he is afflicted with a disease that renders his condition serious, and that thereby his longevity will be prejudicially impaired, his statements and representations to the contrary in reply to specific inquiries constitute a fraud practiced upon the insurer, and which, when successfully proven, invalidates the policy.

[5] For the reasons stated, we think the district court erred in not granting defendant's request for a directed verdict in its favor. The question next arising is whether the case should be remanded to the district court with directions to dismiss the action or

to order a new trial. In view of the fact that there have already been two trials followed by appeals to this court, and it does not now appear but that the plaintiff has had ample opportunity to present all of the testimony that may be produced in her favor, the writer of this opinion has a very strong conviction that the ends of justice would be better subserved in a dismissal of the action. Had the district court, upon defendant's request, directed a verdict in its favor, that would have been, under the ruling of this court in *Smalley v. Railroad*, 34 Utah, 423, 98 Pac. 311, a submission of the case for determination on the merits. The defendant was entitled to a directed verdict, and had it been given by the district court that would have ended the case. Nothing being apparent at this time from the record before us which would suggest the propriety of a new trial or further proceedings by way of amendment to the pleadings, or that the introduction of new or additional evidence might establish the validity of the policy sued upon by the plaintiff, this court might well exercise a lawful discretion by terminating the litigation between the parties.

However, my esteemed Associates, those concurring as well as those dissenting in the reversal of the judgment, are of one mind, that in remanding the case the order should be to grant a new trial. It is only in deference to their opinions that I yield my assent that such shall be the order.

It is therefore ordered that the judgment of the district court entered on verdict be reversed, and that the case be remanded, with direction to grant a new trial. Defendant to recover costs.

FRICK, J. I concur. It now appears from the unmistakable and uncontradicted declarations of the insured that he not only had reason to believe, but that he knew, that at the time he made application for insurance with the defendant he was afflicted with some serious ailment. The record now conclusively shows that he concealed from the medical examiner of the defendant some material and important information, which, had it been disclosed, would have led to the discovery of the fact that the insured was then suffering from the disease which, within a comparatively short time, resulted in his death. The fact, therefore, that the insured knew that his health was seriously impaired, and that he willfully concealed and withheld that fact from the medical examiner, necessarily, and as a matter of law, vitiates the policy. The jury had no right to disregard the statements of the insured, which were in writing and stand wholly unexplained; nor can we disregard them, although the jury, by inadvertence or for some other reason, did so. Where the evidence is conflicting, or where the facts and circumstances respecting

any material fact are such that conflicting inferences may legitimately be deduced therefrom, the finding of the jury is binding upon us. Where, however, as here, the statements of the insured are uncontradicted, and in and of themselves are sufficient to vitiate the policy, it is our plain duty to set aside the finding of the jury.

In this case the decision of this court may affect every policy holder who carries insurance with the defendant company. If unjust claims are allowed against the company, it necessarily increases the rate each policy holder must pay in order to meet such claims. It may, however, go farther than that. It may affect the financial soundness and integrity of the company. Such a result would be detrimental to every policy holder. It is the duty of the insurer to avoid, as far as possible, the payment of all unjust claims. When, therefore, as here, it is made to appear without question that the insured, in making his application, knowingly concealed from the insurer his true condition of health, which was of such a serious nature that if it had been disclosed his application would necessarily have been rejected, the courts may not shut their eyes and blindly accept the finding of the jury. Jurors usually see only those who are dependent upon the insured, and their sympathies are easily aroused in their favor. They do not stop to consider the consequences that may follow from the allowance of unjust claims. To permit a recovery upon a policy wrongfully obtained encourages similar applications which may ultimately result in preventing the insurer from paying the claims of legitimate policy holders, and thus there may be hundreds of worthy claimants whose insurance fails because the rights of the insurer have been disregarded by the courts. The undisputed facts which must control this case are such which, to my mind, in the interest of fairness and justice, and to protect the honest policy holder, clearly require us to deny a recovery in this case as matter of law.

It is, however, further earnestly contended that the evidence on the last trial is substantially the same as it was on the former one, upon which it was held by this court that the question of whether the deceased knowingly concealed his real condition from the defendant was for the jury, and hence the district court had erred in directing a verdict. I was of the opinion that the evidence on the former hearing was such as entitled the plaintiff to go to the jury. The evidence respecting the deceased's knowledge of his actual state of health was in doubt, and that was true also with regard to whether he made the answers respecting his consulting a physician or whether those were written by some other person. There was some doubt, therefore, as to whether deceased knowing-

ly misstated or concealed facts concerning his state of health and the consulting of a physician. Those questions, however, as the evidence now stands, are no longer in doubt for the following reasons: The evidence is without dispute that the answers were made on May 29th, and that the deceased died August 13th, just 75 days thereafter; that he died from tuberculosis of the spine; that the disease is in its nature progressive, and in most instances terminates fatally, sometimes sooner, sometimes later; that the deceased was afflicted with the disease at the time he made the application for insurance and answered the questions therein, and for some time prior thereto had been so afflicted, and that he received medical attention and treatment for some ailment for a considerable time prior to the time he made the answers; that he was placed in a plaster cast within less than 20 days from the time he made the answers; and that he wrote a letter during the time he was being treated, in which letter he stated that he was in a serious condition physically, and was unable to leave Ogden, where he was being treated, and attend court at Kemmerer, Wyo. The statements stand uncontradicted and unexplained. What, then, is the natural, the inevitable, the irresistible conclusion which follows from the undisputed facts? Necessarily this: That the deceased did know, when he made the application for insurance and answered the questions, that he was seriously afflicted with some ailment, and that he then was, and for some time prior thereto had been, under the doctor's care and treatment. It is idle to attempt to explain away that evidence, and it is equally idle to refer to cases where the nature of the disease and the facts concerning the condition and surroundings of the insured were different from what they are here. While it is true that the deceased may not have appreciated the nature of his disease, he, as the undisputed evidence shows, did know that he was seriously afflicted with some malady, and that he had not only consulted doctors, but was being treated by them therefor. The evidence thus stands uncontradicted that the deceased did conceal material facts from the defendant, and it is but fair, just, and right that the consequences of such concealment should fall upon the beneficiaries of the insured rather than upon the defendant, and indirectly upon the policy holders.

I most cheerfully concede that it is possible that the very material and damaging statements made by the deceased in the letter, which was established by secondary evidence, might have been denied, and, if not denied, might nevertheless have been explained satisfactorily to a jury. Such was not done, however, but the statements stand admitted and unexplained. It is idle to contend that the deceased's answers to the ques-

tions in the application constituted either a denial or an explanation of those statements. The answers cannot deny or explain away the fact that the deceased knew that he was seriously afflicted with some malady, and that he was being treated for the same, both of which facts he concealed in making the answers to the questions in the application for insurance. Therefore, unless, and until the statements contained in the letter written by him are either denied or explained, neither the jury nor the court has a right to ignore them, and if the jury does so the court nevertheless cannot evade its duty by seeking refuge behind the findings of the jury. Nor does this in any way conflict with the former opinion of Mr. Justice Thurman. That decision turned entirely upon the question whether there was some substantial evidence to go to the jury with respect to whether the deceased at the time he made the answers in the application knowingly concealed some material fact or facts which it was his duty to disclose. We held that there was some such substantial evidence, and in arriving at that conclusion at least some reliance was placed upon the negative evidence of the deceased's neighbors. In the face of the unexplained and uncontradicted statements that he did know that he was in a serious condition, and was being treated by doctors, that evidence has been entirely dissipated, and has no probative force or effect, and there is now no alternative except to arbitrarily say that the deceased did not know what his own uncontradicted and unexplained statements show he did know or to take those statements at their face value. As the evidence stood, therefore, at the close of the last trial the condition of the case from a legal standpoint was substantially this: Assuming that A. sues B. upon a promissory note, and B. interposes the defense of payment, the burden to prove the defense being on B., and in support thereof he produces some substantial evidence of payment, but the court, nevertheless, directs a verdict in favor of A. B. appeals, and this court holds that the evidence of payment should have been submitted to the jury, and on that ground reverses the judgment. Upon another trial plaintiff's evidence is substantially the same upon the question of payment as it was upon the first trial, but B. produces a receipt in full, admitting the payment of the note in question from A., and A. neither denies nor explains the receipt. May the jury or the court ignore the receipt upon the ground that it may be a forgery or may have been obtained by duress or by fraud, etc.? Clearly not. In the absence of any denial or explanation of the receipt, both court and jury would be required to receive and consider it at its face value, and find that the debt was fully paid and discharged. To hold otherwise is to hold that verdicts and

judgments need not be based upon the evidence, but may reflect merely the arbitrary conclusions of the jury, and may be based entirely upon their conjectures and caprice. When we once reach that state of affairs in the administration of law and justice, the courts had better be abrogated.

THURMAN, J. (concurring). On the former appeal I regarded this as a border-line case. The same question presented then is presented now: Was the evidence sufficient to sustain a verdict? Every reasonable doubt was solved in favor of the plaintiff's contention. Even upon questions of law we adopted a rule most favorable to the plaintiff. In doing so we were compelled to disregard numerous decisions rendered by some of the most distinguished courts of the country—decisions which hold that if the statements and answers of the insured in his application for a policy are false, the policy may be avoided without regard to the question as to what the insured knew or believed. These cases are cited in the opinion. 181 Pac. at page 451. We adopted what we believed to be the better doctrine, especially in view of our statute (Comp. Laws, 1917, § 1154). I have no apology to make for the rule enunciated in that opinion, nor for having given plaintiff's contention, as to the sufficiency of the evidence, the benefit of every reasonable doubt. I am strongly impressed with the conviction that such is our duty in every case where we are called upon to determine such question as a matter of law.

The case, however, on this appeal presents a different aspect, especially as concerns the evidence produced at the trial.

It is assumed by my Associate with whom I disagree that the evidence before us now is substantially the same as on the former appeal. If that is true, the decision on the former appeal becomes the law of the case. As before stated, the sufficiency of the evidence was the only question then. It is the only question now. It will be conceded, however, that if the evidence on both trials of the case is not substantially the same then the rule known as the "law of the case" has no application.

The Nebraska Supreme Court, in *Phelps County Farmers' Mutual Ins. Co. v. Johnson*, 66 Neb. at page 592, 92 N. W. at page 577, speaking of the rule, says:

"The evidence in different cases, and in different trials of the same case, may, and often does, differ in many essential particulars. It may shift and change as the current of a stream in a bed of sand. Not only may changes occur by reason of newly discovered evidence, new witnesses whose testimony may supply a missing link, but often those having the management of a case turn the current of evidence in one direction at one time and in an entirely new channel at another. If the evidence is the

same, or substantially so, and made to thus appear, doubtless the rule would apply."

On the former trial there was evidence to the effect that prior to February, 1916, the insured, Thomas Chadwick, hereinafter called deceased, was a strong able-bodied man. That during February and March of that year he was afflicted with some disease supposed to be rheumatism. He suffered considerably with pains in his back and was under the care of a physician. Some treatment was administered, but whatever it was it did not effect a cure. In March he came from his home in Wyoming to Ogden, Utah. Defendant contends he came for medical advice and treatment. Plaintiff testified he came merely to visit friends or relatives. The next heard of him, on the former trial, was when he returned home about the middle of June in a plaster cast. In August next following he died of tuberculosis of the spine. What deceased did except to procure the insurance policy in question, or what his condition was while he was in Ogden during April, May, and June, until he returned in a plaster cast, was not known, or at least did not appear in the evidence on the former trial of the case.

In considering the evidence, as before stated, this court resolved every doubt in favor of the plaintiff's contention. It was not clear to the court that the deceased, at the time he made his application for the policy in May, knew, or had reason to believe, he was afflicted with anything more than a passing ailment. Giving to the evidence every intendment favorable to the plaintiff, we were bound to find that deceased had been a strong healthy man all his life up to February, 1916; that he then became afflicted with some ailment which caused him more or less pain during February and March. We would not have been justified in finding that the ailment with which the deceased was afflicted in March, when he came to Ogden, was anything more than rheumatism of very recent origin or some similar ailment of a temporary nature. We would not have been justified in finding that the deceased knew, or had reason to believe, that he was afflicted with a disease which might seriously affect his health or impair his longevity. Besides this, we were bound to find that he had come to Ogden, in March, not for the purpose of consulting physicians or in search of medical treatment, but merely to visit friends or relatives. Such are the rules by which this court is bound; no matter what we may have believed had we been triers of the case, we were bound to give effect to every word of substantial evidence in favor of plaintiff's contention, whether it convinced our understanding or not. We were not sitting as jurors and could not consider the case from that point of view. Under these circumstances this court, on the former appeal,

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reversed the judgment which was entered upon a directed verdict because as the evidence then stood we considered it a case for the jury.

On the trial of the present case the testimony was absolutely conclusive that in April, 1916, deceased, instead of being in Ogden visiting with friends, as testified by plaintiff, was in fact there under the care of a doctor, as contended by defendant on both trials of the case; that he was not only under the care of a doctor, but in a serious condition of health. This evidence did not come from company physicians or expert witnesses employed by defendant, but from the deceased himself—the one who, of all men living, had the best opportunity to know. It should be considered by this court of the highest probative value in determining the state of mind of the deceased as to the actual condition of his health. We are bound to assume that the letter written by deceased was true, in which he stated the seriousness of his condition and that he was under the care of a doctor. The unequivocal statement of deceased contained in the letter is in strict harmony with all the established facts. It is admitted he had pains in his back from which he suffered in February and March; that he returned home in June in a plaster cast, and that he died in August next following of tuberculosis of the spine. The evidence supplies a "missing link." It covers a period of time not touched by the evidence in the former trial. It makes altogether a different case. Whereas, on the former trial there was nothing except by a process of ratiocination from which it could be determined that deceased must have known his health was in a serious condition when he applied for the policy, it is now as clear as the noonday sun that he was in a bad state of health at that very time, and it is equally clear that he must have known that such was the case. As shown by the evidence, tuberculosis of the spine is a progressive disease. The victim does not improve; he grows worse until the disease culminates in death. Such is the rule. The exceptions are rare. If the deceased was in a serious condition as to health in April, he must have been in a worse condition in May, when he applied for the policy; for two weeks afterwards he was placed in a plaster cast, and two months after that he was in his grave.

As the case now stands, there is no substantial conflict in the evidence. It has become a question of law. As I view the law, I cannot concede that the statement and answers made by deceased in his application for a policy raise a substantial conflict in the evidence. The statement made in April, if not in its nature an admission, is at least a solemn statement of fact. The statement and answers in the application made in May

were self-serving, and would not have been admissible if offered by the plaintiff. They were introduced by the defendant as a matter of necessity to prove the allegations of its answer that the statements and answers were made as alleged. While there is a presumption that the statement and answers were true and sufficient to cast the burden of proof on the defendant, yet the probative effect of such presumption, when invoked as against substantial evidence to the contrary, became practically negligible for the reason above stated. They were self-serving declarations, made in his own interest, to accomplish a selfish purpose. Besides this, the statement and answers fly in the face of every well-established fact.

I am also of the opinion that statements made by the medical examiner in his confidential report as to the appearance of deceased when he was examined as a risk for insurance, under the facts of this case, are entitled to little or no consideration. It is manifest that whatever report the medical examiner made was based substantially, if not entirely, upon the false answers of the deceased. What the medical examiner concluded from the general appearance of the deceased certainly should have no weight as against the solemn statement of deceased a few days prior thereto that he was in a serious condition and under the care of a doctor. As I view the case, the admitted facts all tend to establish with unerring certainty the conclusion that when deceased made his statement and answers to the medical examiner, upon which statement and answers the policy was issued, he knew, or must have known, he was afflicted with a serious disease, and one which he believed impaired his longevity. I can arrive at no other conclusion.

Besides these considerations, there is another feature of the case, entirely new, developed on the last trial, which strengthens in a material degree the conviction that deceased deliberately intended to mislead and defraud the defendant company. It is alleged in the amended answer of defendant that at the time the policy of insurance was applied for deceased was asked by the medical examiner if he had ever been afflicted with rheumatism, to which question the deceased answered, "No." If there is any fact established in the case beyond the peradventure of a doubt, it is the fact that in February and March, 1916, deceased was treated by Dr. Reese for a disease supposed at that time to be rheumatism, and the deceased understood and must have known that he was being treated for that disease. When he was asked the question on May 29th if he had even been afflicted with rheumatism, and unqualifiedly answered "No," it was not the frank candid answer of an honest man. It was misleading and disingenuous. It was

calculated to deceive the medical examiner, and cause him to relax the rigor of his examination as to the physical condition of the deceased. Can any one believe that the policy in this case would have been issued at all if the deceased had frankly and honestly answered the questions asked? Is it conceivable that the medical examiner would have recommended the deceased as an insurable risk if the deceased had told him he had been treated by physicians in February and March for a disease supposed to be rheumatism, and that the disease had not responded to the treatment, and that in April he was still under the care of a doctor and in a serious condition? I have no doubt that medical examiners in these cases are, ordinarily, anxious to extend the business of the companies they represent, and probably sometimes take long chances in their recommendations; but I cannot believe that any reputable physician desirous of maintaining good standing with his employer would recommend for insurance a case of this kind if all the facts he was entitled to know, in response to the questions asked, had been fairly and honestly disclosed. We may therefore well believe the testimony of the medical examiner in the instant case to the effect that he would not have recommended the policy holder if the questions asked had been truthfully answered.

It follows, therefore, that in my opinion the policy of insurance was not procured by the deceased in good faith, believing he was entitled thereto, but was procured through fraud and misrepresentation, as to which there is no substantial conflict in the evidence. For this reason the judgment of the trial court should not be permitted to stand.

I concur in a reversal of the judgment.

GIDEON, J. By the former opinion of this court in this case it was held that the plaintiff was entitled, under the evidence then produced by her, to have the same submitted to the jury. In other words, the effect of that decision was that plaintiff had made out a prima facie case. That decision is, to that extent at least, the law of the case. It was the law of the case in the district court at the last trial. At that trial the plaintiff offered the same proof as at the former trial. The defendant was permitted to amend its answer. It produced testimony in addition to that given by it at the former trial and the same was admitted by the court. Part of this additional proof was the testimony of one Cook, who recited the contents of a lost letter written to him by the insured in April preceding the date of the policy. In that letter the witness Cook stated that the insured wrote, in substance, that he, the insured, was then seriously ill and under the care of a doctor. The testimony of the witness Cook was not disputed by any witness.

At the close of the case counsel for defendant moved for a directed verdict in its favor upon the ground that it had been conclusively shown that the deceased, at the time he made application to the defendant company, and at the time he made answers to its medical examiner, knew or believed, or had good reason to believe, that he was suffering from a disease which was prejudicial to his health and which would impair his longevity. The refusal of the court to grant that motion is the principal error relied upon. The other errors all relate to, and are dependent upon, the denial of this motion. In the judgment of the majority of the members of this court the district court should have granted that motion, and it is held to be prejudicial error not to have done so. I withhold my assent from that conclusion, but concur in the order remanding the cause for a new trial.

WEBER, J. (dissenting). At the first trial of this case plaintiff recovered judgment, which was set aside by the district court on motion for new trial. At the second trial a verdict was directed by the court in favor of defendant, and plaintiff appealed. *Chadwick v. Beneficial Life Ins. Co.*, 181 Pac. 448. As stated in the opinion by Mr. Justice Thurman, the facts at that trial were:

"The testimony introduced by respondent tended strongly to show that the deceased was afflicted with some physical ailment as early as March, 1916, over two months before he applied for insurance; that he was in frequent consultation with a physician, and was receiving medical attention; that he complained of pain in his back, and electric treatment was applied; that he was advised by the physician to come to Utah for medical advice; that he came to Ogden and consulted one or more physicians; that while there he applied for the insurance in question, and made the statements and answers which respondent relies on as a defense. It was shown by the autopsy that deceased died of tuberculosis of the spine, and in the opinion of the physician the conditions were such that deceased must have known that he was not in good health at the time the policy was applied for. It must be admitted that the evidence tended strongly to support respondent's contention, but it did not pass entirely unchallenged. The testimony on behalf of plaintiff tended to show that the deceased, who had previously been in good health and was strong and vigorous, about March, 1916, became afflicted with a pain in his back; that it was supposed to be rheumatism, in fact was so considered by the company physician who treated him; that up to the time he went to Ogden he had been attending to his farm work and logging in the canyon. Plaintiff testified that she went with deceased on one occasion to the doctor; that she did not realize her husband was seriously ill until in June, 1916; that when he went to Ogden it was not for the purpose of consulting physicians, but merely on a visit; that when he returned in July he was in a plaster of Paris cast.

"The depositions of eight witnesses, all resi-

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dents of Afton, Wyo., and neighbors of deceased in his lifetime, were read in behalf of plaintiff. Each of them testified he had known deceased intimately during his lifetime. Several of them had seen him almost daily for several years previous to his death. None of them ever knew of his being sick or attended by a physician until June, 1916, or ever knew of his being unable to do his work, which was farming. The testimony of these witnesses was of a negative character. Its probative force is for that reason limited, but that goes to the weight of the evidence only, and was therefore a question for the jury.

"It thus appears there was some substantial evidence before the court and jury to the effect that prior to March, 1916, the deceased was a strong, able-bodied man, capable of logging in the canyon and working on his farm; that in March he complained of pain in his back, and consulted Dr. Reese, who treated him for rheumatism; that he still continued to carry on his work; that he went to Ogden on a visit, and when he returned in July he was incased in a plaster of Paris cast. There is not a suggestion in any of the evidence that the deceased had reason to believe he was afflicted with anything more than rheumatism until after the policy of insurance was issued, and this affliction was of recent origin. These considerations, together with the testimony of eight of deceased's neighbors, who were intimately acquainted with him for several years before his death, and never knew him to be sick or unable to do his work, or to consult a physician in regard to his health prior to June, 1916, are sufficient in themselves to present a serious question as to whether or not the deceased, at the time he applied for insurance, believed, or had reason to believe, that he was afflicted with anything more than a temporary ailment. The same rule must be applied in considering the negative answer of deceased as to the name and address of the physician last consulted. The uncontradicted evidence shows that Dr. Reese, whom the deceased consulted, treated him for rheumatism before he went to Ogden. There is no evidence that he was treated for anything else by any other physician, either in Wyoming or Utah, prior to his application for insurance. In fact there is no evidence that prior to making his application he consulted any physician at all except Dr. Reese, of Afton, Wyo. Hence it cannot be contended as matter of law that deceased knew, or had reason to believe, he was afflicted with anything more than a temporary ailment at the time he applied for insurance."

It was held that the case was one for the jury, and that the district court erred in directing a verdict for defendant.

The only difference between the testimony at the second trial and the last, in which plaintiff obtained the judgment from which this appeal is taken, was that further testimony was introduced for the defendant at the last trial and that the defense was strengthened. If I am right in that, the former decision of this court should now be the law of the case and the present judgment should stand.

But, waiving the question of the law of the

case, there is, nevertheless, no good reason that I can perceive for reversing this judgment. The defendant, however, claims that the evidence produced by the defense was so strong and convincing that this court should, as a matter of law, hold the insurance policy to be null and void. As stated in its brief:

"The defendant contends \* \* \* that, in view of the testimony submitted on this trial, which was stronger and clearer than submitted at the first trial, and which stands uncontradicted, that the trial court should have directed a verdict for the defendant. We contend that, as a matter of law, the policy of insurance upon the life of this party was null and void, inasmuch as it is shown that the deceased knew, or had good reason to believe, that he was affected at the time he made his false answers to Dr. Morrell."

As I read the record, the testimony at the last trial was no more uncontradicted than at the second trial, as a review of the new or additional testimony will demonstrate.

Dr. Joseph E. Morrell, who examined Chadwick for defendant, and who did not testify at the former trial, was produced, and testified that he made the usual examination of the insured on May 29, 1916; that certain questions were asked Chadwick, the applicant; that applicant answered every question on the examiner's report, and that the answers were recorded as given; that applicant was submitted to the usual physical tests. In reply to a question on cross-examination as to whether he recalled what took place at the time of the examination Dr. Morrell testified that there were so many examinations that he could not remember what occurred. The doctor further testified that very often he took the family history and inserted it in the application, and filled out the balance of the answers after the signing of the application by the applicant; that he could not say that this was not done in this case; that there was nothing aside from the average case to bring this particular case back to his mind; that at the time of the examination of Chadwick there was nothing about him that caused the witness to notice anything out of the ordinary; that Chadwick walked naturally; that there was nothing to indicate that he was favoring any part of his body, and that there was nothing about deceased when he was examined to indicate to layman or doctor that he was suffering from tuberculosis; that from symptoms shown by deceased at the time of examination he might have had only a passing ailment; that there was nothing about the length of time that spinal tuberculosis exists to indicate when it started or when the patient might know he had it; that from the history of the case the deceased "would not be able to tell from the history of the pain of that length of time whether it would

be serious or not, because backaches are common from simpler causes."

Dr. William R. Calderwood, medical director of defendant company, in answer to a question which assumed that a person died of tuberculosis of the spine August 13, 1916, that a post mortem examination of the body of such deceased person showed two of the vertebrae to have undergone what is known as caseous degeneration, and assumed that such person had been under the care of physicians from February 1st until the middle of March, being treated about twice a week for pain in the back, such pains being more intense when such person performed manual labor, and assumed that such person was incased in a plaster of Paris cast on or about June 13, 1916, and from that time was unable to do any work around the house until his death, testified that such a person would, on the 29th day of May, 1916, know that he was suffering from a serious ailment, and one which was not merely temporary and passing, but which was prejudicial to his health and would impair his longevity. On cross-examination the witness said that if symptoms of the disease are not present so that a doctor could observe them under those conditions the patient would not know. He further said that ordinarily it took a period of years for the spinal processes to become degenerated as they were in the deceased; that before complete softening occurred it would be a period of months to a period of a year, all depending upon the rapidity of the disease.

Dr. Calderwood's testimony was corroborated by that of Dr. Horace G. Holbrook.

Dr. John F. Sharp, in response to an hypothetical question similar to that propounded to Dr. Calderwood, stated that the patient would have reason to know he was not in good health, but suffering from a serious ailment that would impair his longevity. In answer to the question as to what symptoms he would look for on May 29, 1916, in the deceased, Dr. Sharp said that he would look for rheumatic pain in the region of the back and abdomen, for a tendency on the part of the patient to save himself any jars or accidents, and whether he would have a tendency to move as lightly as possible, whether he would find that doing as little as possible would make him feel best. After describing the symptoms, and at the close of the cross-examination of this witness, he was interrogated and made answers as follows:

"Q. Suppose such a patient came to you to be examined for insurance on the 29th of May, and was stripped to the waist line, and went through the movements coming into the office, and did not exhibit any of these symptoms, what would you say then? A. I cannot conceive him not exhibiting any of them. Q. I am assuming that is the case; would you say then there was anything about his condition

that would cause him to believe he was suffering from anything but a passing ailment? A. If he had none of these symptoms, he would not."

It is vigorously contended by defendant that there is no escape from the conclusion to be drawn from the testimony of these doctors and from the corroborating testimony of other witnesses in the case that Chadwick, on May 29, 1916, when he was examined by Dr. Morrell, had reason to believe or knew that he was suffering from a serious ailment prejudicial to his health, and which would impair his longevity. So far as the evidence of the physicians is concerned, it was greatly weakened upon cross-examination, and the statements of Dr. Sharp, as above quoted, could easily and with good reason have induced the jury to wholly disregard the expert testimony.

Junius Romney, defendant's superintendent of agents, who visited plaintiff after Chadwick's death, testified that plaintiff then stated that she and her husband had gone to consult the Drs. Reese, physicians at Afton, Wyo., and that they first diagnosed the case as rheumatism and treated him for that; that she further said that, the malady not yielding to the treatments, the doctors informed both her and the insured that Chadwick was then suffering with tuberculosis of the spine, and advised him to go to Utah and there consult specialists; that she then further said that he went to Ogden for that purpose, and consulted Dr. Rich and others, and that she later joined him in Ogden, and that after treatment there her husband returned to Afton in a plaster of Paris cast, and later died. The jury may have concluded that Mr. Romney was mistaken. They could have fairly justified such a finding upon the following grounds and for the following reasons: (a) At the former trial Romney testified, in substance and effect, that tuberculosis of the spine was not mentioned until after Dr. Reese had made his post mortem examination. (b) H. B. Booth, one of the defendant's agents who was present at the conversation referred to by Romney and whose testimony at the second trial was read at the last, testified that Mrs. Chadwick said in the presence of Romney that Dr. Reese advised her that he thought that Chadwick had rheumatic pain in the back. Booth further testified that Mrs. Chadwick said that Dr. Reese had performed a post mortem examination on her husband and said he found that the deceased had tuberculosis of the spine. (c) When plaintiff's attorney, on September 15, 1917, wrote to Dr. Reese calling his attention to the statements by the company that Chadwick had tuberculosis of the spine in May, 1916, the answer received was to the effect that Chadwick consulted Dr. Reese for a pain



in the back, and that they (the Drs. Reese) gave him electric treatments. It is evident that Drs. Reese & Reese had not diagnosed the case as spinal tuberculosis, or, if they did, they failed to treat him for that disease, and failed to inform Chadwick that they had so diagnosed his case. It appears from the admission of defendant's attorney in the record in this case that if the Drs. Reese diagnosed Chadwick's disease as tuberculosis of the spine they never conveyed their thought or belief to the deceased. Neither is there any evidence that either of the Drs. Reese ever, prior to the post mortem examination, told Mrs. Chadwick that her husband was afflicted with spinal tuberculosis. (d) Mrs. Chadwick denied that she made the statements as testified to by Mr. Romney.

Not only is there a conflict in the evidence, but on this proposition plaintiff's evidence is so strong and convincing that it is difficult to conceive how a jury could fail to arrive at the conclusion that Mr. Romney was mistaken in that part of his testimony.

The most important testimony produced by the defense at the last trial is that of Carl Cook, who testified that as clerk of the district court at Kemmerer, Wyo., he issued a summons for the insured to attend court as a juror May 1, 1916, and that about a week or 10 days before the opening of court he received a letter from Chadwick stating that the writer of the letter was in Ogden, Utah, under the constant care of a doctor; stating also that he was in a serious condition, and unable to leave Ogden to attend court. Cook testified that he had filed the letter with the court records; that he had made search for it, but was unable to find the document. It is claimed that the testimony of Cook is conclusive. If that be true, it follows that the jury's verdict is wrong, and that the court erred in failing to direct a verdict for the defendant, and abused its discretion in denying defendant's motion for a new trial. Why Cook's testimony, under the circumstances of this case, should be accepted as conclusive I am unable to perceive. There is no evidence whatever in the record except what Cook said Chadwick stated in his letter that Chadwick was under a doctor's care at Ogden before the policy of insurance in question here was issued. It is claimed that Chadwick wrote that he was in a serious condition. The record contains no evidence whatever, except this alleged admission in the letter by Chadwick, tending to show that he was actually in a serious or dangerous condition; nothing to prove that the statement had any reference to the disease from which he ultimately died. Neither is there anything in the record to show that, whatever his condition in April was, he knew, or had reason to believe, that he had not recovered entirely by the time that

the examination for the insurance was made. The fact that Cook testified that a letter was received by him does not make his testimony any stronger, or any more convincing, than if he had testified to verbal admissions, as the letter was not produced. Cook's testimony, therefore, was nothing save uncorroborated testimony of inconsistent declarations by Chadwick. The letter was received some time in April asking to be relieved from court attendance in May. According to Cook's testimony, Chadwick claimed to be under the constant care of a doctor. From other testimony, and from a certificate attached to the letter by Dr. Freenor, a chiropractor, it may be reasonably inferred that he was taking chiropractic treatments, and not that he was under the care of a doctor constantly or otherwise. As he apparently was in good health on May 29th, when examined for insurance, as shown by Dr. Morrell's confidential report to the company, it is a justifiable, if not a necessary, inference from the evidence that Chadwick had obtained at least temporary relief from the chiropractor, and had been induced by the chiropractor to believe that that relief meant a permanent cure; that on that date he, in good faith, believed that he had suffered from a passing ailment or temporary indisposition only, and that at the examination he believed himself to be in good health and had good reason for such belief.

The answers made by Chadwick when examined for insurance are presumed to be true, and the burden was upon the defendant to prove their falsity. Not only is the burden of proof upon defendant, but the evidence to establish fraud must be clear and convincing. *Wingo v. New York Life Ins. Co.* (S. C.) 101 S. E. 653. The fact that Chadwick in a letter to Cook made declarations inconsistent with his answers to the company's questions was not necessarily conclusive, but it was for the jury to say whether it was sufficient proof to overcome the presumption that Chadwick's answers were truthful. In *McEwen v. New York Life Ins. Co.*, 183 Pac. 373, decided by the District Court of Appeals, Second District, Division 1, California, July 9, 1919, rehearing denied by Supreme Court September 4, 1919, the effect of declarations made in response to questions at the time of examination for insurance, and of admissions by the insured prior to obtaining the insurance, is discussed, and what is said is applicable here. The court said:

"In response to question 8, 'How long since you consulted or have had the care of a physician?' McEwen's answer was, '1891; Dr. Thomas, Bucyrus, Ohio;' and in response to question 9, 'If so, for what ailment; name and address of physician?' the answer was, 'Typhoid fever.' The verdict that the answers to

these questions were true is attacked by appellant upon the ground that the evidence is insufficient to support the same. The declarations made by the appellant in response to the questions are presumed to be true, and hence the burden was upon defendant to prove the contrary. The only evidence adduced on the part of defendant tending to overcome the presumption so attaching to the answers given by McEwen was the testimony of one Hosick to the effect that McEwen, after an occasion when he was said to have been drunk, told him that he had been under a doctor's care ever since, and the testimony of Dr. Garrett that on August 18, 1909, McEwen stated to him, while acting in the capacity of medical examiner for an accident insurance company, that he (McEwen) was under treatment from Dr. Taylor, which fact of being under Taylor's treatment McEwen also stated in the notice of an injury sustained which he gave to the accident insurance company. It thus appears that, in determining the issue, all that the jury had before it was the declaration of McEwen made in his application to defendant, to which a presumption of its truth attached, and subsequent \* \* \* declarations insufficient as evidence to overcome the presumption of truth attaching to the answers made by McEwen in his application for the policy."

**The court further said:**

"The only evidence tending to show the falsity of McEwen's answer, 'No,' to question 6, 'Have you ever raised or spat blood?' is a statement made by him to Dr. Garrett to the effect that he had, following an injury from being kicked or struck in the chest by the foot of a mule, spat blood. The representation made to the insurance company must, in the absence of sufficient proof to overcome the presumption, be deemed to be true, and we cannot say that it is overcome by an inconsistent statement therewith made by McEwen. As to the special verdict rendered in response to this question no ground appears for complaint, since the jury, in weighing the inconsistent declarations, decided in favor of the one presumed to be true as against one as to which no such presumption existed."

At the last trial the defendant introduced in evidence the medical examiner's confidential report to defendant. This report shows the "vigor and general appearance" of the insured to be "erect and healthful" and gives other information not contained in the answers made to the medical examiner—the report being a favorable account of Chadwick's health. These statements by the examining physician, who was the representative of the company, were statements of the company itself, and are the admissions of the company itself, and are testimony for plaintiff. It was for the jury, and not for the trial court or this court, to say what weight should be given to the company's admissions as well as what weight should be given to the admissions made by Chadwick in the letter to Cook.

In *McGowan v. Supreme Court, Ind.* Order of Foresters, 104 Wis. 173, 80 N. W. 603, it is said:

"The examining physician, who was an officer of the local court of Galena, made a personal examination of Pyon at the time of his application, and made a long written report, in answer to questions, as to Pyon's physical condition, in which he gave a very favorable account of his health. This report was offered in evidence by the defendant on the trial, in connection with, and as part of, the application. Thereafter the plaintiff asked one of the medical experts a hypothetical question based on the facts stated in the physician's report, and the defendant objected, on the ground that the paper was not evidence of the facts stated in it, but only of the fact that such a report was made. The court overruled the objection, and held that the statements in the report were in the nature of admissions by the company of the facts therein stated, not conclusive, but competent to go to the jury on the subject. We think the ruling was correct. The statements were made by one of the defendant's officers, as a part of his official duties, and within the scope of such duties. Such statements are plainly statements of the company itself, and must be regarded as upon the same plane as the admissions of agents generally, made during the transaction of the agency business, and within its scope, which are deemed part of the *res gestæ*. 1 Jones, Ev. § 256."

For this court to say that Cook's testimony must be accepted as conclusive is, in my opinion, a clear invasion of the province of the jury. It is resolving the conflict between the evidence produced by plaintiff and that produced by appellant in the latter's favor. It is a substitution of the court's judgment on the weight of the evidence for that of the jury.

I think the judgment should be affirmed.

**On Application for Rehearing.**

CORFMAN, C. J. Plaintiff has filed a petition for rehearing. It is asserted by counsel that the members of the court concurring in a reversal of the judgment misconceived and misinterpreted the testimony of certain witnesses, particularly the testimony of the physicians who testified in behalf of the defendant. We think the record fully justifies all that has been said in the concurring opinions with regard to this testimony, and that a further review would be useless and unavailing. It will suffice to say that the testimony of the physicians, although an important factor in the case, was not treated nor regarded alone as controlling nor determinative in arriving at the findings of fact and conclusions of law upon which the judgment of reversal is predicated.

It is further contended that each of the concurring members of the court founded his separate opinion upon the testimony of Carl

(191 P.)

Cook, a witness who testified to the written admissions made to him by the insured concerning his health shortly before the policy was written. Again, we do not think a careful reading of the opinions justifies the conclusion arrived at by counsel. However, as counsel insist we attached too much importance to the testimony of this particular witness, and that his testimony was merely hearsay, and therefore erroneously admitted by the trial court over plaintiff's objection, we have taken the pains to examine the following cases and authorities cited and relied on by plaintiff in support of her contention: 7 Ann. Cas. 647, 648; Taylor v. Grand Lodge A. O. U. W., 101 Minn. 72, 111 N. W. 919, 11 L. R. A. (N. S.) 92, 118 Am. St. Rep. 606, 11 Ann. Cas. 260; 14 R. C. L. 1438; McGowan v. Supreme Court I. O. F., 104 Wis. 173, 80 N. W. 603; Valley Mut. Life Ass'n v. Teewalt, 79 Va. 421; Schwaibach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227; Mobile Life Ins. Co. v. Morris, 3 Lea. (Tenn.) 101, 31 Am. Rep. 631; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Penn. Mut. Life Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; Supreme Lodge K. of P. v. Schmidt, 98 Ind. 374; Rawson v. Milwaukee Mut. Life Ins. Co., 115 Wis. 641, 92 N. W. 378; Supreme Lodge of Knights of Honor v. Wollschlager, 22 Colo. 213, 44 Pac. 598; Union Central Life Ins. Co. v. Cheever, 36 Ohio St. 201; Fraternal Mut. Life Ins. Co. v. Applegate, 7 Ohio St. 292; Granger's Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; Edington v. Mut. Life Ins. Co., 67 N. Y. 185; Dilleber v. Home Life Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182; Washington Life Ins. Co. v. Haney, 10 Kan. 395; Lazensky v. Supreme Lodge Knights of Honor (C. C.) 31 Fed. 592.

Most, if not all, of the above cases will be found cited in the foot notes supporting the text of 14 R. C. L., and in the editorial notes of 11 L. R. A. (N. S.) supra. If the texts of these authorities properly reflect the decisions of the courts, as we think they do, the contention made by plaintiffs in the case before us finds no support whatever.

The case note of Taylor v. Grand Lodge A. O. U. W., 11 L. R. A. (N. S.), supra, reads:

"It may be laid down as a general rule, established by the weight of authority, that, where

the defense in actions on contracts of life insurance is based upon the alleged falsity of statements contained in the application, admissions, or declarations of the assured, whether made before or after the policy was issued, will not be admissible against the beneficiary, *unless they were made at a period not too remote in time from the making of the contract of insurance, and were of such nature as to be of real probative force in determining the truth or falsity of such statements*; apparently upon the ground that the contract of insurance is between the insurer and the beneficiary; that the assured is not a party to the suit; and that the beneficiary has a vested interest in the policy of which he cannot be deprived by the insured except by some act in violation of a condition of the policy." (Italics ours.)

To the same effect will be found the text of 14 R. C. L. p. 1438, § 601, supra; 5 Joyce, Law of Ins. § 3819; Kelsey v. Universal Life Ins. Co., 35 Conn. 225; Haughton v. Aetna Life Ins. Co., 165 Ind. 82, 73 N. E. 592, 74 N. E. 613; Swift v. Mass. Mutual Life Ins. Co., 63 N. Y. 186, 20 Am. Rep. 522; Welch v. Union Central Life Ins. Co., 106 Iowa, 224, 78 N. W. 853, 50 L. R. A. 774.

In the case at bar the contract sued upon was between the defendant company and the assured, not between the insurance company and the plaintiff, the beneficiary named in the policy. The plaintiff, therefore, had no vested interest in the policy. The representations and declarations of the assured concerning his health, made at or about the time of his procurement of the policy, were material. The letter in question was written by the assured very shortly before the policy or contract of insurance was entered into by the assured and defendant. We think it was properly admitted by the district court in the trial of the case, and as to its probative value in arriving at the truth, under all the circumstances attending the case, there cannot be the possibility of a doubt.

The application for a rehearing is denied.

FRICK and THURMAN, JJ., concur.  
GIDEON, J., concurs in the order denying a rehearing.

WEBER, J., dissents.

(107 Kan. 349)

**In re LAWLESS' ESTATE.\*****FINLEY v. GILMORE et al.**

(No. 22605.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Partnership  $\S$ 315 — Liquidating partner may sue other partner for share of ascertained liabilities paid.

Where by agreement of two partners their partnership business is turned over to one of them for the purpose of settling its outstanding liabilities, and collecting its claims and accounts, and winding up its affairs, a cause of action will lie on behalf of the liquidating partner against the retiring partner for the latter's share of the ascertained liabilities of the partnership which have been paid by the liquidating partner.

2. Limitation of actions  $\S$ 53(4)—Limitations not running against liability of retiring partner until ascertained.

Under the circumstances stated in the first paragraph of the syllabus, the statute of limitations does not begin to run until the business has been wound up by the liquidating partner and the liability of the retiring partner ascertained.

Appeal from District Court, Rawlins County.

Claim by J. L. Finley against the estate of John E. Lawless, deceased, opposed by Mrs. J. B. Gilmore and others. Claim rejected by the probate court, and demurrer to petition sustained on appeal, and claimant appeals. Reversed and remanded.

T. F. Garver, of Ft. Worth, Tex., and J. L. Finley, of St. Francis, for appellant.

E. E. Kite, of St. Francis, for appellees.

**DAWSON, J.** This was an action on a claim against the estate of the late John E. Lawless, of Rawlins county. The claim was founded upon the outcome of a certain business partnership which had existed between the plaintiff and Lawless.

In the year 1907, plaintiff established Lawless in business at McDonald, in Rawlins county, and furnished him with a stock of merchandise valued at \$4,374.48. Plaintiff and Lawless agreed that the latter should conduct the business and pay the expenses, and that the profits should be divided between them. Lawless was to order and purchase merchandise on the advice and approval of plaintiff, and to turn over to plaintiff the cash and notes received from the sale of merchandise, and Lawless was to be credited therewith, and charged with the value of the original stock and the cost of other goods purchased. Plaintiff was to supervise and handle their dealings with wholesalers. Under these arrangements,

the business was conducted from 1907 until March, 1911, although Lawless did not wholly comply with his duty to report to plaintiff, nor did he always remit the cash and proceeds of the business, and he sometimes did obligate the business to wholesalers without the approval or knowledge of plaintiff. In March, 1911, the parties agreed to discontinue the business, and the goods, notes, and accounts were turned over to plaintiff. It was agreed that the plaintiff should liquidate the business and pay off the bills payable to wholesalers, collect the notes and accounts, and that plaintiff and Lawless would then make a final settlement.

All these agreements were oral. The community where the business had been conducted suffered from crop failures and short crops during the years 1911 to 1915, inclusive, and the collection of outstanding accounts was consequently very slow. Lawless had obligated the business heavily to wholesalers, and he had failed to keep plaintiff apprised of the nature and extent of these obligations, and some litigation arose over their adjustment. Lawless, also, without the knowledge of plaintiff, had withdrawn cash and merchandise from the business for his private use. It took a long time to straighten these details, and it was not until 1916 that the business was finally wound up, and then it became apparent that plaintiff was entitled to recoupment in the sum of \$7,147.40.

Meanwhile Lawless had died in February, 1914. No administrator had been appointed for his estate, nor was any effort made to secure such appointment until in May, 1917, when plaintiff, as a creditor, filed application therefor. An appointment was made in December of that year, and thereafter plaintiff filed a verified claim against Lawless' estate, consisting of a book account, covering all the transactions of the business from its inception in 1907, and which involved debits of \$30,478.94 and credits of \$23,331.54. Plaintiff's claim was rejected by the probate court, and on appeal a demurrer to his petition was sustained on two grounds: (1) No cause of action; and (2) the statute of limitations.

[1] Since the cause was determined on a demurrer to plaintiff's petition, the foregoing recital of facts must be taken as true, so far as concerns this appeal; and the defendant's first objection raised by the demurrer was not well taken. While the business relationship between plaintiff and Lawless was governed by the terms of their contract, that relationship was essentially a partnership. Their dealings with each other and with the wholesalers and with the public were of a character which logically belong in the category of partnerships. Their rights and liabilities toward each other and

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 29, 1920.

toward third parties were those of partners. It was proper and not unusual that they should agree that one of them should liquidate the business. It was proper, and legally correct, that their final adjustment with each other should be deferred until the business was completely wound up so far as concerned their debtors and creditors. And so this court has no difficulty in holding that the petition stated a cause of action. In *Brooks v. Campbell*, 97 Kan. 208, 155 Pac. 41, syl. 1 (Ann. Cas. 1918D, 1105), it was said:

"When a partnership business is closed out, a cause of action for an accounting and settlement arises between the partners, under an implied contract mutually and equally to share the profits and bear the burdens of the partnership."

[2] What about the statute of limitations? The law is thoroughly established that when a business partnership is discontinued, and its affairs are turned over to a liquidator for the purpose of being wound up, a final settlement between the partners cannot be made, whether for division of proceeds or for determination of their proportionate liabilities, until the partnership assets have been sold, and credits collected, and the debts paid.

Taking plaintiff's petition as true, as at present we are bound to do, the long delay in winding up the business was caused by the uncertainty surrounding the extent of the liabilities to wholesalers and the series of crop failures in that locality, which delayed the collection of the outstanding notes and accounts. Notwithstanding these delays, if the final determination of the status of affairs in 1916 had disclosed a surplus in the hands of the liquidating partner, Lawless or Lawless' estate would have an absolute right to share in that surplus. Moreover, if there had been no assets in Lawless' estate to make it worth while to have an administrator appointed until such surplus was disclosed in 1916, the right of the Lawless heirs to have an administrator appointed to sue for a share of that surplus could not have been denied. In this case an earlier appointment of an administrator would have served no purpose. There would have been nothing for an administrator to do. He would merely have had to wait until the liquidating partner had accomplished the task of winding up the business. The fact that the contract was not in writing does not affect it. It was the circumstances, and not the terms of the contract, that delayed its performance for more than a year. *Henshaw v. Smith*, 102 Kan. 599, 602, 603, 171 Pac. 616; *Dubbs v. Haworth*, 102 Kan. 603, 607, 171 Pac. 624.

In *Brooks v. Campbell*, supra, this court casually noticed the principle which governs this case. In the opinion it was said:

"The other case cited by appellant (*Benoist et al. v. Markey, Tutor, et al.*, 25 La. Ann. 59) is much more to the point. There the firm of Benoist, Shawn, Murphy & Newman had formed a partnership in 1859. Its business was ruined by the Civil War, and there was nothing done towards a settlement of the partnership business until 1868, when suit was begun and a receiver appointed upon the application of the parties. Litigation of several years' duration ensued. This was a plain case where the statute should not be held to begin to run until a settlement of the partnership affairs had been effected and until the partners could have an opportunity to commence proceedings under the judgment settling the respective rights of the liquidating partners. Other cases holding that the statute does not under all circumstances begin to run on the dissolution of the partnership are *Holloway v. Turner*, 61 Md. 217, *Jordan v. Miller et al.*, 75 Va. 442, and *Riddle v. Whitehill*, 135 U. S. 621. They relate to partnerships being wound up in due course, realizing assets, satisfying debts, etc. Obviously no statute of limitations would run in such cases." 97 Kan. 211, 155 Pac. 42.

*Brooks v. Campbell* has been republished in Ann. Cas. 1918D, 1105, and is followed by an elaborate note, from which we glean these pertinent excerpts:

"If after the dissolution of a firm, either by the act of the persons concerned or by operation of law, it is necessary to continue the partnership relation for the purpose of winding up the firm's affairs, the statute cannot begin to run against an action between the partners or their successors in interest for an accounting and settlement so long as the winding up of the firm's business continues. *Riddle v. Whitehill*, 135 U. S. 621, 10 S. Ct. 924, 34 L. Ed. 282; *Hammond v. Hammond*, 20 Ga. 556; *Prentice v. Elliott*, 72 Ga. 154; *Bauduc's Syndics v. Laurent*, 2 La. 449; *Benoist v. Markey*, 25 La. Ann. 59; *Bender v. Markle*, 37 Mo. App. 234, 244; *Patterson v. Lilly*, 90 N. C. 82, 88; *Miller v. Harris*, 9 Bart. (Tenn.) 101; *Peel v. Giesen*, 21 Tex. Civ. App. 334, 51 S. W. 44; *Marsteller v. Weaver*, 1 Grat. (Va.) 391; *Jordan v. Miller*, 75 Va. 442, 449; *Boggs v. Johnson*, 26 W. Va. 821." Page 1108.

"Where by an agreement between the partners the assets of the firm are left with one or more of them, after the firm has been dissolved, for the purpose of winding up the business, the partnership relation is continued, and the statute cannot begin to run against the right of the copartners to an accounting so long as the trust thus created in the firm property in the hands of the liquidating partner or partners continues and is recognized by all of the partners as such. *Causler v. Wharton*, 62 Ala. 358; *Taylor v. Morrison*, 7 Dana (Ky.) 241; *Coudrey v. Gilliam*, 60 Mo. 86; *Dye v. Bowling*, 82 Mo. App. 587, 592." Pages 1109, 1110.

"Therefore, until the liquidating partners have succeeded in closing up the firm's business and the accounts of debtors and creditors of the firm and in adjusting the balances between the partners, the statute cannot begin to run against an action between the partners or their representatives in interest for an accounting

and settlement. *Thomas v. Hurst*, 78 Fed. 372; *Haynes v. Short*, 88 Ala. 562, 7 So. 157; *McKaig v. Hebb*, 42 Md. 227, 235; *Gray v. Green*, 142 N. Y. 316, 37 N. E. 124, 40 Am. St. Rep. 596; *Miller v. Harris*, 9 Bart. (Tenn.) 101; *Roberts v. Nunn* (Tex.) 169 S. W. 1086." Page 1111.

It follows that the judgment on the demurrer must be reversed, and the cause remanded for further proceedings.

It is so ordered.

All the Justices concurring.

(107 Kan. 221)

**PATTERSON v. UNCLE SAM OIL CO. et al.**  
(No. 22437.)

(Supreme Court of Kansas. July 10, 1920.)

(*Syllabus by the Court.*)

1. Explosives ⇐9—Evidence held not to show that defendant sold mixture of gasoline and kerosene to plaintiff as coal oil.

Plaintiff was injured by the explosion of a coal oil lamp, and sued the defendant, a wholesale dealer in gasoline and coal oil, alleging that defendant had carelessly mixed a large quantity of gasoline with coal oil, and negligently sold and delivered some of the product as high-grade coal oil to the retail grocer from whom it was purchased, and that the mixture of gasoline caused the explosion which injured her. On the trial it was conceded that at defendant's place of business several thousand gallons of kerosene from a tank car had been, by mistake, loaded into a tank containing gasoline, and that some of the contents was sold to the trade as gasoline. The principal issue of fact was whether any of this mixture was sold to the trade generally, or to the retail grocer in question, as coal oil. Upon an examination of the record it is held that there was no substantial evidence, direct or circumstantial, tending to prove that fact, and therefore plaintiff failed to prove her cause of action.

2. Explosives ⇐9—Negligent sale as coal oil of a mixture containing gasoline could not be shown by proof of negligent sale of gasoline.

Over defendant's objections, plaintiff was permitted to prove that shortly after the accidental mixture of gasoline and coal oil at defendant's plant, other persons purchased high-grade gasoline from the defendant, which contained large quantities of coal oil. Held, that the testimony was not admissible, for the reason that evidence of defendant's negligence in selling for coal oil a mixture containing gasoline could not be established by proof that it was negligent in the sale of gasoline.

(*Additional Syllabus by Editorial Staff.*)

3. Explosives ⇐9—Testimony of wholesaler's superintendent as to quality of alleged explosive mixture held admissible.

In action for injury by the explosion of a coal oil lamp, wherein the petition alleged that

defendant, a wholesale dealer in gasoline and coal oil, had carelessly mixed gasoline with coal oil, and negligently sold some of the product to the grocer from whom plaintiff bought it, testimony of defendant's superintendent, tending to show the quality of the mixture at the time it was sold and sent out for delivery, was admissible.

Appeal from District Court, Sedgwick County.

Action by Hortense Patterson against the Uncle Sam Oil Company and others. Verdict and judgment for plaintiff, and defendants appeal. Reversed, and cause remanded, with directions to enter judgment for defendant.

Redmond S. Brennan, of Kansas City, Mo., and J. N. Haymaker and A. V. Roberts, both of Wichita, for appellants.

John Adams and William Keith, both of Wichita, for appellee.

PORTER, J. On the 26th of December, 1913, Hortense Patterson was seriously injured by the explosion of a coal oil lamp. On April 24, 1915, she brought this action against the Uncle Sam Oil Company to recover damages for her injuries, alleging that the defendant was engaged in the wholesale and retail gasoline and coal oil business in the city of Wichita, and kept large quantities of coal oil and gasoline in storage tanks for that purpose; that some time prior to plaintiff's accident the defendant, through its agents and servants, mixed and mingled a large quantity of gasoline with a large quantity of coal oil, and negligently and carelessly delivered and sold to one J. H. Missildine, a retail grocer, large quantities of the mixture, knowing that he would sell and retail the same to his customers as coal oil, for use in lamps for lighting purposes; that the mixture was sold to him as pure, high-grade coal oil, and that the plaintiff's husband purchased some of the mixture from him as coal oil; and that the large content of gasoline therein caused the explosion which injured the plaintiff. There was a verdict and judgment in plaintiff's favor for \$3,000, from which the defendant appeals.

It is insisted that the petition does not state a cause of action, since it is not brought under any statute, because there is no common-law action in Kansas for injuries sustained through the explosion of coal oil sold for illuminating purposes; that a recovery for such injuries can only be had under the Kansas statute (section 5023, General Statutes 1915), which declares that:

"Whoever shall sell any fluids without inspection as provided for in this act shall be liable to any person purchasing any of said oils or fluids, or any person injured thereby, for any damages to persons or property arising from the explosion thereof."

(191 P.)

The defendant relies upon the case of Oil Co. v. Rankin, 68 Kan. 679, 75 Pac. 1013, the syllabus of which reads:

"In the absence of an express warranty, fraud, or deceit, the rule of caveat emptor applies where a dealer sells goods on the market for retail." Paragraph 1.

"Chapter 72a, General Statutes of 1901, makes no provision for the recovery of damages to persons or property resulting from the explosion of illuminating oil, except where such oil is sold without having been inspected and tested." Paragraph 2.

In that case the petition set up two causes of action: The first, under the statute for damages for selling illuminating oil without having it tested; the second was a common-law action, charging the defendant with having manufactured for illuminating purposes oil which, because of its liability to explode, was dangerous. In both causes of action it was alleged that the oil was sold by the defendant to a retail grocer, who sold it to the plaintiff. The evidence showed that the defendant was a dealer in oil and sold to the retail trade. It was held that the demurrer to the second cause of action should have been sustained. In the opinion it was said:

"Our statute, unlike the statutes of many states, does not give a right of action against the seller of oil for damages sustained by an explosion, except where the oil was sold without having been tested. It gives that right, however, if the oil has not been tested, regardless of what its actual test may be. The purpose of the act is to require all oils to be tested before being put on the market; in all its provisions that one idea predominates." 68 Kan. 681, 75 Pac. 1014.

[1] In the present case the jury made a finding that the oil had not been tested. The finding is unsupported by any evidence. The only evidence upon the subject was offered by the defendant, and showed affirmatively that the oil had been tested. The court refused to set aside the finding. The defendant concedes that the jury were not bound to believe the testimony offered by it to show that there had been an inspection, but with much reason insists that the jury could not, in the absence of any testimony that there had been no inspection, make a finding that there had been none.

Evidence offered by both plaintiff and defendant established the fact that at the defendant's place of business in Wichita there were six or eight oil tanks, including fuel oil tanks, gasoline tanks, and coal oil tanks, which were filled as occasion required from tank cars; that in the latter part of November, 1913, there was an accidental mixture of some of defendant's coal oil and gasoline. The mistake arose by misunderstanding a telephone message from the railway agent at Wichita, notifying defendant that a tank of

oil had arrived. The employé who received the message understood the agent to say: "We have a car of gasoline for you." When the tank car filled with coal oil arrived at the plant, about 4,000 gallons of the contents were pumped into one of the gasoline tanks which held about 10,000 gallons, and which already contained several thousand gallons of gasoline. The mistake was then discovered. The evidence showed, however, that none of the mixture was run into the coal oil tank from which wagons were filled for trade in Wichita; that the mixture was allowed to stand in the gasoline tank until the next day, when the coal oil had settled to the bottom, and part of the contents was run off into a reserve tank and into barrels, and shipped back to Cherryvale for treatment. What remained after having been tested was sold in Wichita as gasoline.

In an attempt to show that some of this mixture got into the general trade at Wichita, the plaintiff produced the testimony of two witnesses—one, the proprietor of a cleaning establishment, who, over the objections of the defendant, was permitted to testify that in December, 1913, he ordered high-grade gasoline from the defendant for use in his dry-cleaning establishment, and when it was used it left a coal oil odor in the garments, which could not be removed, and he was obliged to pay customers for injuries to the garments; that he had tested the gasoline so purchased from the defendant, and that it contained a large quantity of coal oil. He had never bought any coal oil from the defendant. Over the objections of the defendant the witness was permitted to testify that he brought an action against defendant and recovered damages for the loss occasioned by coal oil being mixed with the gasoline. Another witness testified that he was conducting a garage in Wichita, and during the month of December purchased gasoline from the defendant which contained kerosene or coal oil; that he complained of the quality of the gasoline, and the defendant immediately replaced it with a high grade of gasoline, to which he had no objection; that he had purchased coal oil from the defendant, and had found it all right.

All of this testimony was objected to on the ground that evidence of these transactions had no tendency to establish the fact that any of the mixture caused by the accident at the defendant's plant was sold as coal oil, and that they had no connection whatever with the transaction between the defendant and the grocer, Missildine. It was further objected to on the ground that it confused the issues and was not admissible, because evidence of defendant's want of care could not be established by proving its negligence at other times, or that it was generally careless. *S. K. Rly. Co. v. Robbins*, 43 Kan. 147, 23 Pac. 113; *Roberts v. Dixon*.

50 Kan. 436, 31 Pac. 1083; C., K. & W. Rld. Co. v. Hoffman, 50 Kan. 697, 32 Pac. 382; Railway Co. v. Morris, 64 Kan. 411, 67 Pac. 837. Numerous additional authorities are cited on the proposition that particular acts of negligence cannot be admitted to prove the negligence in question.

[3] Mr. Wade, who was the superintendent in charge of the defendant's plant at Wichita, and who discovered that the employes had made a mistake and were filling a gasoline tank with kerosene, testified that they drew off all except a little that was left in the tank, and a thorough test was made of what remained after it had settled; that it was sold to garages and the gasoline trade in Wichita; that the rest, including that first drawn into the reserve tank and into barrels, was shipped back to Cherryvale. He testified that he personally superintended the disposition of this mixture; that it was sold as gasoline, and before any of it was sold or delivered he personally tested it. His testimony is that sales and deliveries of coal oil were under his direct supervision. He identified the delivery tickets, showing two sales of coal oil to Grocer Missildine, one of 20 gallons on December 15th, and one of 30 gallons on December 22d, just previous to plaintiff's accident. He testified that he was present and knew the tank wagons were loaded with the coal oil shown by the exhibits.

The court sustained a motion to strike out the latter part of his testimony, possibly on the theory that something might have happened to the coal oil after it left the defendant's place and before it was emptied into the tanks at the Missildine grocery. The witness had explained the different method used in loading tank wagons with gasoline and with coal oil. The storage tank for coal oil was mounted on piers, and the wagons were loaded from it by gravity. When the gasoline tank wagons were loaded the gasoline was pumped from a tank lying on the ground into a graduating tank, in order to ascertain the grade of the gasoline; from this tank it was then loaded into the wagons by gravity. On cross-examination, Mr. Wade testified that in December, 1913, the product that remained in the tank after the mistake occurred had been sold and distributed over the city of Wichita as gasoline, and that some of it was sold to Jackson, the dry cleaner, some of it went to the Hughes garage, and that some of it might have gone to Missildine as gasoline.

Manifestly it was error to strike out the testimony of the witness Wade. It concerned the most important issue in the case—the character and quality of the most recent sales of coal oil to Missildine, the retail dealer, just previous to the purchase made by the plaintiff's husband of the mixture which, it is claimed, caused her injuries. It was, at least, evidence tending to show the quality

of the mixture at the time it was sold and sent out for delivery. The witness did not attempt to testify as to what might have happened to the mixture after the wagons left the defendant's place of business.

[2] We think, too, that it was error to admit evidence as to the sales of gasoline to Jackson and Hughes. The plaintiff does not claim to have purchased gasoline, and the fact that defendant had sold to other persons or to the public generally, as high-grade gasoline, a product which contained coal oil, or that damages had been recovered in an action against it for such sales, was not competent evidence to establish a particular sale, as high-grade coal oil, of a product mixed with gasoline. The testimony merely served to confuse the jury as to the real issue of fact involved. The error was highly prejudicial, because it was upon this character of testimony alone that plaintiff was forced to rely in order to establish by mere inference that the defendant had sold as coal oil a product mixed with gasoline.

The importance of this character of proof to the plaintiff's case is apparent from the contentions presented in the brief, where it is insisted that the evidence shows that this mixture of gasoline and kerosene was sold to the retail trade of Wichita through the month of December, and that the evidence of Jackson and Hughes was admissible for the purpose of showing that defendant had mixed its gasoline and coal oil. It is said in the brief that:

"This evidence was admissible for the purpose of showing that the defendants had mixed their gasoline and coal oil, for the purpose of showing knowledge and notice, and for the purpose of showing the intention of defendants to sell this mixture to the trade generally. \* \* \* The defendant's own witness [Wade] testified that this mixture was sold all during the month of December in the city of Wichita. \* \* \* It was merely evidence of selling the same mixture here complained of, and as such was clearly admissible. \* \* \* The gasoline was sold to the trade, and the coal oil mixture was sold to the trade."

But the witness Wade testified that none of the mixture went into the coal oil storage tank; that some of it might have gone to Missildine as gasoline; if he bought any, he bought it as gasoline. Referring to the testimony of the witnesses Jackson and Hughes, it is said in plaintiff's brief:

"The evidence of these witnesses was merely cumulative of the fact that a mixing of this coal oil and gasoline had taken place. The time of the sales and mixing all corresponded. The witnesses all testified that the time was the same, and the evidence all shows that it was but one act of mixing. The fact that a mixture was sold to others shows the purpose of the defendants, and the intention of the defendants to sell this mixture to their customers. It also shows notice to and knowledge of the



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defendant of the dangerous character of the mixture."

Entirely independent of the errors in the admission of testimony, it is the opinion of the majority of the court that plaintiff's case must fail because of a lack of evidence upon the vital question involved. It was only by mere conjecture and speculation that the jury could find that any of the mixture at defendant's plant was sold or delivered to Missildine, the grocer, as coal oil. In *Duncan v. Railway Co.*, 86 Kan. 112, 119 Pac. 356, 51 L. R. A. (N. S.) 565, it is said:

"While the jury were warranted in drawing fair and reasonable inference from the facts and conditions shown, it was only from those shown, and not from those imagined or inferred, that such inference could rightfully be drawn." 86 Kan. 123, 119 Pac. 359.

See, also, another case with same title, *Duncan v. Railway Co.*, 82 Kan. 230, 108 Pac. 101, and cases cited in the opinion.

In *Railway Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58, it was ruled in the syllabus:

"So, to establish a theory by circumstantial evidence that it may be accepted as a fact proved, the known facts relied on as a basis for the theory must be of such nature and so related to one another that the only reasonable conclusion that may be drawn therefrom is the theory sought to be established." Paragraph 1.

"The term, 'a presumption of fact,' has reference to a fact whose existence is established by that just and reasonable inference which common sense and experience naturally draw from another fact known to exist. It must have a fixed fact for its foundation. It cannot be based upon a presumption." Paragraph 2.

To the same general effect see *Hart v. Railway Co.*, 80 Kan. 699, 102 Pac. 1101; *Brown v. Union Pac. R. Co.*, 81 Kan. 701, 106 Pac. 1001, 29 L. R. A. (N. S.) 808.

In *Duncan v. Railway Co.*, 82 Kan. 230, 108 Pac. 101, Judge Benson, speaking for the court, said:

"The real question must always be whether there is substantial evidence, direct or circumstantial, fairly tending to prove the fact in issue. Presumptions, as understood in the law of evidence, must have substantial probative force, as distinguished from surmise. If a fact may be established by inference from the presumption of another fact, it should at least be a logical deduction, and reasonably certain in the light of all other proper presumptions, and of all collateral facts. The chain of presumptions ought not to be extended into the region of conjecture. *Diel v. Mo. Pac. Ry. Co.*, 37 Mo. App. 454. A fact is not proved by circumstances which are merely consistent with its existence. *Carruthers v. C., R. I. & P. Ry. Co.*, 55 Kan. 600." 82 Kan. 233, 108 Pac. 102.

The theory of plaintiff's case, as set out in her petition and at the trial, was that there

had been an accidental mixture of coal oil and gasoline at the defendant's plant in Wichita, and that defendant, knowing this, negligently sold and delivered to Missildine as coal oil a part of this mixture, containing quantities of gasoline, which exploded and caused her injuries. That there was an accidental mixture of coal oil and gasoline at defendant's plant a few weeks before is conceded, but the burden rested on the plaintiff to establish that some of this mixture was sold and delivered to Missildine for coal oil. That was the principal issue of fact involved at the trial. It must be held that there was no substantial evidence, direct or circumstantial, tending to prove that fact.

It follows that the judgment must be reversed, and the cause remanded, with directions to render judgment for the defendant.

JOHNSTON, C. J., and BURCH, MASON, WEST, MARSHALL, and DAWSON, JJ., concur.

PORTER, J. (concurring specially). I concur in the judgment of reversal on the ground of failure of proof, but in my opinion the doctrine of the Rankin Case is controlling, and the allegations of the petition, as well as the proof, being that the defendant was a dealer in oils and sold without any express warranty to the retail dealer, no cause of action was stated or proved.

(107 Kan. 224)

CHAMBERLAIN v. MISSOURI PAC. R. CO.  
(No. 22759.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

Constitutional law § 241 — Eminent domain  
§ 2(8)—Statute requiring crossing connecting parts of farm after payment of all damages takes property without compensation and denies equal protection.

Where a railway company acquired a right of way across a farm in 1885, and at that time paid the owner the full compensation for all the damages, matured, continuing, and prospective, which he thereby sustained, the railway company cannot be compelled, under a statute enacted many years later, to furnish a crossing over the railway and to construct it at its own expense to connect the two parts of the farm divided by the railway, since such an application of the after-enacted statute would deprive the railway company of its property without compensation, and deny to it that equal protection of the law which is guaranteed by both the state and federal Constitutions.

Appeal from District Court, Sedgwick County.

Mandamus by Jess Chamberlain against the Missouri Pacific Railroad Company

to compel it to furnish plaintiff a convenient crossing connecting the two parts of his farm which were divided by the construction of the Railroad. Peremptory writ allowed, and defendant appeals. Reversed, with instructions to enter judgment for defendant.

W. P. Waggener and J. M. Challiss, both of Atchison, and O. H. Bentley, of Wichita, for appellant.

Wilson, Madalene & Hudson, of Wichita, for appellee.

DAWSON, J. This was an action to compel the defendant railway company to construct, at its own expense, a private crossing over defendant's railroad track and right of way which runs through the farm of the plaintiff in Sedgwick county. The purpose was to furnish the plaintiff a convenient crossing to connect the two parts of his farm which were divided in 1885 by the construction of the railway. In 1885 the defendant railway's predecessor procured by condemnation and by deed from plaintiff, and by the payment of \$2,502.40 in cash therefor, a right of way through this farm, and a railway has been continuously operated thereon since that time.

In 1911 (Laws 1911, c. 244, §§ 1-3) the Legislature enacted:

"Sec. 8466. Whenever any railroad, either steam or electric, shall run through any farm so as to divide it, such railroad at the request of the owner of such farm, shall construct, keep and maintain, a crossing either on, over or under such railroad track, at some convenient place, which crossing shall be so constructed as to permit ready and free crossing thereon, by animals, farm implements and vehicles.

"Sec. 8467. That through the fences on either side of the right of way of such railroad, at such crossing, such railroad shall construct, keep and maintain gates so as to permit the passage of animals, farm implements and vehicles.

"Sec. 8468. If upon such request being made, such railroad shall fail, neglect or refuse to construct such crossing and gates, or to keep the same in repair, then the owner of such farm may, by appropriate action, compel such railroad to so construct, keep and maintain such crossing and gates, or such owner may construct or repair such crossing and gates, and then collect from such railroad the cost thereof."

An alternative writ of mandamus being issued on plaintiff's application, the defendant answered as to the facts, set up its deed from plaintiff issued in 1885, and raised all pertinent defenses under the state and federal Constitutions.

The trial court decreed:

"That peremptory writ of mandamus be and the same is hereby allowed, directed to the said defendant, Missouri Pacific Railroad Company, commanding it to forthwith construct,

keep, and maintain, at its own cost, a crossing on, over, or under its railroad track at some convenient place on the premises of the plaintiff, Jesse Chamberlain, which crossing shall be so constructed as to permit ready and free crossing thereon by animals, farm implements, and vehicles."

The defendant appeals.

Twenty-six years before the enactment of 1911 the defendant's predecessors in title and interest bought and paid for, and also acquired by condemnation, all the rights which defendant now possesses and which affect the plaintiff. All the inconvenience, matured, continuing, and prospective, of which he now complains, was included in and compensated for by the payment of \$2,502.40 in 1885. 15 Cyc. 715, 800-803, 895-896, and notes. The plaintiff's right and the defendant's liability in this lawsuit, if any, are based upon the act of 1911. Is that act constitutional? Defendant says its effect, as interpreted in the trial court's judgment, is to reconfer on plaintiff part of what was taken from him in 1885 by condemnation, and to return to him part of what he sold to defendant's grantors by his right of way deed, and that the act bestows on him gratis what defendant's grantors paid their money for 35 years ago. The act of 1911 and the judgment based thereon, according to defendant, impair the obligation of the contract of the parties made in 1885, take the defendant's property without just compensation, take the defendant's property for a private purpose, and deny the defendant the equal protection of the law.

We have no present concern with the act of 1911 so far as it may effect the duties of railway companies towards private farm owners where rights of way which divide farms have been established since 1911, nor are we now writing a treatise on this general subject. See 22 R. C. L. 785-787, 873-875. Our present concern is with the objections to the act of 1911 as applied to the rights which defendant acquired in 1885. A way of convenience or of necessity to connect two parts of a farm, divided by a railroad or otherwise divided, is a private, and not a public, right. Presumably there are, or can and should be, public roads in the neighborhood whereby a landowner may have access to the divided parts of his property. *Kansas Cent. Ry. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190; *Atchison & N. R. Co. v. Gough*, 29 Kan. 94; *K. C. & E. R. Co. v. Kregolo*, 32 Kan. 608, 5 Pac. 15; *C. & K. & W. R. Co. v. Cospers*, 42 Kan. 561, 22 Pac. 634. See, also, *Ferguson v. Ferguson*, 106 Kan. 823, 189 Pac. 925. But, if the chief object of the creation of a roadway or crossing is to serve the necessity of a private person, the servient estate must ordinarily be compensated at the expense of the person benefited thereby. Gen. Stat. 1915, § 8767.

Why should not the defendant railway company be compensated for subjecting its property to an easement for a private farm crossing? Still more, why should the railway company construct such crossing at its own expense? A legislative act which thus discriminates between a railway company and all other property owners is subject to constitutional infirmities. Most of defendant's objections to this act were similarly raised in *Railroad Co. v. Utilities Commission*, 98 Kan. 667, 158 Pac. 863, but in that case it was not necessary to determine the questioned constitutionality of the statute. Here our responsibility to declare the law must be met and discharged. Here we are bound to hold that the text and spirit of both state and federal Constitutions (Kansas Bill of Rights, §§ 1, 2, and 18; Fed. Const. 14th Amend.; *Winters v. Myers*, 92 Kan. 414, 140 Pac. 1033; *State v. Wilson*, 101 Kan. 789, 795, 796, 168 Pac. 879) are violated in the act of 1911 when applied to railroads whose rights of way were acquired, and paid for, and in use long prior to that enactment. To compel the defendant to furnish this crossing and to construct it at its own expense would be to deprive it of its property without compensation, and would deny to it that protection of the law which the railway company, equally with all other persons and corporations, is guaranteed under both the state and federal Constitutions. The Supreme Courts of other states have also reached this conclusion in similar cases. See *Railway v. Rowland*, 70 Tex. 298, 7 S. W. 718, and citations; *People v. Railway*, 79 Mich. 471, 44 N. W. 934, 7 L. R. A. 717, and citations; note in *Ann. Cas.* 1915 C, 1192.

Reversed, with instructions to enter judgment for defendant.

All the Justices concurring.

(197 Kan. 419)

BEALMEAR et al. v. HILDEBRAND, County Superintendent. (No. 22968.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

Schools and school districts §42(2)—Private persons cannot question organization by action to enjoin officers.

Private persons have no standing to question the legality of the organization of a rural high school district, by an action to enjoin election of rural high school district officers.

Appeal from District Court, Gray County.

Action by Hays Bealmear and others against Emma Hildebrand, as County Superintendent, etc., to enjoin the calling an election in a rural high school district, to choose a board of officers. From a judgment

sustaining a demurrer to the petition, plaintiffs appeal. Affirmed.

L. A. Madison and Carl Van Riper, both of Dodge City, for appellants.

John M. Martin, of Hutchinson, for appellee.

BURCH, J. The action was one by taxpayers to enjoin the county superintendent from calling an election in a rural high school district, to choose a board of officers. A demurrer to the petition was sustained, and the plaintiffs appeal.

The petition discloses that persons living at and near Ensign, in Gray county, close to the Ford county line, promoted organization of a rural high school district composed of territory lying in both counties. A petition was circulated and signed before boundaries of the proposed district were approved by the county superintendent of Ford county. When the petition was presented to her, she declined to approve it. In order to save circulation of a new petition stating different boundaries, the promoters of the district and the county superintendent of Gray county made a proposition not to oppose segregation of part of the Ford county territory, and to recommend such segregation, after the district was formed and bonds voted, if the county superintendent of Ford county would approve. The proposition was accepted, reduced to writing, and signed, and the county superintendent of Ford county approved the boundaries of the proposed district as described in the petition. The writing reads as follows:

"Inasmuch as some opposition exists by certain parties within the east two tiers of sections of township 27, range 26, to being incorporated in the proposed Ensign rural high school district, it is agreed by the county superintendents of Gray and Ford counties, and the promoters of said district, that in consideration of the approval of the county superintendent of Ford county of the boundaries in Ford county as stated in the petition presented for the proposed Ensign rural high school district, the county superintendents and the promoters agree that after the district is formed and the bonds voted and sold, they will not oppose the segregation of the said east two tiers of sections in township 27, range 26, and the said county superintendents agree to in-dorse the segregation of said two tiers of sections.

"Done at Dodge City, Kansas, Feb. 7, 1920.

"Executed in duplicate.

"[Signed] Esther M. Wilkinson,

"Co. Supt. of Ford Co.

"Emma Hildebrand,

"Co. Supt. of Gray Co.

"C. M. Bratton.

"Chas. E. Sturdevant."

The petition charges fraud on the county superintendent of Ford county because there is no way to detach the Ford county sections,

and alleges that because of the agreement some of the inhabitants desisted from efforts to defeat establishment of the district.

Section 1 of chapter 284 of the Laws of 1917 authorizes electors to form a rural high school district whose boundaries have been approved by the county superintendents of each county in which a portion of the proposed district is situated. Section 2 provides as follows:

"Whenever a petition, signed by two-fifths of the legal electors residing in the territory of the proposed rural high school district \* \* \* shall be presented to the board of county commissioners of the county in which lies the greatest portion of territory comprising said district, reciting the boundaries of said proposed district and the approval thereof as provided in section 1 of this act, and requesting said board of county commissioners to call a special election to vote on establishing and locating a rural high school, \* \* \* it shall be the duty of the board of county commissioners forthwith to call a special election in said proposed district to vote on establishing and locating a rural high school. \* \* \*"

The statute further provides as follows:

"On the Friday following the election held as provided in sections 2 and 3 of this act the board of county commissioners shall canvass the vote and shall report the same to the county superintendent of public instruction. Upon receiving notice that a proposition to establish a rural high school has been adopted by a majority of those voting in an election held as provided in sections 2 and 3 of this act, the county superintendent of public instruction shall call a special meeting, notice of which shall be given as provided in section 2, to elect a rural high school board which shall consist of a director, clerk, and treasurer. \* \* \*" Gen. Stat. 1915, § 9350.

Under this law a high school district has been established. In calling the election to choose a district board, the defendant acts in a purely ministerial capacity to execute the command of the Legislature. The proposition is that the plaintiffs may litigate with her the legal existence of the corporation. This court has uniformly held, under a great variety of circumstances, that this may not be done. *A. T. & S. F. R. Co. v. Wilson, Treas.*, 33 Kan. 223, 6 Pac. 281, and cases cited in the opinion; *Topeka v. Dwyer*, 70 Kan. 244, 78 Pac. 417, 3 Ann. Cas. 239, and cases cited in the opinion; *Hornier v. City of Atchison*, 93 Kan. 557, 144 Pac. 1010; *Miely v. Metzger*, 97 Kan. 804, 156 Pac. 753.

The petition presents no facts which would authorize the court to depart from the established rule. No matter what moved the mind of the county superintendent of Ford county, she approved the boundaries of the proposed district. There came to the board of county commissioners a petition, signed

by the proper number of electors, and approval of boundaries by the county superintendents of both counties. If approval of boundaries followed, instead of preceded, signing of the petition, the proceeding was irregular merely, and not void, and the board of county commissioners was authorized to call the election and declare the result. Whatever it was that influenced or did not influence the minds of the voters, the result of the election was favorable to the establishment of the district, and that ends the matter, unless the state should choose to interfere. Besides what has been said, it is clear the plaintiffs are not entitled to the relief prayed for, because of the rule forbidding injunction against calling or holding an election. *Duggan v. Emporia*, 84 Kan. 429, 114 Pac. 235, Ann. Cas. 1912A, 719.

The judgment of the district court is affirmed.

All the Justices concurring.

(107 Kan. 233)

**STOKES v. MORRIS & CO. (No. 22533.)**\*

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

Master and servant  $\S$ 411½, New, vol. 5A Key-No. Series—New trial held warranted on ground that claimant was not entitled to compensation as wife.

A woman, who claimed to be the wife and sole dependent of a deceased workman, recovered judgment for his death against his employer under the Workmen's Compensation Act. The woman died, and after her death the judgment was revived in the name of her administrator and that of the deceased workman, and the administrator and guardian of a minor child of the deceased was substituted for the plaintiff. On a motion for a new trial, it was shown that the plaintiff was not the wife of the deceased workman, that another woman then living was his wife, and that the plaintiff had knowledge of that fact. *Held*, that the judgment should have been set aside, and that a new trial should have been granted.

Appeal from District Court, Wyandotte County.

Action by Lillie Stokes, as widow of Major Stokes, deceased, employé, against Morris & Co., employer. Judgment for plaintiff, and after her death action was revived in the name of Earl R. Gilbert, public administrator and administrator of Lillie Stokes and Major Stokes, and as administrator and guardian of Ralph Stokes. Motion for new trial on the ground of newly discovered evidence denied, and defendant appeals. Reversed, and new trial granted.

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 29, 1920.

(191 P.)

C. W. Trickett, of Kansas City, Kan., for appellant.

McCanles, Thompson & Gorsuch, of Kansas City, Mo., for appellee.

**MARSHALL, J.** The defendant appeals from a judgment against it under the Workmen's Compensation Act (Gen. St. 1915, §§ 5896-5942). Major Stokes was injured November, 1917, while he was an employé of the defendant, and according to the verdict of the jury died as a result of that injury. The plaintiff brought the action as the widow of Major Stokes. The defendant came within the operation of the Workmen's Compensation Act.

The serious question presented arises out of the order overruling the defendant's motion for a new trial. One of the grounds of that motion was newly discovered evidence material to the defendant, which it could not with reasonable diligence have ascertained and produced at the trial. The newly discovered evidence tended to show that the plaintiff was not the wife of Major Stokes at the time of his injury and death. An agreed statement of facts filed on the hearing of the motion for a new trial recited that Major Stokes was married to Lillian Wembly, another woman, January 9, 1909; that in February, 1918, he filed an action for divorce against his wife, Lillian Stokes, formerly Lillian Wembly, but that action had not been tried, nor disposed of, but was pending, on the date of the death of Major Stokes, June 28, 1918; that Major Stokes and his wife, Lillian Wembly Stokes, separated, and that after such separation the plaintiff and Major Stokes lived together, when the plaintiff took the name Stokes, and afterward went by that name. The affidavit of Lillian Wembly Stokes was filed, in which she stated that she was married to Major Stokes at Newton, Kan., and was the mother of Ralph Stokes and Homer Stokes, children of Major Stokes; that Major Stokes never got a divorce from her; and that he and she were husband and wife until his death. The affidavit of the attorney who filed the petition for a divorce for Major Stokes was presented, and it tended to prove that the plaintiff, Lillie Stokes, knew that Major Stokes had a living wife.

The evidence produced was sufficient to establish the fact that the plaintiff was not the wife of Major Stokes at the time of his death. If she was not his wife, and he had a wife living at that time, the plaintiff cannot recover compensation in this action for herself or for the dependent members of the family of Major Stokes. Part of the statute under which the plaintiff seeks to recover reads:

"'Dependents' means such members of the workman's family as were wholly or in part dependent upon the workman at the time of

the accident. 'Members of a family,' for the purpose of this act, means only widow or husband, as the case may be, and children." Laws 1917, c. 226, § 2, subd. (j).

If the evidence produced on the motion for a new trial was true, the plaintiff was not the wife of Major Stokes at the time of his injury and death, and was not then a member of his family within the meaning of the Workmen's Compensation Act. She cannot recover compensation as the wife of Major Stokes; neither can she recover in any other capacity, because she does not come within any of the provisions of the act. *Ellis v. Coal Co.*, 100 Kan. 187, 163 Pac. 654, supports this conclusion. See, also, *Armstrong v. Industrial Commission*, 161 Wis. 530, 154 N. W. 844; *Hall v. Industrial Commission*, 165 Wis. 864, 162 N. W. 812, L. R. A. 1918D, 829; 1 *Honnold on Workmen's Compensation*, § 75, and notes.

The plaintiff cites authorities which hold that a woman who innocently lives with a man whom she believes to be her husband, but who has a wife living, can recover compensation. We have two difficulties in following these authorities, the first of which is our statute, of which a part has been quoted, and the second of which is that in the present case the evidence tended to show that the plaintiff knew that Major Stokes had a wife living.

After judgment was rendered in this action, the plaintiff died, and the action was revived in the name of Earl R. Gilbert, public administrator and administrator of the estates of Lillie Stokes and of Major Stokes, and Earl R. Gilbert, as such administrator and as guardian of Ralph Stokes, was substituted for the plaintiff. It is argued that the substitution was proper and avoided the consequences of a judgment having been wrongfully obtained in favor of the plaintiff. It is also argued that the defendant has waived its right to object to the substitution by filing its motion for a new trial instead of objecting to the substitution. It is further argued that a defect of parties or a want of proper parties cannot be presented or reached by a motion for a new trial. The fault in this argument lies in the fact that the judgment was improperly obtained, that the plaintiff had no right of action, and that the defendant may have valid defenses against all parties for whose benefit a judgment might be obtained. On the showing made, a new trial should have been granted, and the defendant should have been permitted to set up any defense that it may have against the substituted party and against those for whose benefit a judgment might be obtained by the substituted party.

The judgment is reversed, and a new trial is granted.

All the Justices concurring.

(107 Kan. 489)

**LASWELL et al. v. SEATON et al.**  
(No. 23059.)

(Supreme Court of Kansas. July 19, 1920.  
Rehearing Denied Aug. 10, 1920.)

*(Syllabus by the Court.)*

1. Appeal and error  $\S$  190(2)—Appeal lies from temporary injunction without first applying for vacation or modification.

An appeal will lie from a temporary injunction, granted without notice under section 262 of the Civil Code (Gen. St. 1915, § 7160), without first applying to the court or judge to vacate or modify the order.

2. Appeal and error  $\S$  242(1)—Right of appeal from temporary injunction not destroyed by motion to vacate not passed upon.

The right of appeal in such case is not destroyed by the filing of a motion to vacate which has not been presented to nor been passed upon by the judge or the court granting the order.

3. Injunction  $\S$  132—Though containing words "until the further order of the court," order was a "temporary injunction," and not a "restraining order."

On the facts and circumstances in this case, the order granted is *held* to be a temporary injunction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Temporary Injunction; Restraining Order.]

4. Schools and school districts  $\S$  103(1)—Rural high school district can only elect rural school board.

In an ordinary school district the patrons of the school at the annual meeting of the district determine what levy shall be made for school purposes, but a rural high school district at its annual meeting has no power except to elect the rural high school board, which determines at its annual meeting on the third Monday in April how the school shall be conducted, and makes the levy of taxes for school purposes.

5. Schools and school districts  $\S$  100—Rural high school board may erect suitable building, and meet bond deficiency by levy of taxes.

Under sections 4 and 5, chapter 284, Laws of 1917, the rural high school board, in the erection of a school building, is not necessarily limited to the proceeds of bonds voted by the district for that purpose, and where it is found that a school building, suitable and fit for the district, cannot be erected for the amount of bonds voted and issued, the board may proceed to erect a building and meet the deficiency by a levy of taxes made within the limits of the levy authorized by section 4, chapter 284, Laws of 1917.

6. Schools and school districts  $\S$  111—Temporary injunction against officers of joint rural high school district restraining their tax levy held erroneous.

On appeal from an order granting a temporary injunction, restraining a rural high

school board from erecting a high school building or levying any taxes for that purpose, *held*, that the petition fails to state a cause of action, and that it was error to grant the injunction.

Appeal from District Court, Pottawatomie County.

Action for injunction by Otis Laswell and others against G. M. Seaton and others, as officers of joint rural high school district No. 3 in Pottawatomie county for erecting a school building. Temporary injunction granted, and defendants appeal. Reversed and remanded, with directions to dissolve the injunction.

Wheeler, Brewster & Hunt, of Topeka, for appellants.

A. E. Crane, of Topeka, and Maurice Murphy, of St. Marys, for appellees.

PORTER, J. The appeal is from an order granting a temporary injunction, restraining the defendants, as officers of joint rural high school district No. 3, in Pottawatomie county, from erecting a school building.

Joint rural high school district No. 3, which comprises four school districts in Pottawatomie county and three in Jackson county, was established at an election held in 1919. At the same election an issue of \$25,000 of bonds was authorized for the purpose of constructing a high school building in the town of Emmett in Pottawatomie county, and the bonds were issued and sold. The plaintiffs are residents, landowners, and taxpayers of the district, and in their petition alleged that, aside from the proceeds of the bonds, the defendant officers have no other funds; that \$50,000 was the lowest bid for the erection of the building which could be obtained by the defendants, and that in November, 1919, defendants called a special election for authority to issue \$19,000 additional bonds, which proposition was defeated at the election; that thereafter defendants, without any legal authority, were proceeding to erect a building "which, according to the plans and specifications," will cost not less than \$75,000, and had hired labor, employed mechanics, and purchased materials for the building; that this unwarranted action of the defendants will occasion the levy of an illegal tax against the property of plaintiff and other taxpayers. A temporary injunction was prayed for, restraining defendants from entering into any contract for the erection of the building, hiring any labor, purchasing any material, or collecting any taxes for that purpose until the final trial, and that the injunction be made permanent. The petition was verified by one of the plaintiffs. On the 25th of March, 1920, the judge of the district court granted a temporary injunction, which became effective upon the giving

of a bond by plaintiffs in the sum of \$1,000.

The answer alleged that defendants were proceeding to construct a building that would cost, fully equipped, not to exceed \$50,000, and that the district was already indebted in a large sum for materials purchased, ordered, and supplied, and that it would be impossible to erect a building suitable and fit for the needs of the school district at a less cost.

[1, 2] At the outset we are met with an objection to a hearing of the appeal, and plaintiffs ask that it be dismissed on the ground that defendants are attempting to appeal from an order granting a temporary injunction allowed without notice. While it is conceded that the Code of 1909 dispenses with the necessity of taking or saving exceptions (*Kelley v. Schreiber*, 82 Kan. 403, 404, 108 Pac. 816, 20 Ann. Cas. 192; *Kroenert v. Sawyer*, 87 Kan. 374, 124 Pac. 418), it is insisted it is still necessary to make objections to a ruling before an appeal will lie, and that the Code does not contemplate an appeal from an order granting a temporary injunction without notice, for the reason that the defendant, under section 262 of the Code (Gen. St. 1915, § 7180), at any time before trial may, upon notice, apply to the court or judge to vacate or modify the injunction. In this connection it is urged that defendants gave notice and filed a motion to set aside the injunction; that the motion was set for hearing, but was afterwards continued. Since it has been neither presented to the court nor decided, it is urged that the granting of the temporary injunction is not a final order. We are unable to see any merit in these contentions. The injunction was granted before the defendants had answered, and in such a case the statute allows a temporary injunction to be granted without notice. The Code, § 565 (section 7469) authorizes an appeal from an order granting an injunction, and the fact that a motion filed by defendants to set it aside has not yet been considered or passed upon by the trial court does not destroy defendants' right to appeal from the granting of the injunction.

[3] Although the plaintiffs speak in their brief of the order as a "temporary injunction," there is a suggestion that, because the order enjoined the defendants "until the further order of the court," it was not, in fact, a temporary injunction, but a mere restraining order, and therefore not a final order. The plaintiffs asked and obtained a temporary injunction, which has been in force since some time in March. It has apparently been created by all the parties and the court as a temporary injunction; and up to this time has effectually restrained the defendants from proceeding further with the erection of the school building. "Temporary injunction" and "restraining order" are often used synonymously. \* \* \* The restraint which the order purports to impose, and not

the name given to it, determines its true name and character." *State v. Johnston*, 78 Kan. 615, 97 Pac. 790; *City of Emporia v. Telephone Co.*, 90 Kan. 118, 123 Pac. 858. We regard the order in this case as a temporary injunction, and for the reasons stated the motion to dismiss is overruled.

[4, 5] In their brief, plaintiffs cite several cases involving the powers of the board of directors of a school district, which we do not regard as in point. In the ordinary school district the resident taxpayers determine at the annual school meeting what levy shall be made for school purposes; but at the annual meeting of a rural high school district the patrons of the school have no power except to elect a board. Section 4, c. 284, Laws of 1917, fixes the time for the annual school meeting for the election of officers of rural high school districts on the day preceding the annual meeting of school districts. In the same section it is provided that the annual meeting of the high school board shall be held on the following Monday, at which time the board is required to make the necessary levy for taxes, not to exceed four mills on the dollar, on the valuation of all property in the high school district, to pay teachers, to create a fund to retire any indebtedness and interest on the same, to purchase a site, to build, hire, or purchase a schoolhouse, and to pay incidental expenses of the high school. It is at the annual meeting of the high school board on the third Monday of April that the board determines how the school shall be conducted and makes the tax levy. Rural high school district No. 3 was not organized until July, 1919, and the annual meeting for that year was not held.

In section 5 the board is given authority to issue the bonds of the district for the purchase of a site and for the construction of a building, or buildings, for school purposes; provided, that no bonds shall be issued unless authorized by an election.

The petition in this case alleged that the board had no funds in its hands except the proceeds of the bonds issued, which were insufficient to meet the cost of the building contemplated by the board; but the suit was filed and the temporary injunction was granted on March 25, 1920, only a few days prior to the time fixed for the annual meeting of the board to make a levy of taxes for the purposes determined to be necessary.

One theory upon which the petition is drawn appears to be that in the erection of a school building the rural high school board is limited to the proceeds of the bonds voted by the district, but this is a mistaken view. In *Wright v. Board of Education*, 106 Kan. 469, 188 Pac. 439, the court considered the authority of a board of education, after being authorized at an election to issue \$50,000 in bonds for the purpose of erecting a building for an industrial training school, which

was found to be insufficient, to make up the deficiency by the levy of a two-mill tax authorized by another statute for the construction and repair of school buildings. A somewhat similar situation arose in that case as in this. It was discovered, after the bonds had been voted, that owing to the increased cost of labor and material, the proceeds of the bonds (even when supplemented by a donation of \$10,000) would not be sufficient to pay for the building called for by the plans. In that case the board at first adopted a resolution to submit to the voters a proposition to issue additional bonds, but afterwards rescinded their action and decided to raise the additional amount by taxation. This action was under the authority of the statute authorizing an annual levy of that amount "for the purchase of sites and for the construction and repair of school buildings." Notwithstanding the fact that the statute which authorized the voting of bonds for the erection of buildings contained a provision that the board must complete the building within the estimated cost, and should in no case create a deficiency in connection therewith, it was held that this did not prevent the expenditure for that purpose of such sum in excess of the amount of bonds voted as might be raised by the levy of a two-mill tax under the general statute.

In the present case we may assume that after the bonds were voted the school board discovered that, owing to the increased cost of labor and materials, it would be impossible to erect a building suitable and fit for the needs of the district, and keep within the amount of the bonds and the original estimate. In the *Leavenworth Case*, *supra*, it was said:

"The Legislature can hardly have intended that where, as in the present case, it is found impossible to erect a suitable building for the amount of the original estimate, the board must nevertheless, despite any obstacles or changed conditions, proceed to put up such an edifice as the bonds already voted would pay for. \* \* \* If a board has on hand, or can raise by the tax permitted in the current year, a sufficient fund to pay for such a building as is found to be necessary, there can be no occasion for issuing bonds. And if a part of the amount necessary to pay for the construction of a new building is available from a fund on hand or from the proceeds of current taxes, there can be no occasion for issuing bonds beyond the sum needed to make up the difference. We interpret the statutes as permitting the board to incur such expense in the erection of a school building as may be met from the proceeds of the bonds and the levy of a two-mill tax." 106 Kan. 473, 188 Pac. 441.

[8] In this case the petition shows that the defendants, who were authorized to provide a school building, found that the \$25,000 in bonds, voted for the purpose of building a schoolhouse, was insufficient, and that they contemplated the levy of a tax to meet the deficiency. It is not contended that the building the board was proceeding to erect is unnecessary; it seems to be conceded that a school building suitable for the district cannot be erected for the amount of the bonds or for a sum less than that which the board proposed to expend. It is not alleged that the amount that might be levied under the provisions of the statute for the very purpose of erecting a school building would not be sufficient to meet the deficiency in the amount of the bonds. There is no provision in the statute that a rural high school building shall not cost to exceed \$25,000; nor is there any provision that deprives the board of the power to contract for a building in excess of the amount of bonds issued. We see no reason why the board might not raise part of the funds necessary to erect a building by the issuance of bonds, and levy a tax for the remainder of the cost, so long as they keep within the limits of the levy authorized by the statute. The duty providing a suitable building for the high school is imposed upon the board, and not upon the district, and there is nothing alleged in the petition to indicate bad faith upon the part of the board. We interpret the provisions of section 4, c. 284, Laws of 1917, as conferring authority upon the district board to levy taxes to be used in the erection of a school building, and authorizing them, if they find it necessary, to issue bonds for that purpose, provided the proposition be submitted to the voters at an election. There is nothing in the statute to prevent the board, in our opinion, from making a levy of taxes to be used in whole or in part for the erection of a school building. As suggested in defendants' brief, we think that if a proposition for the issuance of bonds were defeated at an election, it would be the duty of the board, under section 4 of the act, to make the necessary levy for taxes in order "to purchase a site, to build, hire or purchase a schoolhouse," provided they had not acquired the site "by donation" as authorized under section 5.

The petition was subject to demurrer on the ground that it states no cause of action, and it was error to grant the temporary injunction. The cause is reversed and remanded, with directions to dissolve the injunction.

All the Justices concurring.



(107 Kan. 424)

STATE ex rel. BURNETT, County Attorney,  
v. STEWART, County Clerk. (No. 23023.)

(Supreme Court of Kansas. July 19, 1920.)

*(Syllabus by the Court.)***Highways** §127(1)—Taxes can be levied before improvement is completed.

Under the provisions of the road law, it is not necessary that an improvement shall be completed before general county and township taxes can be levied to provide a fund to meet at maturity the first installment of the bonded debt created therefor, notwithstanding that local assessments upon the land specially benefited cannot be made until such completion.

Original mandamus by the State of Kansas, on the relation of William H. Burnett, County Attorney, Reno County, against Chas. H. Stewart, as County Clerk of Reno County. Writ of mandamus awarded.

William H. Burnett, Co. Atty., of Hutchinson, for plaintiff.

Walter F. Jones, of Hutchinson, for defendant.

MASON, J. The commissioners of Reno county on May 26, 1920, levied county and township taxes to meet the first payment of principal and interest due January 15, 1921, upon bonds issued to raise money for a road improvement. The county clerk declined to extend the levies upon the tax rolls on the ground that they were not authorized by law. This action is brought against him by the state on the relation of the county attorney to compel such extension. The case is submitted upon an agreed statement of facts.

The county clerk contends that no tax can be levied to provide a fund for the payment of the bonds until the improvement is completed, and the disposition of the case turns upon the soundness of that contention.

The first steps for the improvement of the road were taken in 1918, and were controlled by the law then in force. Laws 1917, c. 265. After its amendment in the following year, the proceedings were governed by the new law. Laws 1919, c. 246, § 8; Washburn v. Shawnee County, 103 Kan. 169, 172 Pac. 997. Under the act of 1917, no bonds were to be issued until the completion of the improvement. Section 9. The section of the present law relating to the issuance of the bonds and the levy of taxes reads as follows:

"That section 9 of chapter 265, Laws of Kansas of 1917, be amended to read as follows: Sec. 9. After the approved estimates have been filed with the county clerk and the cost to be assessed against the taxable property of the county and township has been approximately determined by deducting from the total estimated cost all donations, subscriptions, state aid or federal aid that have been granted or promised, the board of county commissioners

may issue from time to time as required, bonds of the county, bearing not to exceed five per cent. interest, payable within the time fixed in the petition for levying special assessments: Provided, the total amount of bonds issued previous to completion of the improvement shall not exceed the amount of the estimated cost to be assessed against the county and townships. Said bonds shall be issued in series and shall be payable in equal amounts each year as nearly as practicable, and shall be disposed of by the county board in the manner provided by law, and the proceeds thereof shall be deposited with the county treasurer in the special fund for the improvement. After completion of the improvement, the application of state and federal aid, the ascertainment of apportionments to be charged against the taxable property in the county and township and the amount assessed against the several tracts of land within the benefit district, the board of county commissioners shall issue bonds of the county in the same manner as above provided in this section and the proceeds thereof shall be used in paying the remaining outstanding warrants for the improvement. After any such bonds are issued the board of county commissioners shall make an annual levy upon all the taxable property of the county and upon the taxable property of the township and upon the lands within the benefit district according to the apportionment of cost fixed upon said lands in all cases in proportion to the respective liabilities, which tax shall be sufficient to pay the bonds falling due each year and the interest upon outstanding bonds; these bonds shall be in addition to any other bonds which the county may by law be authorized to issue: Provided, that the board may in its discretion pay the county's proportion of the cost out of the general fund and road fund of the county if such funds are sufficient for that purpose after deducting all other proper charges against said funds, and after such payments no general county levy shall be made for payment of the bonds, or if any portion of the county's proportion of the cost is paid in such manner the county levy shall be reduced proportionately thereto: Provided further, that the township board or boards of the township or townships affected by the benefit district may, in their discretion, deposit with the board of county commissioners sufficient funds to pay the township's proportion, or any part thereof, of the cost of the road out of the general funds or road funds of said township or townships, if such funds are sufficient for that purpose, and if any of the townships' proportion of the cost is paid in such manner, the township levy shall be reduced proportionately thereto." Laws 1919, c. 246, § 6.

The act further provides that the cost of the improvement in excess of the aid received from the federal government and from other sources shall be distributed thus: Fifty per cent. to the county, 25 per cent. to the townships in which the benefit district is situated, divided according to its area in each township, and 25 per cent. among the several tracts within the district according to the benefit received as determined by the county

commissioners after the completion of the improvement (section 5); and also that the petition shall designate "the number of annual assessments to be levied upon the lands in the benefit district" (section 2)—in this instance twenty.

It will be observed that the statute authorizes the issuance of one set of bonds upon the filing of the approved estimates and another after the improvement is completed, and then provides for the levy of taxes for the payment of "any such bonds," obviously referring to those of both sets. The difficulty to which the defendant calls attention arises out of the fact that no levy can be made upon the specially benefited property until the work is finished. This dilemma is therefore presented: Either no provision is made for the levy of a tax in time to provide a fund to meet at maturity the first installment due on the bonds already issued, or else a series of annual county and township general levies must be begun before any special assessment can be levied upon the peculiarly benefited land. It cannot have been contemplated by the Legislature that bonds should be issued on which a payment should be due before means could be provided to meet it. In the absence of an express provision on the subject, it could readily be inferred that the intention was for a tax levy to be made in time to prevent a default. *United States v. New Orleans*, 98 U. S. 381, 393, 25 L. Ed. 225; 4 Dillon's Municipal Corporations (5th Ed.) § 1506. The defendant has not shown that there is any way other than that pursued by the commissioners by which that result can be avoided. In the oral argument it was suggested that warrants might be issued for the purpose; but the issuance of warrants unless a fund existed against which they could properly be drawn would not amount to a payment or better the situation, and there is no showing of the existence of such a fund.

The language of the statute to the effect that after the issuance of bonds the commissioners shall make an annual levy upon all the property of the county and of the townships, and upon the lands within the benefit district, would naturally seem to mean, in the absence of some specific reason to the contrary, that the levies of the general tax and of the special assessments were to begin at the same time. But to avoid the consequences pointed out—the opening of a way for the issuance of bonds without the power to provide for their payment—it may readily be interpreted as meaning that, if any installment of principal or interest on the bonds matures before a special assessment can be made, a general tax sufficient for the purpose shall be levied. It will be noted that the limitation of the number of levies is not in terms made applicable to the general county and township taxes, the provision being that the petition for the road

improvement shall designate "the number of annual assessments upon the lands in the benefit district \* \* \* which shall not be less than ten nor more than twenty." The bonds, moreover, are required to be made "payable within the time fixed in the petition for levying special assessments."

We conclude that it was proper for the commissioners to levy the taxes in question upon all the property of the county and townships, although for the present no local assessment can be made against the land specifically benefited.

It is suggested that this conclusion results in practical difficulty because the tax levied, being based on the estimate and not on the actual cost of the improvement, may overrun the amount needed. While the immediate occasion for levying a tax at this time is the need of providing a fund to meet the installment first maturing, the purpose of the tax is to pay a part of the debt incurred to make the improvement, the statutory requirement being that it shall be "sufficient" therefor, and any surplus can be carried over to the next installment without constituting a diversion. Although the obvious intention is that the amounts raised annually shall be approximately equal, there is no requirement of absolute equality, and minor differences can easily be adjusted from year to year.

The defendant interprets the statute as requiring that all the taxes it provides for shall be levied "according to the apportionment of cost" and argues that this cannot be arrived at until the completion of the work. The language from which he derives this meaning is to the effect that the commissioners "shall make an annual levy upon all the taxable property of the county and upon the taxable property of the township and upon the lands within the benefit district according to the apportionment of cost fixed upon said lands in all cases in proportion to the respective liabilities." The italicized words of the quotation show that the requirement regarding apportionment has reference only to the special assessment upon the benefited property, for the general tax runs against personalty as well as real estate.

A final argument against the tax is based on the theory that its levy before the completion of the improvement would deprive the townships of the opportunity given them by the statute to avoid general township taxes, or reduce their amount, by depositing with the county board funds to pay, or to apply upon, its proportion of the cost. We do not see that such a consequence follows. It was not necessary for the officers of a township to know the precise amount for which it would ultimately be liable in order to make a cash deposit in lieu of the first year's levy, and that course, which was open to them,

would have taken care of the situation for the time being.

The writ of mandamus asked for is allowed.

All the Justices concurring.

(107 Kan. 194)

**SCHUMACHER et al. v. JACOBS.\***  
(No. 22103.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

**1. Contracts**  $\S$  322(3)—Evidence sustaining judgment for contractor in suit for his breach.

The record examined, and held sufficient to sustain a judgment for defendant in an action against a contractor for an alleged breach of an oral contract to protect the stone wall of a building adjacent to the place where the contractor was engaged in excavation and foundation work for a new building.

**2. Contracts**  $\S$  353(2)—Instructions as to oral contract held not erroneous.

The instruction to the jury examined, and, when read and construed together, are held to fairly state the issues and the pertinent law, and to be free from material error.

Appeal from District Court, Ellis County.

Action by Anton Schumacher and others, copartners doing business under the firm name and style of A. Schumacher & Sons, and others, against Anton Jacobs. Judgment for defendant, and plaintiffs appeal. Affirmed.

Burch, Litowich & Royce, of Salina, and Lee Monroe, James A. McClure, and C. M. Monroe, all of Topeka, for appellants.

E. A. Rea and E. C. Flood, both of Hays, for appellee.

**DAWSON, J.** This was an action against a contractor for damages occasioned by a falling wall which, it was alleged, the contractor had agreed to protect. The defendant had been awarded a contract to erect a new building next to the wall in question; and plaintiffs alleged that one of the conditions under which he was awarded the contract was an independent oral agreement that he should protect and save the wall. The defendant denied the making of this agreement. In the contract for the new building the only reference to the wall provided:

"If old stone wall on south requires underpinning when basement (of new building) is dug, this will be an extra paid by owners, time and material."

[1] The plaintiffs' testimony was amply sufficient to support their claim that defendant had agreed to protect and save the wall. They testified that prior to and about the

time of the letting of the contract for the new building they had repeatedly mentioned the matter to defendant and had explained to him that he, or whoever should get the job for the new building, would have to protect and save the old stone wall of their adjacent building, and that defendant agreed to that, and assured them that he could and would protect and save the wall.

On the other hand, defendant testified that he had never made any such agreement; that this matter never was the subject of negotiations between them; but that the architect who drew the plans for the new building brought up the subject of the old wall on the day the contract was awarded; and that at that time no one knew the character or depth of the foundation of the old wall, and so it was then agreed that if the old stone wall had to be underpinned that such item, for work and material, would be an extra.

The stone wall which fell was two stories in height. It formed the north wall of a building otherwise made of lumber. This building faced the west. Its ground floor had been occupied theretofore as a restaurant, and its second story as a residence. Next to it, on the north, there had been two old mercantile buildings which plaintiffs removed to make space for their new building. The merchandise from these removed buildings was stored in the building on the south, and much of it, weighing several thousand pounds, was stored on the second floor. The joists of this building, upstairs and down, were 2x8's, laid 24 inches on centers, having an unsupported span of 22 feet. Near the stone wall, on the north, was a basement which had pertained to one of the buildings which had been removed to make room for the new structure. This basement was walled, and it served as a retaining wall for the foundation of the wall which collapsed; but this basement did not extend the entire length of the stone wall in controversy. It was shown that the stone wall was weak and shaky in times of high winds, and especially so since the removal of the old buildings to the north of it. A day or two before the wall fell, it was seen to be "puffing out about the middle east and west and about the middle up and down." The cave trough of the old building next to the wall, which had been removed, was clogged and defective, and rain-water from that building had disintegrated the lime in the stone wall and had rendered sodden its foundation. The wall fell on March 29. The weather was ordinarily freezing at that season, and it was usually about the middle of the afternoon ere it thawed—just about which time the wall collapsed. It was also shown that, after some of the excavation work was done, the defendant talked with one of the plaintiffs about his proposed method of underpinning the wall, and the latter

approved of that method. Accordingly, defendant, who had left a bank of earth 2 or 3 feet wide at the top and 5 or 6 feet wide at the base, next to the stone wall, set laborers at work digging two holes in the bank, at the east end of the stone wall, beyond where the old basement extended; the purpose being to build stone and cement pillars to uphold that part of the wall. While the workmen were so engaged, the wall bulged out in its center at a considerable distance from where the workmen were digging, and then the whole mass collapsed, carrying down the whole structure, precipitating the merchandise into the old basement, and also damaging the next building to the south which was partially attached to the fallen building.

We have set out the foregoing to develop the main features of the evidence—to show plaintiffs' contention that defendant had agreed to protect and save the wall, and defendant's contention that he did not so agree, but that the wall fell from its own weakness and its overloading with merchandise, and that what defendant was doing at the time and what he had theretofore done had nothing to do with the collapse of the wall.

The general verdict and certain special findings of the jury were in defendant's favor:

"(1) Did the plaintiffs and the defendant Anton Jacobs prior to the letting of the written building contract or before the falling of the building in question enter into a verbal contract by the terms of which Anton Jacobs agreed to protect the wall of the stone building on the south, to underpin the same, and to use such means, by underpinning or otherwise as were necessary to keep said stone wall from falling into the excavation or cellar on the north? Answer: No. \* \* \*

"(14) How much do you allow the defendant for work and material under his contract? Answer: \$784.51."

Judgment was rendered accordingly, and plaintiffs appeal.

Plaintiffs first complain of the enlargement of the issues, but we do not discern that they went beyond the rather extensive recitals of facts set up in the pleadings.

A model of the stone building was introduced, over plaintiffs' objection, to show that the building had collapsed by reason of its inherent weakness and its overloading with merchandise which would tend to bend and spring the joists and push the wall outward. This was competent for what it was worth to prove that the wall fell from obvious causes with which defendant's alleged negligence had nothing to do. While it is true that plaintiffs' theory of a right to recover was eventually narrowed to the question of a specific oral contract to protect and save the wall, the issue was not originally so clearly defined in the trial below. Plaintiffs had alleged:

"The defendant carelessly and negligently and wantonly proceeded with said excavation nearly

to the base of said stone wall without employing any means or methods for the protection thereof; and on account of such excavation, and by so carelessly, negligently, and wantonly digging and removing the earth near to the base of said stone wall and to the depth of about 8 feet, without employing any means or methods to prevent the giving away of said stone wall, or the dirt thereunder, upon March 29, 1917, the defendant caused said stone wall and the dirt thereunder to give way and fall into said excavation and caused said two-story building to collapse and fall into said excavation, whereby the same was totally destroyed."

[2] Considerable objection is made to the trial court's instructions, but when these are read and construed together they are free from serious fault. They elaborated on the theory of plaintiffs' right to recover if defendant did agree to protect and save the stone wall, and even went so far (in plaintiffs' favor) as to declare that, if he did so agree, only the act of God, inevitable accident, and the like, would excuse him. The instructions said that such a contract as plaintiffs insisted on could be made by a series of oral conversations, and, if the nature of the contract could be gleaned with sufficient precision from the several different conversations had at different times and places, it would be binding. "There must, however," said the court, "be a fairly, reasonably definite proposition, offer, or condition or combination of these on one side of things to be done and performed under an oral contract, and a fairly, reasonably definite acceptance by the other party by words or acts or acquiescence, or all of these."

It is difficult to find anything that looks like a plain palpable error in this case. The plaintiffs' argument is mainly based upon the assumption that it can still be considered that there was a contract to protect and save the stone wall. But the jury has said that there was no such contract, and, after a laborious study of this record, the court has no misgiving about the correctness of that finding. What the record does show is strong corroborative proof that the clause inserted in the written building contract relating to the underpinning as a possible necessity and consequent extra item to be paid for by plaintiffs was all the contract ever entered into by the parties concerning this wall. The parties did not know, even the architect did not know, whether the stone wall would need to be underpinned. Its foundation structure was unknown by any of the parties concerned. Defendant did not know of the inherent weakness of the wall. He did not know of the overloading. No negligence was shown in the way he set about the work of underpinning, and the wall did not collapse at the place the underpinning was attempted until it gave way in the middle where no work of any sort had been done. Some of these facts were in dispute, of course; but the evidence

for the defendant—which the jury obviously believed—was to that effect.

There was a controversy in the trial court over the failure to notify the defendant of a default of his, under his written contract. That feature of the case only involved his right to recover for loss of profits when his contract was cancelled. But as no allowance was made to him on that account, that matter needs no present attention.

There is nothing further in this case to justify discussion. A reply brief for plaintiffs attempts a somewhat different theory from that pressed in the original brief. In the latter brief it is said:

"The plaintiffs, at all times, sought to recover upon an oral contract for the underpinning of the wall."

In their first brief they say:

"The plaintiffs instituted this action against the defendant for damages, alleging the breach of his contract, verbally made, to protect the stone wall in case he was awarded the building contract."

But the record fails to establish a right of redress on either theory; and, as nothing approaching error in this case can be discerned, the judgment is affirmed.

All the Justices concurring, except BURCH, J., who did not sit.

(107 Kan. 203)

SMART v. MAYER et al. (No. 22408.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

Appeal and error  $\Leftarrow$  1070(2)—Limitation of actions  $\Leftarrow$  127(5)—Amendment held not to introduce a new cause of action; refusal to set aside finding of fact held not prejudicial.

The proceedings examined, and held, an amendment to the petition did not introduce a new cause of action, and no prejudice resulted from refusal to set aside a finding of fact.

Appeal from District Court, Crawford County.

Action by Mack Smart against John Mayer, Joe Gladdis, and John Mayer doing business as the Katy Coal Company. Judgment for plaintiff, and defendants appeal. Affirmed.

E. L. Burton, of Parsons, and J. J. Campbell, of Pittsburg, for appellants.

Maurice McNeill, of Topeka, Thomas W. Clark, of Pittsburg, and Charles Stephens, of Columbus, for appellee.

BURCH, J. The action was one for damages for personal injuries sustained by a

coal miner in the defendants' mine. The plaintiff recovered, and the defendants appeal.

All questions but one are solved by an interpretation of the amended petition on which the parties went to trial. After stating that the plaintiff was injured by a fall of rock from the roof of the room in which he was working, and describing the place where the accident occurred, the petition contained a general charge that the defendants were negligent in failing to furnish plaintiff with sufficient and proper prop timbers for bracing the roof of the plaintiff's mine room. The petition then continued as follows:

"Third. Plaintiff now says and alleges that it was the duty of the defendants and their said mining boss, Joe Gladdis, to furnish this plaintiff with prop timber of suitable length, quality, and size for the purpose of bracing the roof of said mine room, and that the timbers so furnished were insufficient in length, size, and strength, and at the time of the injury to plaintiff at the time and in the manner aforesaid, the said props gave way, broke, and fell under the weight and pressure of the roof of his room, thereby causing and permitting the said rock, slate, or stone to fall upon and injure plaintiff as aforesaid.

"Fourth. Plaintiff further alleges that he was unaware of the impending danger, as herein alleged and fully set forth, at the time, but that the defendants either knew, or could have ascertained by use of due care and diligence, that said prop timber furnished him was insufficient in length, size, and strength, and that it was not suitable for the purposes intended by them.

"Fifth. Plaintiff further alleges that it was the duty of the said mining boss, Joe Gladdis, defendant here, to inspect or keep a careful watch over the class and kind of prop timber furnished plaintiff, for the purpose of properly bracing his said room in said mine, and to keep said timber at easy access, and that this duty was independent of the employment of the said John Mayer and John Mayer doing business as the Katy Coal Company, but that this duty was incident to and part of the operation of said mine as imposed by law, but that said defendant Joe Gladdis willfully, carelessly, and negligently failed to keep said careful watch over the class and kind of timber furnished plaintiff for propping said room.

"Sixth. Plaintiff further alleges that it was the duty of said John Mayer and John Mayer doing business as the Katy Coal Company to employ a mining boss, and that they did employ the said defendant Joe Gladdis as such mining boss, whose duty it was to supply plaintiff with sufficient prop timber of suitable length, quality, and size for the room or place where it was to be used, and that said timber should be kept at easy access to plaintiff, but said prop timbers were not supplied, and that the defendants John Mayer and John Mayer doing business as the Katy Coal Company knew, and were negligent in that they knew, that said

prop timber was not so supplied, as they were by law required to do.

"Seventh. Plaintiff now complains and alleges that, by reason of the fault, negligence, and carelessness of the defendants, and each of them, he has been greatly and permanently damaged. \* \* \*

Considering nothing but the face of the pleading, it is manifest that it specifies three grounds of negligence: First, furnishing defective prop timbers, which were insufficient to sustain the weight of the roof of the room; second, failure to inspect prop timbers furnished; and, third, failure to furnish prop timbers. The defendants say the sixth paragraph of the petition is consistent with paragraphs 3 and 4, which is true. There is no inconsistency between allegations that prop timbers which were furnished were defective and allegations that a sufficient supply of prop timber of proper length, quality, and size was not furnished. That the sixth paragraph was designed to charge and did charge failure to supply at all a sufficient quantity of suitable prop timber is made clear by the reference to the defendants' duty to keep such timber at a place easy of access by the plaintiff.

The accident occurred on Monday. The plaintiff testified that the height of his room was 3 feet 4 inches; that he needed props 3 feet 4 inches long for an unpropped area of his room some 12 or 13 feet wide by 15 feet long; that he ordered props of Joe Gladdis, one of the defendants, and of Jackson, a driver, on Friday, Saturday, and again on Monday morning, but did not receive them; that he had no props in his room at the time of the accident; that a rock in the unpropped space fell on him and injured him; and that no props were broken by fall of the rock. Jackson testified that on Saturday, and on Monday morning before the accident, the plaintiff asked him to bring 3-foot 4-inch props, and that he did not do so.

At the close of the plaintiff's evidence, the defendants moved to strike out the testimony in relation to there being no unused props in the room at the time of the accident as immaterial and contrary to allegations of the petition. The motion was properly overruled.

The plaintiff then amended his petition by dropping the charges of negligence relating to defective props and want of inspection, and rested liability on failure to furnish props. The amendment was wholly unnecessary. The court would have taken from the jury the charges abandoned by the amendment, because there was no evidence to sustain them, and the remaining charge was simply restated, in what, for all purposes of the law, was the same form as before, as appears by the following paragraphs of the amended petition:

"Third. That on or about the said 22d day of November, 1915, it was the duty of said John Mayer, trading and doing business as the Katy Coal Company, and Joe Gladdis, as mine boss, to supply plaintiff with, and keep in easy access to him at his working place in said coal mine, sufficient prop timber of suitable length and size for the purpose of propping the roof of his said working place, or room therein."

"Fifth. That said defendants, omitting their duty to plaintiff, did on or about said 22d day of November, 1915, willfully, unlawfully, carelessly, and negligently fail and refuse to supply and keep in easy access to plaintiff prop timber of suitable length and size for the purpose of propping the roof of said room, which plaintiff alleges was the direct and proximate cause of his said injury."

"Seventh. That the injury to plaintiff was caused solely and wholly on account of the negligence and carelessness of said defendants, as herein alleged. \* \* \*

The defendants then demurred to the plaintiff's evidence, on two grounds, stated in the defendants' brief as follows:

"(a) That the statute of limitations had run on the ground of negligence set out in the second amended petition.

"(b) That after appellee had claimed for two years that the injury resulted from the use of defective props, he was estopped from claiming he had no props."

The demurrer to the evidence was overruled. The defendants then asked for a continuance, which was denied. In support of the application for a continuance, counsel for the defendants stated that at a former trial of the case he had a witness in attendance who would have testified that after the accident broken props were found at the place where the accident occurred; but counsel concluded the testimony was immaterial under the pleadings, and the witness was not presently available. The practice which the court is accused of sanctioning, by allowing the amendment and refusing the continuance, is discussed in the defendants' brief as follows:

"If this practice can be pursued, then no man is safe to attempt to defend a lawsuit. Issues may be made, preparation made to disprove the issues, witnesses not be subpoenaed, because their testimony is immaterial, and then upon trial an entirely new issue may be presented, the old issue abandoned, and the party be in the midst of a lawsuit, with no opportunity to defend against the new issue. This changes lawsuits from settlement of rights, and offers success to the shrewd juggler, punishes honest pleaders, and offers a premium to the shrewder schemer. If this practice is permitted, honest and conscientious pleaders will withdraw from the profession, and leave the field open to those who believe that lawsuits should be won by him who deceives his adversary most."

There was a former trial of the action, and a former appeal to this court. *Smart v.*

Mayer, 103 Kan. 366, 175 Pac. 159. At the oral presentation of this appeal the court was invited to inspect the record of the former proceedings. While the propriety of the court's rulings, now complained of, may not be tested by reference to that record, the court has perused it with interest. It shows the trial of just one issue—failure to furnish props. There was no evidence whatever relating to defective props, or the subject of inspection. The plaintiff gave substantially the same testimony as at the second trial, and so did Jackson. The defendants met this testimony by testimony that props were found in the room after the accident, and the question whether or not the defendants furnished the plaintiff sufficient prop timber of suitable length and size for his working place, and kept such timber in a place easy of access by the plaintiff, was the only question submitted to the jury. Special questions bearing upon this issue were propounded to the jury, and the record is barren of any suggestion by counsel for defendants that the sole issue under the pleadings was defective props. When the case came to this court, the brief of the defendants contained the following:

"The plaintiff testified he had no props, and that it was necessary to prop his room; \* \* \* and the inference might be drawn from the evidence of P. H. Scott that there were no props, \* \* \* while the evidence of R. E. Welch \* \* \* and the evidence of defendant Joe Gladdis \* \* \* was that there were props. Therefore this question was in dispute in this case."

The special questions propounded to the jury were answered, "We do not know," and the argument of the defendants was that those answers determined the dispute in their favor. This court stated the issue, failure to furnish props (Smart v. Mayer, 103 Kan. 366, 367, 175 Pac. 159), and disposed of the case, in blissful ignorance that the issue of defective props was the only one triable under the pleadings.

When the case came on for trial the last time, counsel for defendants expressed no surprise and made no objection when counsel for plaintiff, in his opening statement, said this:

"The evidence will show, gentlemen of the jury, that at the time and place the plaintiff was without props of suitable length and size for the purpose of propping the roof of his room; that he had ordered props of Joe Gladdis and the driver in this entry; the driver's name, I think, is Will Jackson; and that such props had not been supplied him or kept within easy access to Mr. Smart. \* \* \*

"It is further contended by the plaintiff that there were no props at the particular point where the rock fell, and that he had none to place there, and the failure to furnish these props was the proximate cause of his injury."

Not until the evidence for the plaintiff was all in did it occur to the defendants that the matter of defective props was the sole question for determination, and consequently that the time of the district court at two trials, and of this court on appeal, had been wasted in considering an issue not raised by the pleadings.

Leaving out of account the record of the case anterior to commencement of the second trial, the demurrer to the plaintiff's evidence was properly overruled, and the motion for continuance was properly denied.

The defendants answered the amended petition by pleading the statute of limitations. The basis of the plea was that a new issue had been injected into the case, which was not true.

The jury found specially that there was an unpropped portion of the roof of the plaintiff's room 12 by 13 feet in extent, that the height of the room was 3 feet 4 inches; that the plaintiff was in need of from 12 to 15 3-foot 4-inch props, and that he had ordered such props of Joe Gladdis and of Jackson. The jury also returned the following special findings:

"(5) Were there any loose or unsound props in plaintiff's room at the time of his injury? Answer: Yes.

"(6) If you answer question 5 in the affirmative, state the number and length of said props. Answer: In our opinion there were loose props as follows: Eight 30-inch props, one 36-inch prop, and 45 caps."

Welch, a witness for the defendants, testified that after the accident he made a sketch of the room, from which he afterwards made a blueprint plat, which was introduced in evidence. He testified as follows:

"Q. I wish you would state now the number of props and the length of the props you found lying down. A. One 3-foot 6, three 3-foot 4, eight 3-foot, and four or five cap pieces. I mean, when I say cap pieces, small pieces of wood about an inch thick and about 6 inches long and 3 or 4 inches wide, used in connection with the props. They are used over the prop and under."

The court refused to set aside the sixth finding. The defendants say nobody testified there were any 30-inch props in the room. The plaintiff says the jury did its best to state some figures on Welch's blueprint which were difficult to decipher. The blueprint has not been photographed, and the original has not been brought to this court. It will be noted that the jury did not attempt to give a positive answer to the question. Whatever Welch and his plat might say, the jury did not believe there were any 3-foot 4-inch props in the room, and, conceding the finding was wrong in reference to 30-inch props, it does not disclose passion or prejudice, or vitiate the general verdict.

There is nothing else of importance in the case, and the judgment of the district court is affirmed.

All the Justices concurring.

(107 Kan. 268)

**BROWN v. WOOLWINE, Sheriff (two cases).**  
(Nos. 22587, 22588.)

(Supreme Court of Kansas. July 10, 1920.)

(*Syllabus by the Court.*)

1. Exemptions  $\S$  145—Court issuing attachment to another county has sole jurisdiction as to its discharge.

Where an action is brought in one county and an attachment issues to another county, and the defendant claims that the property taken in the attachment is exempt, the only court that has jurisdiction to determine whether the attachment should be discharged is the court from which the attachment issued.

2. Attachment  $\S$  300—District court of county in which levied has jurisdiction of replevin by third party against sheriff.

Where an action is brought in one county and an attachment issues to another county, the district court of the county where the attachment is levied has jurisdiction to entertain an action in replevin against the sheriff by one who is not a party to the main action, and who claims to be the owner of the attached property.

3. Stipulations  $\S$  18(7) — Court not conclusively bound by agreed statement.

In a replevin action to recover personal property taken by attachment, the plaintiff claimed to have purchased the property from his brother, who was the defendant in the attachment. *Held*, upon the agreed statements of facts that the transaction by which the plaintiff purchased the property was in fraud of his brother's creditors, in which the plaintiff with full knowledge participated, and therefore the judgment in plaintiff's favor is reversed, and judgment ordered for the defendant.

Appeal from District Court, Ford County.

Action by Tom Brown against C. W. Woolwine, Sheriff of Ford County, Kansas, to enjoin proceedings on an attachment. Attachment discharged and defendant appeals. Reversed and cause remanded with directions to dismiss the action.

Replevin action by Ed Brown against C. W. Woolwine, Sheriff of Ford County, Kansas. Judgment for plaintiff and defendant appeals. Reversed and remanded with directions to enter judgment for defendant.

Richard J. Hopkins, Atty. Gen., G. Porter Craddock, of Richfield, Albert Watkins, of Dodge City, Geo. Getty, of Syracuse, and Edgar Foster, of Garden City, for appellants.

L. A. Madison and Carl Van Riper, both of Dodge City, for appellees.

PORTER, J. These cases are an aftermath of the case of *State of Kansas v. Don Van Wormer*, who was convicted in the district court of Hamilton county of murder in the first degree and appealed from the judgment. One of the signers on his appeal bond was Tom Brown, who resides in Ford county. Upon the affirmance of the judgment (*State v. Van Wormer*, 103 Kan. 809, 173 Pac. 1076, 180 Pac. 450) Van Wormer disappeared and has ever since been a fugitive from justice. His appeal bond was declared forfeited, and suit was brought in the district court of Hamilton county to recover from the sureties. In that action an order of attachment issued to the defendant as sheriff of Ford county; he levied the same upon a quarter section of land and certain personal property in Ford county, and on October 1, 1918, duly returned the order to the district court of Hamilton county. On October 23, 1918, Tom Brown brought this action to enjoin the defendant from proceeding with the attachment, alleging that the plaintiff is the head of a family, that the land levied upon constitutes his homestead and is exempt, and that the personal property levied upon consists of farming implements used by him in his farming and is exempt.

A demurrer to the petition on the ground that the district court of Ford county had no jurisdiction of the subject of the action was overruled, the court holding that it had jurisdiction on the sole ground that the sheriff had exceeded the authority given him by the writ in levying the attachment on exempt property, the court held that it could not exercise jurisdiction to set aside the attachment on any other grounds. The case was tried on an agreed statement of facts, and the court found that all the property attached is exempt, and for that reason discharged the attachment. The defendant appeals.

[1] The statute forbids the taking by attachment execution or other process property which is exempt to the head of a family, and the writ of attachment issued by the district court of Hamilton county in express terms directed the sheriff of Ford county to levy upon the property of Tom Brown that was not exempt from execution. But where a defendant in an action contends that property which the sheriff has levied upon by attachment is exempt, and a controversy arises over that question, it must be determined by some court. The only court that had jurisdiction to discharge the attachment in this case, or to entertain a suit or motion by a party to the action attacking the validity of any proceedings under the attachment, was the district court of Hamilton county, where the action is pending in which the attachment issued. Code,  $\S$  209 (Gen. St. 1915,  $\S$  7101), declares that:



(191 P.)

"From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings under the attachment."

Any other rule would manifestly tend to confusion, expense, and uncertainty in the litigation.

It is conceded that the attached property belongs to Tom Brown. A different rule would obtain if the title to real estate were involved in the attachment (because the district court of the county where the land is situated has exclusive jurisdiction to determine questions of title to real property), or in a case where one not a party to the action in which an attachment issues from one county claims ownership of personal property attached in another county. But Tom Brown, who brings this action in Ford county, is the defendant in the action pending in Hamilton county, and no question of title arises or can arise. He owns the attached property, but claims that it is exempt, which raises an issue affecting the validity of the attachment proceedings, to be determined as to him by the court from which the attachment issued.

The second case is a replevin action by Ed Brown to recover certain personal property taken by the sheriff under the attachment as the property of Tom Brown. He recovered judgment in the district court of Ford county for the return of the property, and the defendant appeals.

It was shown by the agreed statement of facts upon which the case was tried that Tom Brown and his brother, Ed, had been residents of Ford county for many years, and were partners in farming and raising stock. They had accumulated a large amount of real and personal property, which they owned and held as partners. A few days after Don Van Wormer became a fugitive from justice the brothers began negotiations for a settlement and division of their partnership property. The settlement was insisted upon by Ed Brown in order that his share of the partnership property might not become involved in the litigation which he anticipated would follow against his brother on Van Wormer's bond. Both brothers knew of the flight of Van Wormer before they began negotiations for the settlement. It was found in the course of the settlement that the partnership was indebted to various persons in the sum of \$23,420; the value of all the partnership property was fixed by agreement at \$51,977, and the net value at \$28,557. It was agreed that Tom should take at a valuation of \$6,975 the quarter section of land he now claims as his homestead, and a half interest therein was conveyed to him by a deed executed by Ed Brown, dated July 16, and recorded September 13, 1918, the stated consideration being "one dollar and exchange of property."

Ed Brown assumed the partnership indebtedness, and for that reason was given, in the settlement, property valued at \$37,968. The net amount which each was to receive after payment of debts was \$14,278. Allowing for the real estate and personal property taken by Tom Brown, there was a balance due him from his brother, amounting to \$4,984, which his brother paid by a bank check.

The defendant demurred to the petition on the ground that the Ford county district court had no jurisdiction, and that the district court of Hamilton county was the only court that could determine a controversy which affected the attachment proceedings. The demurrer was overruled, and the case proceeded to trial upon an agreed statement of the facts.

The defendant contended that he was entitled to a judgment declaring that the property attached was the property of Tom Brown, because the sum of \$4,984 was paid by Ed Brown to his brother for property sold in fraud of his brother's creditors, and that the plaintiff knowingly participated in the fraud. The trial court held otherwise, and rendered judgment in favor of Ed Brown for the return of the property.

[2, 3] The trial court was correct in holding it had jurisdiction to try the replevin action for the reason that the plaintiff was not a party to the suit in Hamilton county. It has often been held that replevin need not be brought in the court from which the process issued under which the property was seized. *Ramsden v. Wilson*, 49 Iowa, 211; *Seaton v. Higgins*, 50 Iowa, 305; *Dayo v. Provinski*, 90 Mich. 351, 51 N. W. 514. In *Carpenter v. Innes*, 18 Colo. 166, 28 Pac. 140, 25 Am. St. Rep. 255, the court said:

"The rule has been established that replevin will lie in any state court of competent jurisdiction in favor of one who is the owner of goods which had been seized by the sheriff, or any other officer, upon a writ against a third person, where the suit in which the writ issued has been brought in any other of the courts of the state."

It seems that the only exception to the rule is that, where the process issued from a federal court, an action of replevin cannot be maintained in a state court to recover the property from the hands of a United States marshal. *Covell v. Heyman*, 111 U. S. 178, 4 Sup. Ct. 355, 28 L. Ed. 390; note, 7 Ann. Cas. 909.

There remains the question whether the court erred in rendering judgment in favor of Ed Brown. There is no conflict or dispute over the facts, since they are agreed to. The question is merely one of law. What are the controlling facts? The brothers, with full knowledge of Van Wormer's flight, and of Tom Brown's liability on the appeal bond, anticipating that he would be sued and judg-

ment rendered against him, entered into an arrangement by which all of Tom Brown's interest in the partnership property, which so far as the record discloses was all the property he possessed, was transferred beyond the reach of his creditors.

Ed Brown had a perfect right to insist upon a dissolution of the partnership and a division of the property in order to avoid anticipated complications affecting his interests as a partner. He had the right to assume the indebtedness of the partnership, and to take an additional share of the property in order to compensate him for so doing. When a settlement to that extent was made, the partnership property was divided and the debts provided for, his rights were fully protected. But he went much further than merely to protect his own rights. He took a conveyance of all the interest of Tom Brown in the partnership property, which they believed to be subject to the claims of his creditors, and, assuming for the moment that when the question is tried in the proper court, the lands claimed by Tom Brown as his homestead and the other personal property will be held exempt, there still remains the property which the plaintiff purchased from his brother, and for which he paid the sum of \$4,934. This part of the transaction, in our opinion, was in fraud of Tom Brown's creditors with the plaintiff's full knowledge and participation.

In the written opinion by the trial court it was stated that, so far as the agreed statement of facts show, Tom Brown may be the owner of much more property than that involved in this action, and which is more than sufficient to pay any judgment which the state may recover. It was said:

"The statement of facts deals simply with the partnership property. There is no statement that this is all the property owned by the debtor. If he owned other property not exempt sufficient to pay his debts, this transfer would not have the effect of hindering, delaying, or defrauding his creditors."

When Tom Brown signed the appeal bond he was required by the statute to testify under oath as to his qualifications as a surety; the presumption is that he made a full disclosure. Aside from the fact that the statute authorizes an attachment upon a showing that the defendant is about to remove, or convert, or has assigned or removed or disposed of "his property or a part thereof with the intent to defraud, hinder or delay his creditors," we think the absence of a showing in the statement of facts as to whether Tom Brown owned other property subject to execution or attachment furnished no substantial basis upon which to rest the judgment. The trial court was not irrevocably bound by the agreed statement. If the matter was be-

lieved to be important the court should have inquired, and might have compelled, the parties to agree upon the fact with reference to that matter. Doubtless an inquiry by the court would have disclosed the fact. We think the only reasonable conclusion from the facts is that the transaction was in fraud of creditors, and that the plaintiff, Ed Brown, participated in the fraud.

In the Tom Brown Case, the district court had no jurisdiction, and the judgment will be reversed, and the cause remanded, with directions to dismiss the action.

In the case of Ed Brown the judgment will be reversed, and the cause remanded, with directions to enter judgment for the defendant.

All the Justices concurring.

(107 Kan. 238)

**THOMPSON et al. v. UNION TRACTION CO.**  
(No. 22579.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Explosives ¶8—Overruling demurrer to evidence held not error.

There was no error in overruling the defendant's demurrer to the plaintiffs' evidence.

2. Damages ¶188(2)—Evidence held to authorize finding of value of machinery destroyed.

There was evidence from which the jury could ascertain the value of the machinery destroyed, and there was no reversible error in the admission of incompetent evidence.

3. Explosives ¶8—Instruction applying rule as to crossing of railroad track held properly refused.

There was no error in refusing to give requested instructions.

4. Explosives ¶8—Findings held not to require judgment for defendants.

It was not error to deny the defendant's motion for judgment on the findings of the jury.

5. Refusal of new trial.

The motion for a new trial was properly overruled.

Appeal from District Court, Montgomery County.

Action by J. A. Thompson and others against the Union Traction Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

John J. Jones, of Chanute, and Chester Stevens, of Independence, for appellant.

Sullivan Lomax, of Cherryvale, for appellees.

MARSHALL, J. The plaintiffs recovered judgment for the damages sustained by them on account of the loss of a traction engine

and threshing machine, and the defendant appeals. This is the second time this action has been in this court. Thompson v. Traction Co., 103 Kan. 104, 172 Pac. 990.

The facts disclosed by the evidence as abstracted in the present appeal are not substantially different from those set out in the opinion on the former appeal, but some different questions are argued. The main facts material for an understanding of the questions argued by the defendant are that it maintained an oil pipe line on the south side of a public highway in Montgomery county; that the pipe line was laid on the top of the ground; that an inspection of the ground would have disclosed that the pipe line was there; that the plaintiffs were engaged in threshing grain; that they desired to move their machinery, a traction engine and a threshing machine, from the public road into a field adjoining the road on the south; that when for that purpose they attempted to drive out of the road into the field, they drove across the pipe line; that in so doing the engine broke the pipe; that the oil which was being pumped through the pipe escaped therefrom and was ignited by the fire in the engine; and that the engine and threshing machine were destroyed by the fire.

[1] 1. The first question argued by the defendant is that "the court erred in overruling the demurrer of the appellant to the evidence of the appellees." This argument is based on the contention that the evidence did not show that the pipe line was in the highway. The plaintiffs' evidence tended to show that the place was a public highway; that there was a fence along the south side of the highway; and that the pipe line was between the fence and the traveled portion of the road. That evidence was sufficient to compel its submission to the jury, justified overruling the demurrer to the evidence, and brings the present situation within the terms of the decision rendered on the former appeal.

[2] 2. A second contention is that "the court erred in the admission of evidence as to the value of the threshing machine." Henry Behner, who had owned and operated a threshing machine for a number of years, testified:

"The machine had run the eighth or ninth season. I think \$1,500 would be a fair price for it. Threshing machines do not have a ready market, and it is hard to sell for ready cash. \* \* \* The front end of the separator was the worst burned. The wind stacker on the back end was hurt very little. At that time a new wind stacker would cost \$250. This stacker was practically new."

D. P. Curlis, a dealer in machinery, testified:

"I am familiar with the fair and reasonable value of new, rebuilt and secondhand machinery. \* \* \*

"Q. Mr. Curlis, you may state whether or not this machine, after it had been repaired, is what you would call a rebuilt machine or not? A. It undoubtedly was a rebuilt machine.

"Q. I will ask you whether or not you examined it? A. No, sir; I did not.

"Q. That is, not carefully? A. Not carefully; no, sir.

"Mr. Stevens: What do you mean by that? Do you mean that you did examine it or didn't examine it? A. I mean that I did not go over this machine and look at each and every part, but I do mean I was to the machine and saw it in operation.

"Mr. Lomax: Now from what you saw and knew of that machine, taking into consideration the repairs it had on it that spring, would you have an opinion as to its fair, reasonable market value? A. I have my own judgment as to its value.

"Q. What is your judgment as to its fair, reasonable market value? A. I would consider it an easy sale on \$2,700 or \$2,800. \* \* \*

"Q. Do you think that he could sell it yet for cash on the 21st day of August, 1915, for \$2,800? A. I'll answer that in this way. We sell these threshing machines mostly on time. We never have sold, except one, for cash. It's a time price on threshing machines. As one of the witnesses I heard testify, a man was always poor that owned a threshing machine. \* \* \* I was out there in October or November, 1915, and looked at the machine.

"Q. Have you an opinion as to what the cost would be to rebuild it? \* \* \* A. I'm speaking of the engine, now understand. Engine alone. And the expert that I took there said that it would cost about \$1,200."

J. A. Thompson, one of the plaintiffs, testified:

"I would not say that the outfit was worth more than \$1,500 in 1915. \* \* \* After the fire we went off and left the outfit where it burned."

One witness, a junk dealer, testified that the engine and threshing machine were worth \$50 as junk. That witness further testified:

"I didn't pay much attention to the separator. All I saw was burned up and twisted. I didn't pay much attention to it. The iron on the separator I couldn't use because it is most all steel, and I use most always cast iron."

That evidence was sufficient to enable the jury to determine the value of the engine and threshing machine. While some of the evidence introduced to establish these facts may have been incompetent, yet the court is unable to see wherein the admission of that evidence materially prejudiced any substantial right of the defendant.

[3] 3. Another complaint by the defendant is that the court refused to give certain requested instructions. Those instructions were as follows:

"One of the contentions of the defendant is that the pipe line was plainly visible across the gap through which the plaintiffs attempted

to drive their threshing outfit. If you find and believe from the evidence that said pipe line, or a substantial portion thereof, was visible where it extended across the gap through which the plaintiffs attempted to drive their threshing outfit, and you further find and believe from the evidence that the plaintiffs did not see said pipe line, or, having seen it, failed to properly protect it by placing planks over it or covering it with dirt, or in some other manner protecting it, and then attempted to drive their threshing outfit over the same, the plaintiffs cannot recover in this case, and your verdict will be for the defendant and against the plaintiffs. And in this connection you are instructed that if a thing is visible and within the range of vision of the person complaining, it makes no difference whether he saw it or did not see it, for the law presumes that he saw what he should or could have seen had he looked, and does not excuse him because he did not see it."

"You are instructed that in this country a vast number of pipe lines conveying oil and natural gas are maintained over, along, and across the public highways within the same. If you find and believe from the evidence in the case that the plaintiffs, or either of them, knew of the custom and practice of laying pipe lines conveying oil and natural gas over, across, under, or along the public highway, then it would be their duty to exercise care and caution in attempting to use that portion of the highway not worked or traveled, for the purpose of ascertaining whether such unworked or untraveled portion was reasonably safe for the passage of their threshing outfit, and if you find and believe from the evidence in this case that they did not exercise such ordinary care as herein defined to you, and by reason thereof ran over the pipe line of the defendant, if you find that the defendant owned and controlled the pipe line, in question, and their threshing outfit was destroyed, damaged, or injured, then they are guilty of such contributory negligence as will bar them from a recovery in this action, and your verdict will be for the defendant and against the plaintiffs."

The principle embodied in these instructions is analogous to that part of the railroad law of this state applicable to one who, on a public highway, is about to cross a railroad track. The principle does not appear to be applicable to one who is driving out of a public highway into an adjoining field. When this action was here, before, this court said:

"In taking their threshing outfit into a field adjoining the highway, in order to thresh a crop, the plaintiffs were entitled to use, not only the worn part of the highway, but also the whole width of the same so far as it was necessary." *Thompson v. Traction Co.*, 103 Kan. 104, 172 Pac 990, Syl. 2.

If the plaintiffs had the right to use the entire highway, they had the right to assume that they could leave the traveled road and go into the adjoining field with safety, except that they must not encounter such dangers as were manifest by a casual observation of the

road. They were not bound to use the precautions that a traveler must use when he is about to cross a railroad track, and the court cannot say as a matter of law that they were guilty of contributory negligence for failing to look for, or see danger, or for failing to protect their machinery against the pipe line if they saw it. In *Murphy v. Gas & Oil Co.*, 96 Kan. 321, 331, 150 Pac. 581, 585, the plaintiff was injured while driving an engine and a threshing machine out of a field into a public road, where he broke a gas pipe line. The escaping gas became ignited and seriously injured him. This court there said:

"The plaintiff had a right to assume that the highway was safe from one side to the other. He was under no obligation to make an examination of the highway for the purpose of ascertaining whether or not gas pipes were laid thereon. The evidence shows that neither the plaintiff nor his father knew of the existence of the gas pipe before the explosion."

In *Cunningham v. Clay Township*, 69 Kan. 373, 76 Pac. 907, this language is used:

"To be free from contributory negligence it is not necessary that one using a highway known by him to be defective exercise more than ordinary care, but he must adapt his conduct to that condition and employ such care as may justly be regarded as ordinary, in view of his knowledge of such defect." Syl. 6.

The most that can be said in favor of this contention of the defendant, even if the plaintiffs saw the pipe line, is that different minds might reasonably come to different conclusions concerning the contributory negligence of the plaintiffs. This then presented a question for the jury to determine. *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 88; *Kemp v. Railway Co.*, 91 Kan. 477, 479, 138 Pac. 621; *Wade v. Electric Co.*, 94 Kan. 462, 469, 147 Pac. 63; *Wade v. Electric Co.*, 98 Kan. 366, 371, 153 Pac. 23. The instructions of the court properly submitted to the jury the question of contributory negligence, and it was not error to refuse to give the instructions requested by the defendant.

[4] 4. The fourth proposition argued is that—

"The court erred in refusing to sustain the motion of the appellant for judgment in its favor on the special findings of the jury."

The special findings of the jury were as follows:

"(1) Do you find that just before plaintiffs attempted to drive their threshing machine across the pipe line of the defendant at the entrance of Henry Burns' field, the one operating the engine walked over to the gap and looked at said line? (1) No.

"(2) If you find for the plaintiffs do you allow them anything for loss of profits on threshing for which they had no contracts? (2) No.

"(3) What, if anything, did the plaintiffs, or either of them, do to protect the line from injury when they attempted to drive their machine over and across the same? (3) Nothing.

"(4) Was the public highway mentioned in plaintiffs' petition a regularly laid out highway? (4) Yes.

"(5) If you answer to the above question Yes, how wide is such highway? (5) Fence.

"(6) How far, in feet, was it from the center of the worked part of the highway to the pipe line where it crossed the gap through which plaintiffs tried to drive their threshing outfit? (6) On or about 28 feet.

"(7) How long had the plaintiffs owned and operated the machine? (7) Nine years.

"(8) What was the assessed value of the threshing outfit in 1915? (8) Don't know.

"(9) Could the plaintiffs by the exercise of ordinary care on their part have protected the line so as to prevent breaking it when they drove their machine over it? (9) Yes; had he known it was there.

"(10) How much do you allow the plaintiffs for and as the value of their threshing outfit? (10) \$1,500.00."

The argument of the defendant is based on the answers to questions numbered 5 and 6, and on the record evidence introduced by it to show that the established road was 40 feet wide. The defendant contends that under the sixth finding the pipe line could not have been in the public highway. The difficulty with this contention is that the evidence introduced by the defendant showed that the pipe line was 28 feet from the center of the traveled road, but the evidence did not show that the center of the traveled road was the center of the highway. The pipe line may have been 28 feet from the center of the traveled roadway, and yet have been within the established highway. A careful reading of the findings does not disclose any reason for rendering judgment in favor of the defendant.

[5] 5. The last matter urged is "that the court erred in overruling the defendant's motion for a new trial." This is based on the argument advanced to support the other contentions of the defendant, and must follow the conclusion reached thereon. It has not been shown that there was error in overruling the motion for a new trial.

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 312)

STATE ex rel. ZAWADA v. LYONS.  
(No. 22619.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Bastards ~~§~~65—Evidence of prosecuting witness held to support judgment.

The testimony of the prosecuting witness was sufficient to justify the verdict and support the judgment.

2. Bastards ~~§~~92—Witnesses ~~§~~340(3)—Offer to show intimacy with others held properly excluded; vulgar conduct inadmissible to affect credibility of prosecutrix.

The record shows no error respecting the exclusion of evidence.

Appeal from District Court, Ford County.

Proceeding by the State, on relation of Helen Zawada, against John Lyons, for bastardy. From an adverse judgment, defendant appeals. Affirmed.

Carl Van Riper and L. A. Madison, both of Dodge City, for appellant.

Richard J. Hopkins, Atty. Gen., and Karl Miller, of Dodge City, for appellee.

WEST, J. The defendant appeals from an adverse judgment in a bastardy proceeding, claiming that the court erred in the rejection and admission of testimony and the refusal to grant a new trial, and asserting that the verdict was contrary to the evidence.

[1] The prosecuting witness was a Polish girl, employed as chambermaid at the Harvey House in Dodge City; the defendant being a porter there, in which position he had been employed for a good many years. It is contended that the unsupported testimony of the girl is too unreasonable for belief, in view of the fact that the defendant denied all her charges and produced witnesses to his good reputation. But the description of the relations between the two given by the girl covered so much time and was so full of details that it is hard to believe they were manufactured, and we find nothing in the record to render them incredible. Her story seemed to satisfy the jury, who heard the cross-examination and were able to judge of the girl's credibility in a way impossible to us.

[2] Complaint is made that the court refused to let the defense show that during some of the time covered by the alleged intimacy with the defendant the girl associated with another man, and at one time made a statement indicating intimacy with him. Objection was made to this, on the ground that it was too remote in point of time. The court stated that any misconduct with other men within one or two months of the period of gestation might be shown, whereupon the defendant's counsel stated:

That he could show by witnesses that the girl was out frequently late at night with this other man, and this conduct continued up to about the time she left Dodge City. "I will take this matter up a little later, when I know just what the proof will be as to that; but you deny the right to introduce this testimony with regard to this specific act notwithstanding we could connect it up to a time within the period of gestation?"

To which the court replied, "Yes." The record does not show any further attempt to

introduce this or similar evidence, or to produce it in support of the motion for a new trial which frees the matter from anything which amounts to prejudicial error.

After the prosecuting witness came back to Kansas with her child, she stayed for some time at the county farm near Dodge City, and it was attempted to prove that during this stay she was guilty of certain extremely coarse and vulgar conduct. This proof seems to have been sought for the purpose of affecting her credibility. An early decision by this court, frequently quoted in former years, was to the effect that loss of virtue does not imply a lack of truthfulness. *Craft v. State*, 3 Kan. 450; 2 Wigmore on Ev. § 924; 48 L. R. A. (N. S.) 272. No authorities are cited supporting the competency of this testimony, and we do not deem its rejection erroneous.

Finding no prejudicial error in the record, the judgment is affirmed.

All the Justices concurring.

(107 Kan. 340)

**GASAWAY et al. v. TEICHGRAEBER.**  
(No. 22757.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

Mines and minerals § 79(6)—Facts held to justify cancellation of oil and gas lease.

Under the facts shown, it was not error to decree cancellation of the oil and gas lease involved. *Doornbos v. Warwick*, 104 Kan. 102, 177 Pac. 527.

Appeal from District Court, Greenwood County.

Action by Susan Gasaway and husband against R. F. Teichgraeber. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hamer & Ganse, of Emporia, for appellants.  
Wicker & Badger, of Eureka, for appellees.

WEST, J. The plaintiff and her husband made a gas and oil lease to the assignor of the defendant, providing, among other things, that unless a well was begun within six months the rental of a dollar an acre should be paid in advance or the lease should become void. No well was begun and the rental was due on April 17th. Under the lease this might be paid direct to the plaintiff or deposited to her credit in the Virgil State Bank. On the 17th of April, 1919, the defendant mailed a check to the Virgil State Bank for the proper amount payable to its order, a notation thereon indicating that it was the rental on the land covered by the lease of 70 acres to April 17, 1920. This check was not received by the bank until the morning of

April 18. The bank was unable to determine to whose credit the check should be placed and telegraphed the defendant, and it was not in fact placed to the plaintiff's credit until April 19th. The only way for mail to come from Emporia to Virgil was on the train leaving about seven o'clock each day. From a remark in one of the briefs it would seem that this train goes at 7 a. m.

The court rendered judgment for the plaintiffs canceling the lease and allowing them \$100 damages and \$75 attorneys' fees. The defendant appeals, claiming that the judgment is not supported by the facts and that the latter do not show the plaintiffs to be entitled to cancellation. Of course, the damages and attorneys' fees arise from the defendant's failure to cancel when the demand was made to do so, and the real question is whether or not the court erred in ordering cancellation.

While forfeitures are abhorred by the law, this is not strictly a forfeiture, but a mere holding of a party to the contract it has made. There was no need of delaying the payment, and the failure to remit in time was not chargeable to the plaintiffs, and the delay left the defendant in the attitude of calling on the plaintiffs to make or recognize a different contract from the one the parties had voluntarily made. No equitable feature arises by way of money expended, as in *Kays v. Little*, 103 Kan. 461, 175 Pac. 149, 1 A. L. R. 875; but the circumstances are very similar to those involved in *Doornbos v. Warwick*, 104 Kan. 102, 177 Pac. 527.

The trial court decreed cancellation, and it cannot be said that this ruling was an abuse of discretion or otherwise erroneous.

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 291)

**NORDBOE v. FRYE et al.** (No. 22612.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Appeal and error § 1039(13)—Variance as to contract to devise property held not to require reversal.

A difference between the date and character of the contract shown by the evidence and that pleaded is held not to require a reversal, because it does not appear that any prejudice resulted.

2. Wills § 58(2)—Evidence held to sustain finding that deceased had agreed to make will.

The evidence is held sufficient to justify findings that, when the plaintiff was 14 years of age, a contract was made between him and his mother, on the one hand, and the decedent, whose estate is in controversy, on the other, that at the death of the latter the plaintiff was

to have all the property he left, in consideration of remaining with him and working for him until the plaintiff should become of age, and that the plaintiff had carried out the agreement on his part.

3. *Frauds*, statute of §75—Specific performance §86—Enforcement of agreement to devise in consideration of service not refused because of statute.

It is held that enforcement of the contract referred to should not be refused, either on the ground of inequity or because of the statute of frauds.

Appeal from District Court, Lincoln County.

Action by Otto Nordboe against Mary A. Frye and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Burch, Litowich & Royce, of Salina, and E. A. McFarland, of Lincoln, for appellant.  
Z. C. Millikin, of Salina, for appellees.

MASON, J. Thomas J. Nordboe died in November, 1915, at the age of 86, leaving a will, executed a few days before his death, devising real estate to a sister-in-law and her two daughters. Otto Nordboe (that being the name by which he was generally known, although his real name was Otto Cushman) brought action against these devisees, claiming a right to the land by virtue of a promise that he should have it, made to himself and his mother by Thomas J. Nordboe, in consideration of agreements that had been performed on their part. The plaintiff recovered, and the defendants appeal.

The court made special findings, the more material of which may be thus summarized: In 1884 the plaintiff, then 7 years of age, and his younger brother, Julius, were taken into the home of Thomas J. Nordboe and his wife, to be reared by them. At this time Nordboe's eyesight had begun to fail, and 3 years later he became totally blind. Mrs. Nordboe died in January, 1891, and Julius 6 months later. The plaintiff continued to live with Nordboe, doing such work as was customary for boys of his age, assisting Nordboe in going about the premises, and acting as his companion when he left home. In the latter part of 1891 the plaintiff's mother asked Nordboe to permit him to return to her home to be of assistance to her. He was unwilling to do so, saying that he was old and blind, and in need of his services, and that, if the boy was permitted to remain with him, and serve him and work for him, until of age, he would at his death leave him all the property he might then own. An agreement was then made between Nordboe and the plaintiff and his mother that the plaintiff should remain with Nordboe, and faithfully serve him, and perform such work and services as a child would be expected to perform for a parent, until he should attain his ma-

jority, and that Nordboe, in consideration thereof, should leave him all the property he owned at the time of his death. Under this agreement the plaintiff was permitted to remain with Nordboe, and did so, faithfully performing his part—serving him until he reached the age of 27.

The defendants ask a reversal on two grounds: That these findings do not support the allegations of the petition; and that they are not sustained by the evidence.

[1] 1. The amended petition, upon which the case was tried, alleged that a contract substantially like that set out in the findings, but including an agreement on the part of Nordboe to adopt the plaintiff, was made in 1884, just before the plaintiff entered the Nordboe home. The defendants argue that proof of a contract made in 1891 created a variance of such importance as to require a reversal, because a contract made in 1884 would have been in part for the benefit of Julius, and would not by his death have inured to the sole benefit of the plaintiff.

In addition to the averment already referred to, the petition alleged that Nordboe, after the plaintiff had entered his home, from time to time repeated and reiterated his promise and agreement. This language might perhaps by a liberal construction be so interpreted as to allow proof of a new contract to be made under it. We do not rest the case on that theory, however. We hold that, although the contract found to have been made was of a somewhat different character from that pleaded, because the relations of the parties were different in 1891 from what they had been in 1884, there is no such showing or presumption of prejudice as to require a setting aside of the judgment. Gen. Stat. 1915, § 7026. It does not appear that the defendants would have been better enabled to meet the evidence produced by the plaintiff, if the petition had more clearly indicated its scope, or that upon another trial any more light could be thrown upon the matter.

[2] 2. The evidence concerning the transaction that took place in 1884 tends to show that it was then agreed that the boys were to live with Nordboe as his children, but that he then made no promise with reference to his property. There was, however, evidence of such a promise made in 1891. The plaintiff gave this testimony concerning a conversation between his mother and Nordboe after the death of Julius:

"My mother wanted to have him release me and come back. He said, 'No;' he had promised to do—if I would stay with him until I was—take care of him, at the end of his death I was to have the property that was left. That is the substance of the conversation. I can't repeat it word for word. Q. Stay with him how long? A. Until I was a young man."

He also testified that he remained with Nordboe, who was totally and permanently blind, working for him, having so much to do that he could only attend school a part of the time; that he was there about 19 years, leaving in 1905, after talking about it with Nordboe, who made no objection.

Another witness gave this testimony concerning a conversation with Nordboe after the death of Julius:

"Well, he said—he told me, whenever he dies, all that which belongs to him Otto was going to have for his work in taking care of him. Always what is left over after his death, that falls to Otto."

Another witness, testifying to a talk with Nordboe in October, 1915, said:

"I asked Uncle Tom if he had given Danke his property after he was through with it. He spoke up quick: 'No; no,' he said, 'after I am through with it, it goes to Ott. That is what it belongs, and that is the contract, or agreement.' He didn't say contract. 'That is the agreement.'"

There was other testimony of the same character. Some of it was open to a different interpretation, but, taken altogether, we regard the evidence as sufficient to justify the conclusion that the contract described in the findings of the court had been made, and that the plaintiff had performed his part of it.

[3] 3. It is urged that the contract should not be enforced, even if it is established that it was entered into, and upon one side performed, because it was inequitable, and because of the statute of frauds. The character of the services required, particularly in view of the decedent's total blindness, were such as in our judgment to relieve the contract from any imputation of inequity, and to take the case out of the statute of frauds, if it would otherwise be applicable, which may well be doubted (*Heery v. Reed*, 80 Kan. 380, 102 Pac. 846; *Stahl v. Stevenson*, 102 Kan. 447, 171 Pac. 1164), on the ground that the amount of reasonable compensation in money could not be satisfactorily determined (*Schoonover v. Schoonover*, 86 Kan. 487, 121 Pac. 485, 38 L. R. A. (N. S.) 752; 5 *Pomeroy's Equity Jurisprudence*, § 2248, pp. 5024, 5025).

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 235)

**WEBSTER v. CAMP.** (No. 22553.)

(Supreme Court of Kansas. July 10, 1920.)

(*Syllabus by the Court.*)

1. Contracts §81—For support of aged woman held not unreasonable or unconscionable.

A contract, in which a sick and helpless old lady agrees to pay \$11,000 to a young woman

for service rendered in the past and to be rendered in the future during the life of the old lady, has a sufficient consideration, and is not unreasonable, unconscionable, or void, where it has been understood between the parties that the past service should be paid for, although the old lady provided a home for and raised the young woman.

2. Executors and administrators §205(1)—Contract for services provable as claim against estate, although all assets exhausted thereby.

A contract to pay a certain sum for service may be proved and allowed as a claim against the estate of the party contracting to pay, and may be collected from the estate in the same manner as any other claim of the same class, although the payment of the claim may exhaust all the assets of the estate.

Appeal from District Court, Linn County.

Action by Helen L. Webster against the estate of Mary J. Camp, deceased. From a judgment for plaintiff, Mahlon Camp, surviving husband of decedent, appeals. Affirmed.

B. C. Garrison and John O. Morse, both of Mound City, for appellant.

John A. Hall, of Pleasanton, for appellee.

MARSHALL, J. Mahlon Camp, the surviving husband of Mary J. Camp, deceased, appeals from a judgment in favor of the plaintiff against the estate of Mary J. Camp for \$11,286. The action was tried without a jury, and the court made special findings of fact as follows:

"(1) That Mary J. Camp died in Pleasanton, Kan., July 23, 1918, and at the time of her death was the owner of property situated in said county of the value of about \$13,000.

"(2) That the claimant herein, Helen L. Webster, was taken when a very small child by the decedent, Mary J. Camp, and made her home with the said Mary J. Camp until her death on July 23, 1918; that the said Mary J. Camp provided a home for the said Helen L. Webster, and the said Helen L. Webster rendered such help as she could in the home, and they at all times lived together as mother and daughter, and treated each other as mother and daughter; that said Helen L. Webster was never legally adopted by said Mary J. Camp, and had not reached her majority at the time of the death of said Mary J. Camp; that, while said Helen L. Webster lived with said Mary J. Camp, the said Mary J. Camp was sick a considerable portion of the time, and Helen L. Webster stayed with and took care of her, and consequently was deprived of the schooling she should have had during the time she lived with said Mary J. Camp.

"(3) That in April, 1909, Mary J. Camp married Mahlon Camp, and he was her lawful husband at the date of her death, but the said Mahlon Camp and Mary J. Camp separated about four years ago, and since separation said Mahlon Camp has lived outside of the state



of Kansas, and that from their marriage in 1909 until about four years ago said parties lived together in Linn county, Kan.

"(4) That there was an understanding between said Mary J. Camp and Helen L. Webster that Mary J. Camp was to pay said Helen L. Webster for her services, and that Mary J. Camp told a number of her friends and neighbors, prior to the making of the contract hereinafter referred to, that she could never repay Helen for the care she had taken of her.

"(5) That on the 4th day of July, 1918, and during the last sickness of Mary J. Camp, the following contract was entered into between Mary J. Camp and Helen L. Webster, a copy of which is attached hereto, marked Exhibit A, and made a part of these findings of fact.

"(6) That said contract was entered into in good faith by both parties to the same, and at the time Mary J. Camp executed said contract, marked Exhibit A, she was of sound mind and knew and fully appreciated what she was doing, and that there was no undue influence used by the said Helen L. Webster or any one else to procure the execution of said contract, and that the services mentioned in said contract, that had been performed and were to be performed by Helen L. Webster, were in fact performed by her."

On these findings of fact the court made the following conclusions of law:

"(1) That said contract entered into between Mary J. Camp and Helen L. Webster, dated the 4th day of July, 1918, was and is a valid and legal contract.

"(2) That Helen L. Webster is entitled, under said contract, to an allowance of her claim against the estate of Mary J. Camp in the sum of \$11,000, with interest thereon at the rate of 6 per cent. per annum from the 23d day of July, 1918, the date of the death of Mary J. Camp, and that said claim should be allowed by the probate court of Linn county, Kan., for said amount as a fifth-class claim."

The contract referred to in the findings of fact reads:

"This agreement, made this 4th day of July, 1918, by and between Mary J. Camp, party of the first part, and Helen L. Webster, party of the second part, witnesseth that, whereas, the second party has for many years cared for and nursed the said first party; and whereas, first party is now helpless and in great need for some one to care for and nurse her, and to provide for her wants; and whereas, it has been agreed between the parties hereto that eleven thousand dollars (\$11,000.00) is a reasonable compensation for the services rendered to the first party by the second party, and for the care and support and maintenance of the first party:

"Now, therefore, it is hereby agreed that the first party is indebted to the second party in the sum of eleven thousand dollars (\$11,000.00) for services rendered, and that the second party shall continue to care for and support and maintain the first party during the lifetime of the first party; that this agreement shall not in any way affect the operation of the will heretofore made and executed by the first party as to any property of which the first party may die the owner, after the payment of all

lawful debts against the estate of the said first party, including the payment of this debt, which includes the care and maintenance of the first party during her last sickness."

The judgment rendered in favor of Helen L. Webster was on that contract.

[1] 1. The first question argued by Mahlon Camp is that the contract was without consideration, and was unreasonable, unconscionable, and void. The validity of contracts for services between persons holding a family relation to each other has been recognized in a number of instances by this court. *Ayres v. Hull*, 5 Kan. 419; *Greenwell v. Greenwell*, 28 Kan. 675; *Ensey, Ex'r, v. Hines*, 30 Kan. 704, 2 Pac. 861; *Wyley v. Bull*, 41 Kan. 206, 20 Pac. 855; *Story v. McCormick*, 70 Kan. 323, 333, 78 Pac. 819; *Lowe v. Weaver*, 89 Kan. 443, 131 Pac. 142; *Engelbrecht v. Herrington*, 101 Kan. 720, 723, 172 Pac. 715. Such contracts have been enforced against the estates of persons who had agreed to make payments, by allowing as claims against the estate compensation for the services rendered. *Griffith v. Robertson*, 73 Kan. 666, 85 Pac. 748; *Heery v. Reed*, 80 Kan. 330, 102 Pac. 846; *Dubbs v. Haworth*, 102 Kan. 603, 171 Pac. 624. Recovery on such contracts has been had directly against the party for whom the service was rendered. *Shane v. Smith*, 37 Kan. 55, 14 Pac. 477; *Longhofer v. Herbal*, 83 Kan. 278, 111 Pac. 483. Specific performance of such agreements has been compelled. *Anderson v. Anderson*, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229; *Smith v. Cameron*, 92 Kan. 652, 141 Pac. 596, 52 L. R. A. (N. S.) 1057; *Harris v. Morrison*, 100 Kan. 157, 162, 163 Pac. 1062. The trial court found as a conclusion of law that the contract was a valid and legal contract, and this court cannot agree with Mahlon Camp that the contract was without consideration, or was unreasonable, unconscionable, or void. The amount to be paid for the service that was actually afterward rendered may seem large; but it must be remembered that the period of future service might have been long, and that compensation for long years of service prior to the time of making the contract was included within the \$11,000.

[2] 2. The other and principal question argued is that the contract is void, because it operates to deprive Mahlon Camp of the one-half interest in his wife's property which the law says she cannot by deed or will, without his consent, prevent her husband, Mahlon Camp, from inheriting at her death. The law does not deprive the owner of property from making contracts and incurring obligations, the performance of which, after the death of the maker, may be enforced as against his estate. The only exception to this rule is that found in the homestead and exemption statutes of this state. The contract was a valid and binding one, and the debt created thereby was a lawful claim against the es-

tate of Mary J. Camp, payment of which can be enforced in the same manner as the payment of any other claim against the estate, although the payment of the claim may exhaust all the assets of the estate.

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 305)

**PEARSON et al. v. ORCUTT et al.**  
(No. 22618.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

**1. Appeal and error**  $\S$  1008(1)—Specific finding that deed was gift held binding.

A contention that a deed was based upon a valuable consideration is *held* to be untenable, because of a specific finding against it.

**2. Former rulings construed.**

A decision contrary to that reached is *held* not to be required by former rulings.

**3. Courts**  $\S$  100(1)—Effect of erroneous decision, later overruled, but in force upon execution of will, stated.

The fact that a will was drawn and the testator died after a decision had been made by this court announcing a rule of interpretation applicable thereto, and before the rendition of another decision assumed to be in conflict therewith, is not a sufficient reason for following the rule first announced rather than the later one. If the second decision is regarded as overruling the first, the accepted theory is that the first was wrong, not that a change had taken place in the law. The earlier rendition of an erroneous decision could not affect the matter, unless in a situation where it might have a bearing upon the testator's actual intention.

Appeal from District Court, Shawnee County.

On motion for rehearing. Denied.

For former opinion, see 106 Kan. 610, 189 Pac. 160.

MASON, J. In this case (106 Kan. 610, 189 Pac. 160) this court decided that the will involved gave to the widow of the testator a life interest in his realty, a farm, coupled with a power of disposition which was not unlimited, and did not enable her to make an outright gift of the entire property to the prejudice of the remaindermen.

[1] 1. In a motion for a rehearing it is argued that the deed to the farm was not a gift, although no money was actually paid at the time of its execution, but was made in consideration of a promise that the grantee, her grandson, would support her during the remainder of her life. The trial court found that there was no consideration paid by the

grantee to the grantor and that the transaction was treated and considered as a gift. Whatever doubt on the matter might have been left by the evidence was resolved by this finding, which determines the voluntary character of the conveyance.

[2] 2. It is also urged that the conclusion reached is in conflict with a number of our own decisions, as well as those of other jurisdictions. While for reasons stated in the original opinion we deem it inexpedient to enter into any very extended review of the authorities, some of those most strongly pressed will be briefly referred to.

In *Greenwalt v. Keller*, 75 Kan. 578, 90 Pac. 233, the portion of the will preceding that indicating the final disposition of the property read as follows:

"I wish my wife, Eliza Bunt, to have all my property of every kind that I may own at my death, to have for her own use and benefit while she may live. And at her death all property that may be left by her, first I want Mary Greenwalt or her heirs to have what I owe her."

The widow, not being able otherwise to pay the debt to Mary Greenwalt, which amounted to \$300, in satisfaction thereof made a conveyance of real estate which had been owned by her husband at the time of his death. It was held that, although no power of disposition was expressly given, it was to be inferred from the fact that the other persons named were to receive only the property that might be "left by her," and that the deed was valid. The question there presented and determined was whether or not a power of disposition was given by the will—not as to the scope of the power, if it existed.

*Otis v. Otis*, 104 Kan. 88, 177 Pac. 520, was a quite similar case; one party contending that the widow took a fee, the other that she took a life estate with power of disposition, and the decision being in favor of the latter contention.

In *Postlethwaite v. Edson*, 98 Kan. 444, 155 Pac. 802, a will executed by a husband and wife read as follows:

"They and each of them do hereby devise and bequeath to the other surviving, all the estate \* \* \* of which the one dying first shall be seized, or have an estate, claim or interest therein, and to be owned and disposed of by the survivor as he or she may desire, and that upon the death of the survivor, all the estate of the survivor not disposed of by such survivor, is hereby devised and bequeathed to their children \* \* \* in equal parts."

After the death of the wife, preceded by that of the husband, an attempt was made to subject real property which they had occupied as a homestead, the title being in the husband, and which had passed into the

hands of their children, to the payment of a judgment against him. The children claimed that under the will the fee had passed to their mother, and the property had thereby been freed from the lien. The creditor claimed that their mother on the death of her husband took merely a life estate, although accompanied by a full power of disposition; the remainder vesting in the children, who acquired the property subject to the lien of the judgment. The question in dispute was whether or not the widow took a fee; the alternative theory being that she took a life estate with a power of disposition. There was no controversy over the extent of that power. It was spoken of in the opinion as being "full"; the context indicating the meaning to be that, however absolute it might have been, it did not convert the widow's title into a fee. There was no occasion to consider whether the wife might have attempted some disposition of the property which was beyond the power conferred, for no such issue was raised.

In *Brown v. Brown*, 101 Kan. 335, 186 Pac. 499, a husband and wife made a joint will, by which the survivor was to take a life interest in the property of the other, with the right to dispose of any part of it, the estate to be distributed after an interval to their bodily heirs. The widow of a deceased son of the testators claimed an interest therein on the theory that her husband had acquired a title which descended to her. Her claim was denied, and the opinion, in describing the effect of the will, mentioned that on the death of one of the testators the property was to vest in the other, with full power of disposition. As in the case just discussed, no question was raised as to whether the power was literally absolute and unlimited.

It is urged that the decision in the present case is not consistent with that in *Markham v. Waterman*, 105 Kan. 93, 181 Pac. 621, but we discover no inconsistency in principle. There the testator did not expressly confer upon his widow a right to sell or dispose of the property he left, but for reasons stated in the opinion we concluded that such an intention on his part was to be gathered from a consideration of the entire will. Here the testator did not expressly limit the power of disposition he conferred upon his widow, but for reasons stated in the original opinion we conclude that such an intention was clearly inferable from his language, viewed in the light of the surrounding circumstances.

We freely concede that many cases are to be found having at least an apparent tendency against the conclusion we have reached. Some of them are influenced by rules of construction which we do not accept, and some are distinguishable upon the facts. We find no case favorable to the view we have taken that is so absolutely in point that, if conceded to be sound, it would be necessarily con-

trolling. *Johnson et al. v. Johnson*, 51 Ohio St. 446, 38 N. E. 61, would probably meet that description, were it not for the fact that in providing for the distribution of the property undisposed of by the widow the will described it as that remaining "unconsumed" at her death. The court held that, although she was expressly empowered to dispose of the property as she might think proper, she was not authorized to give it away. The use of the word "unconsumed" was, of course, an aid in reaching that conclusion, but only by virtue of an inference to be drawn from it. It was important only as it was of assistance in determining the real meaning of the testator, which his language did not indicate with strict accuracy. In *Terry v. Wiggins*, 47 N. Y. 512, a grant of power to a widow to dispose of property if she should deem it expedient was held to be limited, because it was devised to her "for her own personal and independent use and maintenance." The decision was obviously correct, but it rested only on an inference.

In the present case the devise to the widow was accompanied by a direction that she should immediately enter upon the possession of the property (a provision which carries some implications of a purpose to provide for her support), with power to sell and dispose of it in any way she might desire, without the intervention of any court during her natural life. Any property that remained at her death, after the payment of \$50 to her grandson, was to be distributed among her five children. We regard it as entirely clear that the devise was intended as a provision for the maintenance and comfort of the widow—as much so as though it had been expressed to be for her use and benefit—and that some limitation on her power of disposal was intended. In that situation the inference has been drawn that the body of the estate could be diminished so far as might be necessary to the support of the widow. *West v. West*, 106 Kan. 157, 159, 186 Pac. 1004. We do not hold that in the present case the widow could dispose of the property only where it should be necessary or convenient for her support, unless that term should be so extended as to cover any expenditure she might see fit to make for her own benefit or pleasure. The testator plainly did not intend, however, that she should have any power to determine who should have the farm after her death, if it had not been previously disposed of. If she had undertaken to give the farm to her grandson by will, instead of by deed, the attempt would, of course, have been futile. She made the deed at the age of 84, after being in ill health for some months. She gave as a reason for determining to make it that her grandson was the only one who stayed with her and did for her, and she thought he was the only one to leave it to. To give ef-

fect to the deed would be to allow the manifest purpose of the testator to be frustrated—to permit the grandson, to whom he had allotted but \$50, to possess the entire estate, which he designed to have distributed among the children when his wife should be through with it. We think it clear that this method of disposing of the property was not one of those her husband intended to place within her power, and we derive this belief from the reading of the whole will in the light of the situation of the parties.

[3] 3. In the brief of the appellee it was contended that whatever interpretation might properly be placed upon the will, if made at this time, it should be construed as authorizing the widow to give away the property, because it was executed in 1911 and the testator died in 1912, when a different rule of construction prevailed from that now adopted—the rule declared in cases of which *McNutt v. McComb*, 61 Kan. 25, 58 Pac. 965, is typical. Inasmuch as the present case was held to be distinguishable from that, a discussion of this contention was regarded as unnecessary, and no mention of it was made in the original opinion. In the motion for a rehearing the point is again pressed, but is clearly untenable. The argument in its support is based chiefly upon a recent decision of the United States Circuit Court of Appeals for this circuit. *Wells v. Brown*, 255 Fed. 852, 167 C. C. A. 180. There one paragraph of a Kansas will gave all the testator's property to his mother. The succeeding paragraph expressed a wish and request that she should devise and bequeath to certain persons whatever of it remained at her death. Apparently it was assumed that, if the rule of interpretation now followed by this court (that the real intention of the testator as gathered from all parts of the instrument should be given effect) were applied, the request as to the final disposition of the property must be treated as mandatory. The court held, however, that the rule in *McNutt v. McComb* should control, because the rights of the devisee accrued before any qualification of the language of the opinion therein had been indicated by this court, and that therefore the testator's mother took an absolute estate in fee; the grant of title not being affected by any limitation attempted to be placed upon it in the succeeding paragraph.

It is a familiar fact that, where two decisions of a state court of last resort respecting local law are in conflict, the federal courts do not regard themselves as bound to follow the later expression to the prejudice

of any one whose rights (especially if contractual and presumptively affected by reliance on the earlier interpretation) accrued in the interval between them, but will exercise their own judgment, and ordinarily give effect to the original view of the state court. Note, 40 L. R. A. (N. S.) 396. Indeed, where there is no conflict in the state decisions, they will not necessarily be followed by the federal courts with respect to rights that accrued prior to their rendition. Same note, page 397; *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228. The reasons given for this well-established practice have not been entirely uniform. The *Wells-Brown* Case is perhaps exceptional in treating the overruling of a decision as an actual change in substantive law, as though made by the Legislature. Moreover, it is apparently not in harmony with a former ruling of the same court, where the latter of two conflicting interpretations by a state Supreme Court of local statutes relating to wills was followed, to the disadvantage of a litigant whose rights had accrued in the meantime. *Yocum v. Parker*, 134 Fed. 205, 67 C. C. A. 227. The problems presented by this aspect of the matter, however, are purely those of federal practice, in which this court has but an academic interest; no question of constitutional law being involved.

Although a different theory at one time had a considerable vogue, we think there is now little dissent from the view, which at all events is that of this court, thus expressed in an opinion written by Mr. Justice Benson, wherein the subject is fully treated:

"Courts do not and cannot change the law, by overruling or modifying former opinions. They only declare it, by correcting an imperfect or erroneous view. The law itself remains the same, although interpretations may have differed [citing cases]. An erroneous ruling may in some circumstances become the law of the particular case, but this will not prevent the court in another action from holding to the contrary. A person who is not a party or privy in the action cannot acquire a vested right in an erroneous decision made therein." *Crigler v. Shepler*, 79 Kan. 834, 842, 101 Pac. 619, 622, 28 L. R. A. (N. S.) 500.

If it should appear that the wording of a will might have been influenced by a decision of the Supreme Court, which was overruled after the death of the testator, the matter would doubtless be one to be considered in arriving at the actual purpose in his mind; but no such situation is here presented.

The motion for a rehearing is overruled.

All the Justices concurring.

(107 Kan. 346)

WARNER (STATE, Intervener) v. SNOOK  
et al. (No. 22570.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Public lands  $\Leftrightarrow$  52—Evidence held not to sustain existence of unsurveyed island, so as to authorize its acquisition as state school land.

In an action maintained by plaintiff as a school land claimant and the state as intervener, and defended by riparian title holders, the record shows that plaintiff and intervener failed to establish by preponderating proof the first essential to their success, the existence of an island of a permanent character, unsurveyed by the federal government, lying between the meander lines of the Arkansas river, to which the sovereign proprietorship of the state could attach, so that it might be acquired by plaintiff as state school land.

2. Assignments of error.

The record discloses no error of sufficient importance to justify a disturbance of the judgment.

Appeal from District Court, Ford County.

Suit by Glenn A. Warner against E. O. Snook and others, wherein the State intervenes. Judgment for defendants, and plaintiff and the State appeal. Affirmed.

Richard J. Hopkins, Atty. Gen., Edgar Foster, and Horace J. Foster, both of Garden City, for appellants.

Madison & Van Riper, of Dodge City, and W. W. Harvey, of Ashland, for appellees.

DAWSON, J. The plaintiff, Glenn Warner, and the state of Kansas, intervener, claimed that a certain tract of land in Ford county was an island in the Arkansas river, and as such that it was state school land. Warner entered upon the disputed property with intent to perfect his right thereto as a school land settler. The defendants claimed the tract, or most of it, as riparian owners, and that they held fee titles thereto. The land in dispute lies mainly between the original government meander lines of the Arkansas river in that locality.

The jury made special findings, all of which were approved by the trial court. The most significant of these read:

Questions propounded by plaintiff:

"(1) Q. Did any portion of the land claimed by the plaintiff originate as an island? A. No.

"(2) Q. Did all that portion of the land claimed by plaintiff lying south of the north channel of the Arkansas river, as the said river is designated on the plat filed by the plaintiff, and north of what has been termed the old channel of the river as indicated on the plat, originate as an island? A. No."

The jury found specifically that the north bank of the river in that locality had re-

mained unchanged since the time of the government survey in 1868, and that the original meander line on the north bank coincided with a later (Fonda) survey.

Other questions, propounded by defendants, were answered:

"(5) Q. Was the so-called south or abandoned channel in existence at the time the United States government made its survey of the lands adjoining the river? A. No.

"(7) Q. Was the so-called south or abandoned channel cut through or made at some flood stage of the river, by the water breaking over the south bank and running over and across the lands adjoining the river, after making of the United States government survey? A. Yes.

"(8) Q. If you answer the last preceding question in the negative, then state if the United States government surveyed and disposed of the lands north of, the so-called south or abandoned channel. A. Government sold certain lots north of so-called abandoned channel.

"(9) Q. Are lots 5 and 6 of section 36, lots 5, 6, 7, and 8 of section 35, and lots 7 and 8 of section 34, township 27, range 22, or any portion or portions thereof, as originally surveyed by the United States government, located north of the so-called south or abandoned channel? A. Yes."

Judgment was entered for defendants, and the plaintiff and intervener appeal.

The issue in this case was whether the land settled upon by plaintiff was or had been an island lying between the meander lines of the Arkansas river in Ford county for such duration of time as to give it permanency. It does not show on the government plat, nor in the United States surveyor's field notes made in 1868; so it must be assumed that, if an island did exist thereabout in 1861 or 1868, it was ignored as a part of the federal domain, and passed to Kansas as an incident to the state's sovereign proprietorship of the bed of the stream. Dana v. Hurst, 86 Kan. 947, 122 Pac. 1041; State ex rel. v. Akers, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916B, 543; Wilson v. Zuta-vern, 98 Kan. 315, 158 Pac. 231; Corbett v. Cohen, 100 Kan. 348, 164 Pac. 264; Breneman v. Fleming, 101 Kan. 398, 166 Pac. 482; Stogsdill v. Minor, 103 Kan. 790, 176 Pac. 643; Wear v. Kansas, 245 U. S. 154, 38 Sup. Ct. 55, 62 L. Ed. 214, Ann. Cas. 1918B 586.

It is not contended by the defendants that they own all the land which is claimed by the plaintiff and the state as school land. What they do contend is that a very considerable part of the disputed tract is theirs by virtue of government patents and mesne conveyances deraigned therefrom. There is considerable evidence in the record tending to show that the government surveyors in 1868 had done loose and inaccurate work in that locality. There was testimony that no gov-

ernment monuments, stones, or charred stakes, could be found south of the river for about 12 miles, and scarcely any north of the river for 6 miles. It is also suggested that the meander line of 1868 on the south side of the river was a mere paper survey, and did not correspond with any possible measurements which could have been made. The meander line north of the river was determinable from permanent monuments, certain rocks on the river bank, and the "Santa Fé Trail," which ran near by. The want or disappearance of the government monuments had necessitated several later surveys; the so-called "Fonda survey" north of the river, and the "Mather survey" on the south side. From a calculation based upon measurements between the river and recognized monuments located many miles south of the river, a considerable surplus of land was disclosed. In apportioning this surplus (doubtless in the best of faith and in the exercise of his best judgment), Mather, one of these later surveyors, whose work has been generally accepted and acquiesced in, allotted part of this surplus to lands north of the southern meander line of the river; and but for the fact that the government monuments north of the river were so obvious, and the northern meander line of the river so readily ascertainable, the Mather apportionment of surplus land would have inured to lands north of the river. But, as that line could not be shifted, this apportionment of Mather's could be placed nowhere except in the river bed. Because of this surplus of land, a surveyor who testified for plaintiff and intervenor said:

"Q. How do you account for this land that you have described between the north boundary of the lots and the south channel of the river as it now exists? A. Well, I should judge that, at the time of the survey, the inaccuracy of the government making these surveys, and being such a surplus east of that in coming up the line, that it has been a large island there, and the government did not take it into consideration, by not knowing that it was there. I never could figure out how they could have such a vast surplus along the Kiowa and Edwards county line."

In *Foskuhl v. Herzer*, 77 Kan. 809, 91 Pac. 56, the Fonda and Mather surveys are discussed. But it attaches altogether too much significance to the Mather survey to argue that, because that survey discloses such a large tract of land in the river bed, there must have been an island there, which the government surveyors ignored in 1868. This great area of land in the stream bed is partly due to Mather's division and apportionment of the surplus. If Mather had given a larger proportion of the surplus to the 12 tiers of sections to the south, or disposed of it at other intervals, the surplus in the river

bed would have been less, and the conjectured existence of an island in the river in 1861 or 1868 would not have arisen.

[1] But it is true that the evidence shows that there was an island which existed for some length of time in that locality. It was known by early settlers as Titus' island. Titus lived on it, and cut and sold hay from it. Titus patented it (findings 8 and 9), and the defendants, or one of them, holds the fee by a chain of conveyances from Titus. Another curious incident, which the evidence disclosed, if true, was that Warner's house, as a school land settlement, is located further south than was the settlement cabin of Titus 35 years ago. Be that as it may, the plaintiff and the intervenor have not established the first primary essential to the maintenance of this lawsuit, the existence of an island unsurveyed by the federal government, lying between the meander lines of the river, to which the proprietorship of the state could attach, so that it might be acquired by plaintiff as state school land.

It is not enough to justify a disturbance of the judgment to point out that the evidence conflicts with the jury's finding No. 1. Two juries have made the finding that no portion of the land claimed by the plaintiff originated as an island. *Warner v. Snook*, 102 Kan. 814, 172 Pac. 521. At the former trial the judge first set aside that finding as contrary to the uncontradicted evidence, but later he changed his ruling, and held that the jury could compare the soil on the disputed tract with the soil of the mainland south of the river, and could properly conclude from their similarity that the disputed tract did not originate as an island.

[2] This lawsuit is largely another fact case. There was no error in admitting the evidence of the Fonda survey, nor of the government field notes. Defendants would have a grievance if these had been excluded. The fact that the government field notes have been discredited in other litigation by the Mather survey, and that private rights, public roads, etc., have been established thereunder, does not disqualify the Fonda survey and the field notes as admissible evidence on the question whether there is or ever was an island thereabout to which the state may lay claim. While conflicting deductions may be made by giving validity to both the Fonda and Mather surveys, the Fonda survey, which coincides with the indisputable monuments of the first government survey, cannot be ignored. The fact that there is a large surplus of land thereabout to squabble over does not prove that this surplus is island school land. Even if it be conceded that the evidence is insufficient to sustain findings 1 and 2, the appellants cannot prevail. It was for them to prove the contrary to the satisfaction of the jury. This in two trials

they have failed to do, and this litigation should not be protracted any further.

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 214)

WILLIAMS v. AMERICAN INS. UNION et al.  
(No. 22435.)\*

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Insurance §=719(1)—Amendment of by-law to conform to statute did not violate certificate prohibiting change.

The by-laws of a fraternal beneficiary society and the beneficiary certificate issued by it must conform to section 5409, Gen. St. 1915, which prohibits such a society from issuing a certificate except for the smallest amount provided for in its by-laws until its membership shall be such that one assessment on each member will produce sufficient funds to pay its proposed next largest benefit certificate in full, and a by-law by such society to make its laws conform to the statute does not violate the terms of the certificate prohibiting a change in its terms and conditions before the year 1925.

2. Insurance §=719(3)—Statute construed not to prohibit change in assessment rate.

Section 5419, Gen. St. 1915, which provides for the merger of fraternal beneficiary societies, compels such societies to provide for the continuance of the insurance of all the members of both organizations, but does not prohibit a change in the rate of assessment to be paid.

Appeal from District Court, Labette County.

Action by Lillian Jane Williams against the American Insurance Union and another. Judgment for plaintiff, and the named defendant appeals. Modified by reducing the amount of the judgment.

Wheeler, Brewster & Hunt, of Topeka, Geo. R. Allen, of Kansas City, Kan., H. M. Waring, of Kansas City, Mo., and John V. Sees, of Columbus, Ohio, for appellant.

A. D. Neale, of Chetopa, for appellee.

MARSHALL, J. An opinion in this action was filed on January 10, 1920, but on the application of the American Insurance Union a rehearing was granted, and the opinion was not published.

The plaintiff recovered judgment against the American Insurance Union for \$1,862.10 on a beneficiary certificate issued by the Home Builders Union, a fraternal mutual benefit society organized under the laws of this state. The American Insurance Union appeals.

In 1906, the Home Builders Union issued its certificate to N. R. Williams providing for the payment to the plaintiff, the bene-

ficiary named therein, of certain graduated sums beginning with \$500 if the death of N. R. Williams occurred during the first year after the date of his certificate, and ending with \$2,000 if his death occurred after the expiration of 15 years. The certificate provided for the payment of \$1,800 if his death occurred "after thirteen years and before the expiration of fourteen years."

The application signed by N. R. Williams contained the following:

"I hereby consent and agree that this application to which I have attached my signature, the examining physician's report, and all of the provisions of the constitution and laws of the order, now in force, or that may hereafter be adopted, shall constitute the basis for and form a part of any beneficiary certificate that may be issued to me by Supreme Lodge of the Home Builders Union, whether printed, or referred to therein, or not."

The certificate contained the following provisions:

"This certificate is issued upon the express condition that said Nicholas R. Williams, shall in every particular comply with all the laws of the order. The terms and conditions of this certificate shall not be changed before the year A. D. 1925, except upon written consent of the member holding same, duly acknowledged before a notary public."

The by-laws of the Home Builders Union provided for their amendment. An amendment made in 1906 provided:

"That in no event shall any beneficiary or beneficiaries under any certificate issued in either class of this order, be entitled to receive a larger sum than will be produced and received from one full assessment on all members belonging to the order at the time of the death of the party holding such certificate under the established rates and rules of the order. Provided also the foregoing provision is hereby declared to have been the meaning and intention of the by-laws as originally adopted, and this meaning and construction shall apply to all certificates heretofore written, as well as those hereafter to be written."

The by-laws also provided:

"Each beneficiary certificate shall name the rate paid by the member and shall contain an agreement that the rate named therein shall not be changed before the year A. D. 1925."

A further provision of the by-laws was that each certificate should contain the following:

"The terms and conditions of this certificate shall not be changed before the year A. D. 1925, except upon the written consent of the member holding the same."

In April, 1918, the Home Builders Union merged with the American Insurance Union. The contract of merger contained the following:

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

\*Rehearing denied September 23, 1920.

"Any member of the Home Builders hereby merged and consolidated who has attained the age of fifty-five (55) years at the time this contract goes into effect and who became a member of the said the Home Builders prior to January 1st, 1912, shall continue to pay the premiums and assessments required by the laws of the Home Builders and shall be entitled to receive the amount of insurance which said premiums or assessments so paid will purchase on the basis of the American Experience Table of Mortality with interest at 4 per cent., so loaded as to provide for the use of the same amount for the expense fund as it set aside for expense on the Level and Twenty-year-payment Tables of the American Insurance Union and on the basis of the level rate at the age attained at the time this contract goes into effect. Should said members last above referred to desire to continue their present certificates in force for the full amount thereof by paying their premiums on the basis of the American Experience Table of Mortality with interest at 4 per cent. so loaded as to provide for the use of twenty-five (25) cents per month for expenses, and on the basis of the level rate at the age attained at the time this contract goes into effect, they may do so upon proper notice in writing to the association and the consent and approval of the national surgeon of the American Insurance Union."

On May 10, 1918, the American Insurance Union issued a rider to be attached to the certificates held by members of the Home Builders Union. The rider stipulated that—

"The holder of the certificate hereto attached hereby becomes a member of the American Insurance Union, subject to all the conditions and limitations and entitled to all the benefits of said membership in accordance with and subject to the terms of the contract of merger and consolidation reprinted on the back hereof and subject to the constitution and laws of the American Insurance Union now in force or that may hereafter be in force."

The rider sent to Williams was not attached to the certificate. He was insane from December, 1917, continuously until the time of his death, which occurred in September, 1918. He was 50 years old at the time he became a member of the Home Builders, and was 63 years old when he died. After the merger his assessments were paid to the American Insurance Union. It offered to confess judgment for \$266.67, the amount of insurance the assessments paid by N. R. Williams would purchase under the terms of the merger contract. That offer was refused by the plaintiff. At the time of his death, there were 1105 members in the Home Builders Union, and one full assessment thereon would have produced \$912.75; in October, 1918, there were 1,092 members, and one full assessment thereon would have produced \$852.49. The American Insurance Union argues that judgment should not have been rendered for more than \$266.67.

[1] 1. The application, the certificate, and the by-laws as they existed at the time the

certificate was issued, must be construed together as the contract between the Home Builders Union and N. R. Williams; however, all must be subordinate to law. In the application Williams consented to all the laws of the organization that might thereafter be adopted. The by-laws provided for their own amendment, but they stipulated that no change should be made in the terms and conditions of the certificate before 1925 without the written consent of the member. The by-laws further stipulated that each certificate should contain an agreement, "that the rate named therein should not be changed before 1925." The certificate must be construed to have been issued under the terms imposed by law. Section 5409 of the General Statutes of 1915, governing certificates issued by fraternal beneficiary societies, in part reads:

"No such association shall issue benefit certificates except for the smallest amount provided for by its laws, until its membership shall be such that one assessment upon each will produce sufficient funds to pay its proposed next largest benefit certificate in full; a similar restriction shall apply until the number of its membership shall authorize the issuance of its maximum certificate."

The amendment to the by-laws of the Home Builders Union adopted in 1906 made the by-laws conform to statutory requirement. The by-laws of the Union prior to the amendment did not conform to the laws of the state, and to that extent were invalid, because the state law controlled and prohibited the Union from issuing the character of certificate that was held by N. R. Williams. For the reason that the amendment of 1906 made the by-laws conform to the statutory requirement, that amendment cannot be said to have been in violation of the terms of the contract between the Home Builders Union and N. R. Williams.

[2] 2. The statutes providing for the merger of fraternal beneficiary societies must be examined and interpreted. Those statutes, sections 5418 and 5419 of the General Statutes of 1915, in part read:

"That any fraternal beneficiary society, order or association of the state of Kansas is hereby authorized to consolidate or merge with or transfer its members to or reinsure its members with any other similar organization authorized to do business in this state." Gen. Stat. § 5418.

"To affect (effect) such consolidation, merger, transfer or reinsurance, it shall be necessary for the organizations contemplated in section 1 of this act, to file with the superintendent of insurance a copy of their contract, signed by the president and secretary, or corresponding officers, of the contracting organization(s) together with a sworn statement of the financial condition of each. Such contract shall provide for the continuance of the insurance of all the members of both organizations: Provided, the consolidated organization or the organization taking over the members shall have the same



defense to any certificate that the organization had which issued the same. \* \* \*

"Upon the submission of said contract, \* \* \* the superintendent of insurance, if satisfied that the consolidation, merger, transfer or reinsuring is just and equitable to the members of each of said organization(s), shall approve said contract and notify the respective parties to said contract of his approval, and said contract shall not become effective until approved by the superintendent of insurance." Gen. Stat. § 5419.

Mergers of fraternal beneficiary societies must be made in compliance with section 5419. Prior to the enactment of that law, fraternal beneficiary societies in this state could not merge with each other. *Bankers' Union v. Crawford*, 67 Kan. 449, 73 Pac. 79, 100 Am. St. Rep. 465; *Jackson v. Insurance Co.*, 101 Kan. 383, 385, 167 Pac. 1046. The object of permitting mergers of such societies so far as it can be ascertained should be stated. It is well known that many fraternal beneficiary societies have been conducted on a financial basis that has inevitably resulted in insolvency. This has deprived members of such associations, in many instances, of insurance at a time when they could not get other insurance. Many of such associations, after operating with apparent success for a few years, have been compelled to cease to pay their beneficiary certificates because money with which to pay them could not be realized from the assessments authorized under the by-laws of the societies. To assist in avoiding these consequences, mergers of beneficiary societies were resorted to. The evident purpose of the statute was to authorize such mergers and to save the insurance to the members of the organizations that desired to merge. To effect the latter object the statute provides that "such contract shall provide for the continuance of the insurance of all the members of both organizations." What insurance? Necessarily the insurance that was in existence—not other insurance, but the same insurance. The statute says "the insurance." Particular insurance is thus specified. "The insurance" means that insurance carried by the members at the time the merger contract is put into effect. If the statute read, "the contract shall provide for the insurance of all the members of both organizations," there would be ample room for arguing that any insurance that would be just and equitable would comply with the statute. But the statute does not read as indicated. It positively points out the insurance that shall be continued.

But the statute does not say what rate of assessment shall be paid for the insurance that shall be continued. If the purposes of the statute are to be accomplished, it must be conceded that in the merger of fraternal beneficiary societies with inadequate rates the merger contract may provide for a change in the rate of assessment. If the

statute will not bear this interpretation, mergers of beneficiary societies that are approaching insolvency cannot successfully be carried into effect. The statute directs that the insurance shall be continued; therefore, the rate of assessment may be increased if necessary.

What about the member who is unwilling or unable to increase his payment for insurance. Shall he be denied any insurance whatever after having paid his assessments for a number of years and after having continued to pay his assessments subsequent to the merger and those assessments have been accepted by the merged association? That would be unjust and inequitable. The contract in the present case, however, provides that the beneficiary shall have that amount of insurance which the assessments paid by him will purchase on the terms named in the contract, which terms are on the same basis as those that must be complied with by the member who desires to continue the full amount of his insurance.

This conclusion compels a modification of the judgment. It is therefore modified by reducing it to \$266.67, the amount tendered by the defendant to the plaintiff.

JOHNSTON, C. J., and BURCH, MASON, PORTER, and WEST, JJ., concurring.

DAWSON, J. (concurring specially). A condition and not a theory concerning many of these fraternal insurance societies has arisen with increasing frequency in recent years. Although designed in the most commendable spirit, they have too often been "mathematically" unsound; their obligations could not be met from their sources of income. They did not charge enough for the service—the insurance—which they furnished. This inherent weakness only grew acute after their seemingly successful careers had run for a considerable number of years. As time developed the certainty of their ultimate insolvency, the several state legislatures, the courts, and the supervising departments of insurance have faithfully sought to make the best of a bad situation. Thus mergers and increased rates have been countenanced. I do not think these mergers and increased rates violate the true spirit of the constitutional inhibition against the impairment of contracts. To insist on the cold letter of that inhibition brings to the front the fact of the fraternal society's inherent insolvency, and the same cold letter of the law would require a summary termination of the society's existence by cancellation of its charter, a receivership, a winding up of its affairs, and a distribution of its fragmentary assets among all its members holding certificates of insurance. In such a situation no one member is equitably entitled to a preference—to an exaction of the utter-

most farthing. He is equitably entitled to a pro rata division with his fellow members, and no more. So long as a merger, constrained into existence by such necessity, equitably and economically preserves what assets the failing institution has, no member has any just cause of complaint. To hold otherwise is to declare that a merger of a weak or insolvent insurance society, to prolong its life and possible usefulness, may not be undertaken at all unless such merger provides for the literal discharge of all the merged society's obligations dollar for dollar—and for the impossible fulfillment of the hopes of its founders as well. I should only yield to that conclusion if I could find no logical escape from it.

(307 Kan. 218)

**CUNNINGHAM et al. v. CUNNINGHAM et al.**  
(No. 22644.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Wills  $\S$ 55(1), 166(1)—Evidence held not to show mental incompetency or undue influence.

In an action to set aside a will on the ground that the testator was mentally incompetent and unduly influenced, the record is examined, and held to show abundant evidence to sustain a finding upholding the will.

2. Evidence  $\S$ 474(4) — Witnesses  $\S$ 202—Attorney drawing will may testify to facts showing absence of improper restraint, and mental capacity.

Rule followed that in an action to set aside a will, the lawyer who drew it may relate the facts and circumstances surrounding the preparation and execution of the will to show that the testator was not under an improper restraint, and that he is a competent witness as to the mental condition of the testator. *Black v. Funk*, 93 Kan. 60, 143 Pac. 426; *Durant v. Whitcher*, 97 Kan. 603, 156 Pac. 739.

3. Witnesses  $\S$ 139(9), 159(14), 160(1)—Testimony of daughter as to communications with testator held properly stricken.

Rulings as to the admission of testimony examined and held to be without error.

Appeal from District Court, Elk County.

Action by Pete Cunningham and others against Logan Cunningham and others to set aside a will of Harvey Cunningham, deceased. Verdict and judgment for defendants, and plaintiffs appeal. Affirmed.

J. D. McBrian, of Sedan, and S. H. Piper, of Independence, for appellants.

J. A. McHenry and C. B. Crawley, both of Howard, for appellees.

PORTER, J. The 10 plaintiffs are the children and heirs at law of Harvey Cunn-

ham, deceased, and the 34 defendants are his grandchildren. The plaintiffs seek to set aside the will of their father on the ground that at the time it was executed he was mentally incompetent and under undue influence. The court submitted to a jury, in an advisory capacity, two questions: First, whether at the time the will was executed the testator was of sound and disposing mind and memory, which they answered in the affirmative; second, whether the testator was unduly influenced by any person in making the will, which the jury answered in the negative. The court approved the verdict, adopted the findings upon these questions, and further, found all the issues in favor of the minor defendants and against the plaintiffs. The plaintiffs appeal.

[1] Harvey Cunningham was an old resident of Elk county, and the evidence shows that he was a man of strong and forceful character, had taken an active part in local affairs, and had frequently been a delegate to political conventions. He owned about 1,920 acres of land in Elk and Chautauqua counties, which, aside from the homestead, consisted wholly of pasture lands. At the time the will was executed he was 88 years of age. His wife had died a few months before, and he was greatly affected by her death. There was evidence offered by the plaintiffs indicating that he had hallucinations; that he was worried over the belief that his wife had been prematurely buried, and that he frequently asked to be taken to the cemetery, that the grave be opened; and that apparently he would not be satisfied until he knew that his wife had not turned over in her coffin or he was assured that she had not been smothered. The will was executed on the 12th day of September, 1917. He died about two months later. His son Pete Cunningham was the only one of the family who had remained at home, and for many years Pete and his family had lived at the home place. In order to compensate them for their trouble and services, Mr. Cunningham, at the time he executed the will, and as part of the same transaction, executed a deed conveying to Pete the 160 acres comprising the homestead and 160 acres of the pasture land, and stated in his will that by reason of this provision neither Pete nor his children should take anything under the will. After giving his personal property to a daughter and son, he devised all his real estate to Pete Cunningham in trust to hold and dispose of as directed in another provision. The trustee was directed to rent and manage the real estate according to his own judgment, and annually divide and apportion the net rents and profits among the testator's children and certain of his grandchildren.

The will contained the further provision

that, should any child or grandchild contest the will, the one so contesting should take no portion of the estate, that portion to be divided among the remaining devisees. There was a provision that Pete Cunningham should receive for his services as trustee under the will the sum of \$100 annually and he was named as executor of the will. Immediately after the death of Harvey Cunningham, the plaintiffs agreed among themselves to ignore the rights of the grandchildren (including their own children) and made an offer to Pete Cunningham that if he would consent to this he was to be allowed to retain the land given him by the deed and to share equally with the others in the rest of the real estate. It was agreed that he should qualify as executor, that the will should be probated, and that afterwards a suit should be brought to set aside the will on the grounds stated in the petition.

On the trial Pete Cunningham and several of the plaintiffs testified that this agreement was entered into; that they agreed among themselves that by this method they could take the lands in fee simple; that they disregarded entirely the rights of the grandchildren, and did not consult with them. He also admitted that before this agreement was made he had retained an attorney to defend the will in case an attempt was made by any of the heirs to set it aside.

The grandchildren, among other contentions, insist that the appeal should be dismissed and the judgment affirmed on the ground that Pete Cunningham, having accepted the real estate deeded to him by his father as part of the same transaction, and having accepted the trust imposed by the will by qualifying as executor, comes into court with hands that are unclean; that the agreement between him and his brothers and sisters to set aside and ignore the will is one which under the circumstances equity should not enforce. Authorities are cited where it has been held that contracts of this kind are void as against public policy, because they amount to a breach of faith on the part of the trustee. The court, however, found all the issues in favor of the defendants; the answer had alleged that Pete Cunningham was estopped by his conduct to maintain the action, and that three of his brothers, who had become sureties on his executor's bond, were also likewise estopped. In view of the fact that the record discloses such an abundance of evidence to sustain the findings made by the jury and the court upholding the validity of the will, we deem it unnecessary to pass upon the question of estoppel or the question of public policy presented.

Some years prior to the making of the will, Harvey Cunningham had executed a will, to which he had attached, at different times, seven codicils. A day or two before he made his last will he went in a car with Pete to Moline, and at his request the banker,

who had charge of the old will, came out and talked with him. He told his banker that he wanted to make a deed to Pete to the home place and some other lands, and wanted it done as quickly as possible. His banker, who had been his friend for 30 years, told him that this would probably interfere with his will—might necessitate the making of a new one. He asked the banker if he could attend to the matter of making a new will, but the latter told him it was an attorney's business, and suggested Mr. Sims, an attorney. It was agreed that the banker would make arrangements with Mr. Sims, and on the following day the banker brought the attorney to the Cunningham home. The attorney, in the meantime, had read the old will, and advised Mr. Cunningham that there ought to be a new one written in place of having an additional codicil to the old will.

The testimony of Pete Cunningham, so far as it tended to show that his father was not mentally sound, was largely discredited by his admissions that, although he and other members of the family were present at the time the will was talked over and when it was executed, none of the family suggested that the old gentleman was not competent to make a will; that Pete never suggested that his father was not capable of making the deed to him, which he accepted, recorded, and claimed title under, and also by the uncontradicted testimony showing that some time after the will had been executed Pete retained the services of Mr. Sims, the attorney who drew the will, to defend any action that might be brought by any one to defeat the will.

The deposition of Mr. Sims, the attorney, was taken and read on behalf of the defendants. He told what occurred at the first interview, and the reasons stated by the testator for making the provisions with respect to the disposition of his real estate. In substance Mr. Sims testified that Mr. Cunningham said he wanted to fix it some way so that his children, except Mrs. Bryan and one son in Colorado, should get the rents and the profits of the pasture land; that he told the attorney the number of acres of land that he owned, and the attorney suggested to him that this would amount to over 160 acres for each of the children after giving Pete the lands spoken of, and suggested that it would be a good thing for him to divide the land himself and let each child have certain pieces of the land; that Mr. Cunningham said, in reply,

"That is not a good way to handle it; the land is nearly all in one big pasture, and it ought to be kept and used together as one body;" that some parts of it was much better, than others; some had water on it; other parts did not; and it would be almost impossible to divide the land equitably. I then said to him, 'If you fix this land as you are talking, it will be held together here and won't be di-

vided for 40 or 50 years,' and he said (with an oath), 'That is just the way I want it; they won't get to spend it and run through with it, and them little grandchildren will get it.' He said, 'They will say I am crazy because I don't let them have it themselves so they can spend it, but I want them little grandchildren to get that property after they are through with it and all get their share.'

The witness further testified, in substance:

"I asked him if he wanted to pay anything, and, if so, how much (to Pete for acting as trustee), and the old gentleman called Pete, \* \* \* and asked how much he thought he ought to have; \* \* \* and Pete said he thought \$150 would be all right and the old man said, 'That is too much; \$100 is enough.' \* \* \* I further said to him, 'If they are going to say you are crazy, you ought to have some of your old neighbors who know you best act as your witnesses,' \* \* \* and I told him I thought it would be best to have at least four. He said that Andy McKay of Longton was one of his best friends, and he would like mighty well to have Andy; that Phil Arnall, of Elk Falls, was another good friend, but he guessed he lived too far away. I said to him, 'Mr. Cunningham, you leave that to me; if you want these men to act as witnesses, I'll see that they get here,' and he said, 'All right.' \* \* \* I said to him it would probably be a good idea to have his family physician, and asked him who he was. He said \* \* \* Dr. Shaffer had been waiting on him some. I asked him if I should bring Dr. Shaffer out, and he said, 'Yes,' if I thought it necessary; that he wanted to fix it so they couldn't say that he was crazy."

The testimony of the attorney as to what occurred the following day after he had stated to Mr. Cunningham that the witnesses were there to witness the will is:

"I said to him, 'What do you want to give Pete?' and he said, 'The home place and 160 acres of pasture land.' \* \* \* I asked him what he wanted done with his personal property, and he said, 'Give it to the son in the West,' \* \* \* and Mrs. Bryan. I asked him what he wanted done with the balance of his pasture land, and he said he wanted to keep it together in one body, Pete to look after, pay the taxes, and divide the proceeds up equally among all his children, except Sarah Bryan and his son in the West and Pete; \* \* \* how much he wanted Pete to have for taking care of the pasture, and he said, 'One hundred dollars a year;' \* \* \* how long he wanted the pasture land kept together and rented, and he said as long as any of his children lived; \* \* \* what he wanted done with the pasture land after his children were all dead, and he said to divide it among his grandchildren. I asked him to tell the witnesses what he wanted done if any of his children brought suit to set aside the will, and he said to cut them off without anything."

Several of the witnesses to the will testified, in substance, that they saw nothing to indicate that the testator did not know what

he was doing at the time he executed the papers—the deed and the will.

[2] One of the contentions urged by the plaintiffs is that the testimony concerning communications between the attorney and client was incompetent under § 321 of the Civil Code (Gen. St. 1915, § 7223). We think the objections to his testimony and the motion made to strike out were properly overruled. In addition to the fact that many of the things the attorney testified to were corroborated by other testimony, it has been decided that an attorney who acts as a scrivener in the preparation of a contract regarding property or in the drawing of a will may testify to communications with the deceased at the time the deed or will was prepared or executed, because under such circumstances the communications are not privileged. *Black v. Funk*, 93 Kan. 60, 143 Pac. 426; *Sparks v. Sparks*, 51 Kan. 195, 82 Pac. 892; *Lumber Co. v. Cox*, 94 Kan. 563, 566, 147 Pac. 67; 4 *Wigmore on Evidence*, § 2297.

In *Durant v. Whitcher*, 97 Kan. 608, 156 Pac. 739, the rule was applied that "in an action to set aside a will the lawyer who drew it may testify to the conversation had at the time between himself and the testator," and also that the scrivener and subscribing witnesses of a will are competent witnesses as to the mental condition of the testator.

In *Black v. Funk*, supra, it was said:

"Communications received from the testator not being privileged, it is manifest that the attorney may relate the facts and circumstances surrounding the preparation and execution of the will to show that the testator was not under any improper restraint." 93 Kan. 63, 143 Pac. 427.

[3] One of the witnesses for the plaintiff was Mrs. Stuckey, a daughter of the deceased. The court sustained a number of objections to parts of her testimony, and struck out other parts of it. It is complained that the testimony was improperly excluded. No error was committed in the rulings. The court properly struck out testimony of communications between the daughter and her father, in his lifetime, but permitted her to testify to statements by him to other persons in her presence. There was no error in the court admonishing her to tell what she observed, in place of giving her opinion as to the condition of her father's mind. Many of the statements stricken out were mere conclusions and opinions. She was permitted, however, to testify that her father was not in his right mind, and that his mental condition had been the same for about six months prior to the execution of the will.

There is no force in the contention that the court erred in the instructions to the jury. The findings submitted were merely advisory, and the views of the court, as

reflected by the instructions, show that the court fully understood and applied the law of the case. The instructions were fair, and fully covered the issues submitted to the jury. .

Mary Ellen McMillan, one of the plaintiffs, has filed a motion asking to be dismissed as an appellant, and stating in an affidavit that she never authorized the use of her name as a plaintiff in the court below, and never authorized an appeal in her behalf. As to the authority for the appeal, she is contradicted by an affidavit of one of appellants' attorneys. The minor defendants also resist the motion, and direct attention to the record showing her presence during the trial in the district court and a statement in her presence by her sister, Mrs. Stuckey, while a witness, to the effect that her sister who was present in the court room, had agreed with the other plaintiffs about the settlement of the estate. It is also said that a similar motion was presented to the trial court after the rendition of the judgment, and that it was overruled. In view of these facts there seems nothing for us to do but to overrule the motion.

Finding no error in the record and the judgment being supported by sufficient evidence, it is affirmed.

All the Justices concurring.

(107 Kan. 314)

PURL v. PURL et al. (No. 22635.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Taxation §674—Wife held not entitled to take tax title on land in which husband has life estate.

Where a husband and wife occupy a farm, in which he has a life estate with remainder to his children, and the wife shares in its management and proceeds, keeping stock of her own thereon, she is disqualified to acquire a tax title thereto, based upon taxes which accrued while these conditions existed, and paid for out of a fund derived from its operation.

2. Taxation §810(3)—Evidence held to show that widow obtained tax deeds on farm from its proceeds.

Evidence is held to support the findings.

(Additional Syllabus by Editorial Staff.)

3. Appeal and error §931(6)—Court trying case presumed to have considered only competent evidence.

Even if testimony should have been excluded, because relating to a privileged communication, and because otherwise incompetent, the judgment should be affirmed, unless, without it, the findings would lack support, since, in a case tried without a jury, and in the absence

of an affirmative showing to contrary, it must be presumed that the court was influenced only by competent evidence.

Appeal from District Court, Shawnee County.

Action by Kate Purl against Thomas C. Purl and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. F. Schoch, Edwin A. Austin, Otis E. Hungate, and Paul Heinz, all of Topeka, for appellant.

John J. Schenck, W. E. Atchison, Waters & Waters, and E. S. Quinton, all of Topeka, for appellees.

MASON, J. In 1891 Fillmore Purl, through a will, acquired a life estate, with remainder to his children, in a Kansas farm then occupied by himself and family, consisting of a wife and (for a part of the time) their children; this occupancy continuing until 1906, after which the place was rented. On July 15, 1918, he died, and the next day his widow, Kate Purl, brought this action against their children, claiming full title to the farm under tax deeds issued to her in 1899, based upon the taxes of 1895, 1896, and 1897. She was denied relief, and appeals.

[1] Findings were made to this effect: When Kate Purl came to Kansas, she brought with her two mares, which were taken upon the farm. From these horses, colts and mules were raised, which were kept there. She also acquired other property from the products of the farm. From 1891 to 1899 she returned for taxation as her property horses, mules, cows, hogs, and chickens, which were kept and cared for there; her husband returning no personal property for taxation during these years. He was away from home quite a good deal during the time, and when he was at home he and his wife were in joint charge and control of the farm; when he was away, she exercised complete control. She shared with him in the proceeds derived from the farm. She looked after the payment of taxes upon the farm for 1891 and subsequent years, and paid them out of the proceeds derived from the farm, taking receipts for the years 1891, 1893, and 1894 in her own name. The land was sold for taxes in September, 1893, and she redeemed it from this sale in her own name two months later. In 1896 the land was sold for the taxes of 1895, and the taxes for 1896 and 1897 were indorsed on the certificates. In February, 1899, she took an assignment of the certificates, and upon these deeds were issued to her in September, 1899. The subsequent taxes were paid in her name. The money which went to purchase the tax sale certificates was derived from the property of Fillmore Purl and Kate Purl; and

from their labor in connection with the farm and personal property.

One contention made by the defendants is that a wife cannot under any circumstances acquire a tax title to her husband's property. In *Broquet v. Warner*, 43 Kan. 48, 22 Pac. 1004, 19 Am. St. Rep. 124, a tax title taken by a husband upon his wife's land was upheld; stress being laid upon the fact that neither had been in possession. On a subsequent appeal in the same case it was said that there was sufficient evidence to show actual possession of the land by the husband at the date of the tax sale, but that the earlier decision would be overruled, and the deed held void, on the ground that, irrespective of possession, a husband cannot obtain a valid tax title to his wife's property. *Warner v. Broquet*, 54 Kan. 649, 39 Pac. 228. Still later the whole question was re-examined, in a case where neither spouse had ever resided in Kansas; the court concluding that the mere relation of husband and wife does not prevent the acquisition by one of them of a tax title to the land of the other, and overruling the decision in 54 Kan. 649, 39 Pac. 228, so far as it overruled that in 43 Kan. 48, 22 Pac. 1004, 19 Am. St. Rep. 124. *Nagle v. Tieperman*, 74 Kan. 32, 45, 53, 85 Pac. 941, 88 Pac. 969, 9 L. R. A. (N. S.) 674, 10 Ann. Cas. 977.

In *Croner v. Keefer*, 103 Kan. 204, 173 Pac. 282, it was held that the husband, under the facts there presented, was disabled to acquire a tax title to land standing in the name of his wife. He had owned the property himself, until it had been sold for taxes and bid in by the county, and he had executed a deed to his wife after such sale. This obviously disqualified him to take an assignment of the certificate from the county, and subsequent unpaid taxes were annually added to the lien arising from that sale, and there could be no new sale until a redemption therefrom. Gen. Stat. 1915, § 11426. To the decision on this ground the court added the citation of *Warner v. Broquet*, 54 Kan. 649, 39 Pac. 228, with a statement of its effect. The doctrine of that case was not necessary to the decision, and was not re-established by it. In *Peck v. Ayres*, 79 Kan. 457, 100 Pac. 283, the two *Warner-Broquet* Cases were cited, without reference being made to *Nagle v. Tieperman*, and both were in a sense in point, because the tax deed there taken by the husband to his wife's land was bad under either rule; he having shared the possession with her and enjoyed the rents and profits.

In the present case, likewise, the question whether a disability of one spouse to acquire a tax title to land of the other follows from the mere fact of their relationship is not necessarily involved. Under the findings, the attempt of Kate Purl to buy the tax sale certificates amounted to a redemption of the

property, because when the taxes accrued she was living upon the farm with her husband, operating it jointly with him, using it in part for her own individual benefit, deriving a revenue from it, and paying for the certificates, in part at least, with money obtained therefrom. The suggestion is made that, if the farm had been rented, the tenant would have been at liberty to buy it at a tax sale, and that inasmuch as Fillmore Purl, in pursuance of his legal obligation, furnished it to his wife as a place of residence, her situation is not essentially different. We do not think the analogy close. The occupancy was that of the family, of the husband and wife jointly, and, notwithstanding the legal right of each to transact business separately, we hold that they were equally incompetent to divest the title of the remaindermen by the acquisition of a tax deed.

[2, 3] 2. The findings of fact are not directly challenged in the plaintiff's brief, but complaint is made of the admission of the testimony of one witness on the ground that it related to a privileged communication and was otherwise incompetent. Assuming that this evidence should have been excluded, the judgment should nevertheless be affirmed, unless without it the findings would lack support, for the case was tried without a jury, and in the absence of an affirmative showing to the contrary it must be presumed that the court was influenced only by competent evidence. *McCready v. Crane*, 74 Kan. 710, 88 Pac. 748. Leaving out of account the testimony of the witness referred to, and bearing in mind that the court obviously discredited certain statements of the plaintiff, we regard the findings as sufficiently sustained. The plaintiff testified that she "carried the pocketbook" all the time, and had stock on the farm; that she kept the money for which things were sold on the farm; that her husband did not run the farm half the time; that he was away from it frequently. Any of the specific findings concerning which there was no direct evidence related to conclusions fairly inferable from the circumstances shown. For instance, no witness testified that the money paid for the tax certificates was derived from the property of Fillmore and Kate Purl, and from their labor in connection with the farm and personal property. But this was a legitimate inference from the manner in which it was shown the business had been conducted. Account must be taken of the difficulty in establishing such matters—involving the tracing of family expenditures—by positive testimony, a recognition of which difficulty has doubtless fostered the view that one spouse should under all conditions be barred from acquiring a tax title to the other's property.

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 201)

(191 F.)

**JONES v. SMITH. (No. 22367.)**

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

Frauds, statute of §129(12)—Preparation of crops by tenant under lease cannot give him right of occupancy under subsequent void oral lease.

A tenant, occupying land under a written lease, cannot, by plowing the land and preparing it for crops during the written lease, acquire the right to occupy the land under a void oral lease after the term of the written lease has expired.

Appeal from District Court, Sedgwick County.

Action by J. W. Jones against W. N. Smith. From a judgment for defendant, plaintiff appeals. Reversed.

J. W. Blood and E. L. Foulke, both of Wichita, for appellant.

John W. Adams, of Wichita, for appellee.

**MARSHALL, J.** This action was brought by the plaintiff to recover the possession of real property from the defendant, who, having lawfully entered thereon, wrongfully and forcibly retained the possession thereof. Judgment was rendered in favor of the defendant, and the plaintiff appeals.

The defendant has not filed any brief. However, one of the matters presented by the plaintiff will be noticed. W. E. Jones formerly owned the land, and in writing leased it to the defendant for 12 months, commencing March 1, 1917, and ending February 28, 1918. The plaintiff, J. W. Jones, purchased the land from W. E. Jones. The defendant claims to hold possession of the land under an oral lease for less than a year, given by Wiley Jones, as agent of W. E. Jones. The plaintiff denies that such a lease was made. There was evidence which tended to prove that Wiley Jones was the agent of W. E. Jones, and that Wiley Jones orally rented the land to the defendant; but the plaintiff claims that the oral lease, if any was made, was void under section 4888 of the General Statutes of 1915, which reads:

"No leases, estates or interests of, in or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized, by writing, or by act and operation of law."

There was no evidence which tended to show that Wiley Jones had been authorized by writing to lease the land to any person. The testimony of the defendant showed that the oral lease was made in July or August, 1917, that he planted oats, corn, and kaffir

corn in the spring of 1918, and that he harvested the oats in July, 1918. Corn and kaffir corn could not be harvested until the fall of 1918. The defendant proceeded as though the oral lease was for more than a year; at any rate he commenced what could not be completed within a year from the time he claimed the oral lease was made. The court instructed the jury as follows:

"You are further instructed that in considering the question of whether the lease agreed upon, if you find such a lease has been made, could have been performed within a year, you are to take into consideration all the facts in the case; and if from all the facts you find that a contract could not have been performed within a year, then your verdict must be for the plaintiff, unless you further find, as herein elsewhere instructed, that Smith prepared the land for sowing it to wheat and oats."

That instruction was erroneous. The preparation of the land during the existence of the written lease for planting crops could not give effect to the void oral lease. The work that was done on the land while the written lease was in effect must be referred to that lease, and not to the void oral lease. *Skinner v. Davis*, 104 Kan. 467, 179 Pac. 359; *Nave v. Shaver*, 105 Kan. 176, 182 Pac. 889.

The judgment is reversed.

All the Justices concurring.

(107 Kan. 296)

**SHEPHERD v. WHITMORE et al.**  
(No. 22614.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. **Brokers** §94—Contract construed to be a mere listing; broker authorized to find purchaser could not bind principal by written contract.

Correspondence between a real estate broker and the executor of an estate, with authority under the will to sell real property, is held to show a mere listing of the real estate, with authority in the broker to find a purchaser, and that a written contract made by the broker with a purchaser is not binding upon the executor; and (following *Haggart v. King*, 107 Kan. 75, 190 Pac. 763, *Wiggam v. Shouse*, 105 Kan. 637, 185 Pac. 896, and authorities cited in those cases) further held that the broker had no authority to bind the executor by a written contract with a purchaser.

2. **Brokers** §106—Evidence held to show principal had not ratified broker's unauthorized contract to sell land.

In an action to enforce such a void contract, it is held that the evidence is sufficient to sustain a finding that the executor had not ratified the contract.

**3. Brokers  $\Leftrightarrow$  106—Evidence held to sustain judgment for cancellation of deed and release of mortgage.**

The evidence is further held to sustain a judgment for the cancellation of the executor's deed, which the purchaser obtained from a bank and placed of record, and for the release of a mortgage he had placed on the land.

Appeal from District Court, Lyon County.

Action for specific performance by J. M. Shepherd against William Whitmore, executor of Jonathan J. Whitmore, deceased, and Ernest Hamilton and another, his successors, with answer and cross-petition by the executor. Judgment for defendants, and plaintiff appeals. Affirmed.

W. L. Huggins, O. T. Atherton, and R. E. Boynton, all of Emporia, for appellant.

Hamer & Ganse, of Emporia, F. A. Meckel, of Cottonwood Falls, and Hamilton & Hamilton, of Topeka, for appellees.

**PORTER, J.** This is an appeal from a judgment denying plaintiff specific performance of a contract for the conveyance of real estate. The land in question consists of a farm of 240 acres in Lyon county, which belonged, in his lifetime, to Jonathan J. Whitmore, of Logan county, Ohio. He died, and under the terms of his will his executor, William Whitmore, was authorized to sell all the real property of the estate without an order of court. The plaintiff lives near the land in Lyon county, and in his petition alleged that E. Cotton, acting as agent of the executor, and under written authority, sold to plaintiff by written contract the farm, also the wagon scales on the farm, telephone, and telephone shares; that in the contract the defendant agreed to give plaintiff possession of the premises on March 1, 1919; that the written contract was thereafter ratified, confirmed, and partly performed by the executor; that plaintiff was at all times ready, willing, and able to fully perform all of the terms of the contract on March 1, 1919, and that the defendants, Whitmore, executor, and Cotton, as agent, failed to perform the contract according to its terms, and refused to convey the land as agreed, and failed to give plaintiff possession; that defendant W. V. Gibbs was a tenant in possession of the premises, and refused to vacate, and on March 27, 1919, the executor and his agent informed plaintiff that the executor would not be responsible for giving possession of the land; that if plaintiff desired to take the land under the contract he must immediately accept a warranty deed, which deed reserved to defendant Gibbs his share of the growing crops; that, for the purpose of procuring money to make the purchase, plaintiff had sold a farm and had negotiated a loan covering the land in question and other land, and for these reasons and in order to mitigate

his damages he was compelled to accept the deed as tendered; that he is entitled to the immediate possession of the premises, has the legal and equitable title thereto, and that the defendants are unlawfully keeping him out of possession. He asked for an order of the court directing the executor, and Cotton, as his agent, to specifically perform the terms of the contract and give him possession of the premises, and that he recover from the executor and Cotton actual damages in the sum of \$1,000 and interest from March 1, 1919. He also prayed for \$200 damages against the defendant Gibbs.

William Whitmore, executor, filed an answer and cross-petition. The answer denied that Cotton was the agent of the executor, or that he had authority to represent the executor in any of the matters alleged in the petition and denied generally the averments of the petition. For his cross-petition the executor alleged that on or about October 1, 1918, E. C. Cotton solicited the price at which the executor would sell the property in controversy; that after considerable correspondence between them relative to the sale of the farm, copies of which were attached to the cross-petition, the defendant agreed to sell the farm to Shepherd for \$15,000, but at no time agreed to deliver possession of the farm on March 1st, or any other time; alleged that Shepherd, the plaintiff, had actual notice and knowledge of the contents of the correspondence between the executor and Cotton, and that defendant Gibbs was in possession of the land under a lease terminating March 1, 1919; that Shepherd, the plaintiff, had knowledge of the rights of Gibbs as tenant in the land; that as executor he at no time entered into or executed a written contract for the sale of the land. The only agreement he had was contained in the letters and telegrams, copies of which were attached. The cross-petition further alleged that, in keeping with the correspondence, Whitmore had executed an executor's deed conveying the lands to the plaintiff, deposited the same in a bank at Bellefontaine, Ohio, to be forwarded to the Miller State Bank, of which Cotton was cashier, with draft on the Miller State Bank for the sum of \$15,600; that the deed and draft were forwarded to the bank, with instructions to deliver the deed to Shepherd upon his payment to the bank of \$15,600; that Cotton, acting for himself, and as agent of plaintiff, and as officer of the bank, delivered the deed to the plaintiff, and received from him the \$15,600, and on the same day made a draft for that sum payable to the People's National Bank of Bellefontaine, Ohio, and deposited the same in the post office at Miller, Kan., of which J. R. Shepherd, son of the plaintiff, was postmaster, who, acting in collusion with plaintiff, for the purpose of cheating and defrauding the defendant executor and the es-



tate of Jonathan J. Whitmore, deceased, caused the draft to remain in the post office at Miller for two days after it had been regularly mailed, and that by false statements in affidavits plaintiff procured garnishment proceedings and a restraining order to be served on Cotton, who in the meantime procured from the postmaster the return of the draft, thereby preventing the executor from receiving the purchase money for the farm. He alleged that the plaintiff had never accepted the terms of the defendant's offer to sell the farm, and he, as executor, elected to withdraw his offer to sell the farm to plaintiff, and asked for the cancellation of the deed and the release of a mortgage placed on the land by Shepherd, and that the \$15,600 in the hands of the Miller State Bank be paid into court to satisfy the mortgage. Attached to the answer and cross-petition were copies of the executor's deed and the correspondence which passed between the executor and Cotton.

The court appointed a receiver to take control of the real estate. The case was tried to the court, and judgment was rendered in favor of the Whitmore estate and against the plaintiff. William Whitmore, the executor of the estate, died, and the judgment recites that his successors have been substituted as defendants. The court held there was no contract for the sale of the land between plaintiff and the executor, and that the executor's deed was never delivered, and it was ordered canceled. The mortgage placed on the land by the plaintiff was ordered released.

[1] The principal error complained of is the finding of the court that there was nothing in the correspondence authorizing Cotton to enter into any contract on behalf of the executor. It is conceded that power to sell, as ordinarily applied to real estate brokers, means authority to find a purchaser, and not authority to close the deal and make a contract of sale; but it is insisted that this rule cannot be applied in the present case. After preliminary correspondence between the executor and Cotton, beginning in July, 1918, the executor fixed a price on the land, and requested Cotton, if he had any purchasers at that figure, "to proceed to do business," and the executor would pay him the usual commission. On October 23d, in answer to one of Cotton's letters, he wrote:

"I have decided to say that if you can sell to this party at \$70 per acre to let it go."

On January 18, 1919, Cotton wrote to the executor:

"I have sold the farm at \$65 per acre, or a total of \$15,600, a payment of \$1,000 cash, and the balance of \$14,600 will be paid March 1, 1919. I will have to get a loan on the farm for the man, and will need the abstract the first thing. Possession is to be given March 1st, and the deal completed."

On January 20th the executor wrote:

"You said you had sold the farm, but did not say anything about Mr. Gibbs and the wheat, and I am wondering if you had an understanding with him. \* \* \* We are inclosing the abstract. Please let us know at once what arrangements you have made with Mr. Gibbs."

This was followed three days later by a telegram to Cotton, as follows:

"Don't close any deal for sale of farm without written instructions from me."

And on the day following the executor wrote:

"Confirming my telegram to you of January 23, 1919, I desire to say that I cannot comply with your request to sell the Kansas farm and agree to give possession of same March 1, 1919, or until such time as I have the farm in my possession."

On January 24th Cotton wrote the executor saying:

"Received the abstract to the land and wire message. We have made contract of sale to the farm as stated in our previous letter, receiving payment of \$1,000 down, and the balance to be paid March 1st, when possession is given. \* \* \* I suppose Mr. Gibbs is writing you all kinds of letters, threatening to make you trouble and collect damages and the like. Do not get scared. \* \* \* He has no need to kick, as the man will pay him what he has put into the wheat sown, or take the share agreed upon. He will treat him all right, he tells me."

On the 27th of January the executor wrote to Cotton:

"Your letters received three in a bunch today, which eases up matters with us very much. We were very uneasy, not knowing what claims Mr. Gibbs might put up to the place, fearing he might have picked up something from our correspondence with him about the wheat that would give him permission to hold it for another year. The Gibbs deal is all that we know of that might happen to cause trouble in getting this sale through, and we believe from your letters that everything will be all right."

On January 19th Cotton wrote to the executor:

"Mr. J. M. Shepherd, the man who purchased the place, was in yesterday, and said he had talked with Mr. Gibbs, and we would have no trouble at all with him, he said, as he understood the situation better now. \* \* \* I am arranging matters so as to run smoothly, and at the time that we close the deal, March 1st, the land will be turned over peaceably to Mr. Shepherd, and the cash will be paid to the estate in full, \$15,600."

In a letter dated February 12th the executor stated to Cotton:

"Mr. Gibbs wrote regarding the wheat. Our agreement with him was 'that, if he put out any wheat, he was to have the privilege of returning to harvest and thresh the same, and to give us or the purchaser the customary grain

rental.' This agreement will have to be made a part of the deed. If Mr. Gibbs and the purchaser make a different agreement, that will be their deal."

On March 1st the attorneys for the executor sent to Cotton certified copies of the will and probate proceedings in the Whitmore estate, and on the same day sent direct to the Miller State Bank, as an ordinary collection, an executor's deed with draft attached for \$15,800, the deed to be delivered upon payment of the draft. The executor's deed contained the statement that—

"The tenant's share of the now growing wheat crop is hereby reserved to the tenant, W. V. Gibbs."

The next day the executor wired Cotton as follows:

"Sent deed yesterday. Hold same until I write you."

On the same day he wrote:

"In regard to deed which I asked you to hold, I want you to hold the same until I have a better understanding regards the wheat. \* \* \* I don't want this deed turned over to Mr. Shepherd until the wheat question has been settled. As regards the chattels, which you put in the contract, I can't say yet what I can do regarding the same. The telephone we can't deliver, as it belongs to Gibbs. As regards the telephone right and line, we can't say about this until we hear from Mr. Shultz, who had it put in and paid for the same. Don't deliver this deed until I notify you to do so."

The next day Cotton wired:

"Your telegram at hand. Will hold deed as instructed."

March 10th the executor telegraphed the bank to deliver the deed to Shepherd upon payment of the draft attached to the deed. On March 17th Cotton wrote that:

"The possession of the farm is holding the closing of the deal up. \* \* \* Let me hear what you say in regard to the matter."

On March 19th the attorneys for the executor wrote the Miller State Bank, unless the draft was paid at once, to return the deed with draft to the bank in Ohio from which it had been received. On the same day Cotton wrote the executor, "We have had a lawyer look at our contract with Mr. Gibbs," and that in the opinion of the lawyer there would have to be an arbitration, and said:

"Now, as it seems impossible for Mr. Shepherd and Mr. Gibbs to agree upon the value of the wheat, and Mr. Gibbs still is in possession of the place, it will be necessary for you to follow the contract and arbitrate with him, and pay him off for the wheat, before you can get possession."

In the meantime the plaintiff had employed attorneys and had verified the petition

to be filed in this case. Cotton was a witness, and admitted that on March 22d he was in the office of plaintiff's attorneys, where he wrote a letter to the executor, inclosing an agreement to guarantee Shepherd possession of the farm, in which he told the executor to sign and return the agreement, and thereupon Shepherd would pay in the full price of the farm, which would be sent to the executor at once. He testified that Shepherd paid the money into the bank, and that he, as cashier, sent a draft for the amount to the bank at Bellefontaine, Ohio; that he deposited the letter in the post office on Friday, the 28th, and on the next morning ordered the postmaster to hold the letter; that the postmaster told him Saturday evening that he should either send the letter or return it; that no mail leaves Miller on Sunday, and that on Monday morning, before the mail went out, witness went to the post office and got the letter back. He was served with a restraining order on March 28th, after he had deposited the letter in the post office. On March 29th he wrote the executor:

"Mr. Shepherd paid for the farm yesterday, and took the deed, and immediately, while we were in the act of mailing a draft, \* \* \* he had papers served on us restraining us from making payment."

Later on he wrote, suggesting that the executor come or send some one to settle matters with Gibbs, so as to give Mr. Shepherd possession before the trial and save extra expense. In a letter in reply, the executor sharply criticized his actions. Cotton answered, stating that he mailed the letter March 28th "but took it back at the order of the court, and will forward it as soon as released."

The trial court held that there was nothing in the correspondence or in the understanding between the parties that authorized Cotton to enter into any contract for the executor, that the evidence showed that neither the contract nor a copy of it was ever sent to the executor, and that none of the details were ever submitted to him. In our opinion the correspondence shows nothing more than the usual and ordinary listing of real estate with a broker for sale, giving him authority to find a purchaser. The question has been before this court so often that further discussion of it would be superfluous. In the recent case of Haggart v. King, 107 Kan. 75, 190 Pac. 763, it is said in the opinion:

"It has been held that, under the usual contract by which a landowner lists his property for sale with an agent, the latter has no authority to make a written contract that would be binding upon the owner. *Sullivan v. Jahren*, 71 Kan. 127, 79 Pac. 1071; *Wiggam v. Shouse*, 105 Kan. 637, 185 Pac. 896, and cases cited in the opinion."

Aside from a total want of authority on the part of Cotton to make a contract for the sale of the land binding upon the executor, he had no authority to make a contract that required possession to be given on March 1st, or for a warranty deed, or to contract for the sale of personal property, something not mentioned in the correspondence.

[2] It is contended, however, that the executor ratified the contract, and that the estate is estopped to deny Cotton's authority to enter into it. We are unable to find in the correspondence anything to indicate that the executor knew until after the suit was brought that any written contract had been entered into—nothing to indicate that such contract, or a copy of it, had ever been sent to him. Nor can it be said that he ever consented to give possession on March 1st, except upon the condition, which he insisted upon all through the correspondence, that the purchaser settle with the tenant. In the first letter written after notice that a purchaser had been found, the executor said:

"I am wondering if you had an understanding with him" (Gibbs).

Time and again he was assured by Cotton that he need not be alarmed about any complications with Gibbs—that everything would be arranged satisfactorily to the tenant. Becoming apprehensive that there might still be trouble with the tenant, the executor telegraphed to Cotton:

"Do not close any deal for sale of farm without written instructions from me."

The telegram was confirmed by a letter, in which the executor said that he could not comply with Cotton's request to sell the farm and agree to give possession March 1st. In response he was assured by Cotton that he had been informed by the purchaser that he would treat the tenant all right. In all the correspondence the executor manifested a desire, not only to protect the tenant from any annoyance, but a desire not to be involved in any way in litigation or trouble arising out of any attitude the tenant might take with respect to possession, and as late as January 27th the executor wrote:

"The Gibbs deal is all that we know of that might happen to cause trouble in getting this sale through, and we believe from your letters that everything will be all right."

He was again assured that Cotton was arranging matters "to run smoothly" and that on March 1st "the land will be turned over peaceably to Mr. Shepherd, and the cash will be paid to the estate in full." Full knowledge of all the material facts was essential before the doctrine of ratification could apply. Upon the question of ratification, the court said, in ruling upon the motion for a new trial:

"I have found nothing in the correspondence that would indicate a ratification, or an intention to ratify the contract, on the part of the executor, as claimed."

We think the trial court took the proper view of the question of ratification, and that the evidence abundantly sustains the holding that, in sending the deed to the bank to be delivered to the plaintiff, the executor was relying upon Cotton's assurances that there would be no trouble or complications with the tenant, and that, as soon as he discovered the truth, he promptly wired the bank to return the deed unless it was accepted immediately.

[3] Finally, it is insisted by plaintiff that he bought the land and paid for it, that the executor sent the deed to the bank, with directions to deliver to him upon payment of the agreed price, and that while he may not be entitled to a decree for specific performance, he is entitled to hold the deed, and that the court erred in ordering its cancellation. The view of the court on this question, after having heard the oral testimony of Shepherd and Cotton, appears from the court's language in overruling the motion for a new trial:

"As to the argument that Shepherd bought the land and paid for it under the proposition that the executor made: He did not do that in good faith; Shepherd never intended to purchase under the conditions laid down by the executor; he never accepted the proposition that was made by the executor. It is true that Shepherd paid his money into the bank, but before he did so he made preparation \* \* \* immediately to sue the executor and tie up that money, so that it could not reach the executor. There is no question at all about that. \* \* \* Mr. Shepherd's only reason for making the payment was to get possession of that deed, get it of record, and sue the executor to make him 'come through' with the contract that he [Shepherd] had proposed in the first instance.

"It developed in the trial of this case on the receivership that Shepherd's son was postmaster at Miller, a town in the vicinity of this property. The plan was so laid that, when Shepherd paid the money and the draft was issued by the bank, and the letter containing the draft was placed in the post office, it lay in the post office long after it should have started to its destination, and that Cotton, for some reason, withdrew that letter, took it back to the bank, and held it in his possession. If Shepherd, in good faith, had intended to accept and carry out the contract that the executor had proposed to him, he would have paid his money and received the deed, and that would have been the end of it. \* \* \* I believe Shepherd has not acted in good faith, \* \* \* and that he has placed himself in a position where he cannot plead equities."

Doubtless the court was impressed with the evidence of collusion between plaintiff and Cotton, aided by plaintiff's son, who was postmaster, and by the bank, to allow plain-

tiff to secure possession of the deed by a colorable payment of the money into the bank, with an understanding that it would be tied up by a suit already agreed upon. Neither the bank nor Cotton had authority to enter into any arrangement to aid plaintiff in a scheme to involve the estate in this litigation. Both Cotton and the bank were the agents of the executor, and good faith required Cotton to protect the interests of the executor. The evidence was sufficient to sustain a finding that he not only failed to do this, but that he rendered assistance to plaintiff to enable the latter to gain an advantage over the executor. The court heard considerable oral testimony, including that of plaintiff, who testified that he paid Cotton the money for the deed, had read the deed before receiving it, and was familiar with it, that before Cotton delivered the deed he understood the estate would not attempt to furnish him possession of the land, and that he had to accept the deed and pay the money in order to hold the farm, and that he "supposed" arrangements were made for a restraining order to tie up the money in the hands of the bank. There was the testimony of Cotton to the effect that before he entered into the written contract with Shepherd he informed him of the executor's statement in regard to the claims of the tenant, and that he had explained to him the position of the estate with regard to the wheat and to Gibbs' right in the land, and that Shepherd promised to do the "fair, square thing," and to pay Gibbs what the wheat was worth. To some extent this was contradicted by Shepherd, who testified he had never seen any of the letters, and never knew what their contents were; but the court heard the witnesses, and reached the conclusion that Shepherd had not acted in good faith, and that there was collusion between him and the executor's agent. Under these circumstances, in our opinion, the court was justified in ordering the executor's deed canceled, and in holding that plaintiff was not in a position to ask equitable relief.

The judgment is affirmed.

All the Justices concurring.

(197 Kan. 384)

**IRELAND v. WAYMIRE et al. (HILL, Intervener).** (No. 22792.)\*

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Action ¶28—Election of remedies ¶15—Owner may sue for value of property converted; election to sue for value of property makes suit for specific property unavailable.

Where property is wrongfully obtained from the owner by another and converted to

his own use, the former owner has two remedies open to him, one to treat the title as having passed, and sue for its value, and the other to sue for the recovery of the specific property; and, when with knowledge of the facts, he sues for the value of the property converted, the election is complete, and the other remedy is no longer available to him.

2. Election of remedies ¶9—That first action was dismissed does not avoid effect as election.

The fact that the first action did not proceed to judgment, but was dismissed, does not avoid the effect of the election. The commencement of an action or any decisive act of a party determines the election, and gives finality to it regardless of its result.

(Additional Syllabus by Editorial Staff.)

3. Election of remedies ¶14—Choice of one of two inconsistent remedies bars other remedy.

Where a party having the right to choose one of two inconsistent remedies deliberately elects to follow one of them with knowledge or means of knowledge of the facts, he is effectually barred from thereafter making a new election and pursuing the other remedy.

Appeal from District Court, Linn County.

Action by J. C. Ireland against George W. Waymire and others, with intervention by Juanita Hill. Motion by plaintiff for judgment against intervenor on the pleadings was sustained, and intervenor appeals. Affirmed.

John A. Hall, of Pleasanton, for appellant.

Harry W. Fisher, of Mound City, for appellee.

**JOHNSTON, C. J.** This case involves the doctrine of election of remedies which was invoked in a controversy as to the right to the possession of an automobile. The car was in the possession of the defendant, Waymire; and the intervenor, Juanita Hill, of Arizona, finding him in that state, brought an action against him there, alleging that he had obtained possession of her car, refused to return it upon demand, and had converted it to his own use. She therefore asked judgment for \$1,120, the value of the car, with interest from the time of the conversion. He answered that she never was the owner of the car, that he had purchased and paid for it, and was not indebted to her in any sum. Subsequently she dismissed her action in Arizona, and undertook to recover possession of the car in this proceeding. Ireland, the plaintiff herein, brought this action to recover \$1,025 from Waymire, alleged to have been fraudulently obtained from plaintiff, and obtained an order of attachment, which was levied upon the car in question. Upon a trial the attachment was sustained, and a judgment against Waymire for the amount

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 29, 1920.

of the debt was rendered. After an order for the sale of the attached property had been issued, Juanita Hill intervened in the action, alleged that she owned the car, and asked for the possession of it. She alleged that the location of the car had been concealed from her, and therefore she had brought the action in Arizona, but upon learning that the car was in Kansas, she had dismissed that action, and was seeking a recovery of it in this action. Ireland's answer to her interplea was a general denial, and the defense that by her action in Arizona she had elected to treat the automobile as the property of Waymire, and was therefore precluded from prosecuting an action for the recovery of the specific property. The facts related were set forth in the pleadings, and the court sustained a motion made by the plaintiff for judgment against the intervenor upon the pleadings.

[1] In her appeal the intervenor insists that while she had alleged the conversion of the property by Waymire, she did not aver that it had been sold to him, or that he had acquired it by contract, but had alleged ownership of the property, and was asking a recovery because she had been wrongfully deprived of it. It appears, however, that she did not ask for the specific possession of the property, but explicitly alleged that Waymire had converted it to his own use, and she proceeded upon the theory that he had made the property his own, and therefore asked that he be required to pay for it. Two remedies were open to her; one for the recovery of the specific property, and the other to waive the tort and sue on the implied obligation of Waymire to pay for the property which he had converted. She chose the latter remedy, and is conclusively bound by her election.

[3] It has been consistently held throughout a long line of decisions in this state that where a party having the right to choose one of two inconsistent remedies deliberately elects to follow one of them, with knowledge, or the means of knowledge, of the facts, he is effectually barred from thereafter making a new election and pursuing the other remedy. *Smith v. McCarthy*, 39 Kan. 308, 18 Pac. 204; *Moline Plow Co. v. Rodgers*, 53 Kan. 743, 37 Pac. 111; 42 Am. St. Rep. 317; *Evans v. Rothschild*, 54 Kan. 747, 39 Pac. 701; *National Bank v. National Bank*, 57 Kan. 115, 45 Pac. 79; *Burrows v. Johnitz*, 57 Kan. 778, 48 Pac. 27; *Blaker v. Morse*, 60 Kan. 24, 55 Pac. 274; *Bank v. Haskell County*, 61 Kan. 785, 60 Pac. 1062; *Railway Co. v. Henrie*, 63 Kan. 330, 65 Pac. 665; *Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 636; *James v. Parsons*, 70 Kan. 156, 78 Pac. 438; *Ullrich v. Bigger*, 81 Kan. 756, 106 Pac. 1073.

The doctrine is an application of one phase of the law of estoppel, which prevents one who comes into court asserting or defending

his rights from taking and occupying inconsistent positions.

"A party cannot, either in the course of litigation or in dealing in pais, occupy inconsistent positions. Upon that rule election is founded; 'a man shall not be allowed,' in the language of the Scotch law, 'to approbate and reprobate.'" *Bigelow on Estoppel* (6th Ed.) 732.

Another statement of the basis of the rule and of its application in cases like the one in hand is:

"The reason of this rule, as applied to a case of conversion where the tort is waived, is that the plaintiff thereby elects to treat the transaction as a sale whereby title to the property is transferred to defendant, and he cannot thereafter assert, either against the defendant or another, that the title so transferred still remains in himself." 1 C. J. 1040, note 50a.

*Plow Company v. Rodgers*, supra, like this, was a case of conversion. Underwood, an agent to whom goods were intrusted, absconded after disposing of them. The plow company, the owner, sued the agent upon the theory that there had been a conversion and a transfer of ownership to Underwood, and asked for the recovery of their value. As that action did not promise satisfactory results, the plow company dismissed it, and sought a recovery of the property itself in another action. It was held that the company could not blow hot and cold, that its first action was upon the theory that the title had passed, and, if title had passed, it had no right to the property. It was remarked that—

"Having made its election with a knowledge at least of the more important facts affecting its rights, the plaintiff may not thereafter abandon its first election and choose the opposite remedy. An election, once fairly made by a party having the right to make it, is final and conclusive."

[2] It is clear that at the outset both remedies were open to the intervenor, and that she had knowledge of her rights. Considerable is said about the form of the actions, and it is urged that both were in their nature *ex delicto*, and that therefore the rule invoked was not applicable. The doctrine of election does not depend so much on the form as the nature and theory of the actions. It is the inconsistencies of the remedies, rather than the forms, which give rise to the estoppel. *Commission Co. v. Bank*, 79 Kan. 761, 101 Pac. 617, 24 L. R. A. (N. S.) 490, 17 Ann. Cas. 956. This view was stated in *Sweet v. Bank*, 69 Kan. 641, 77 Pac. 538, as follows:

"Election goes not to the form but to the essence of the remedy. It applies only where the law supplies to a party two or more modes of procedure, predicated upon inconsistent and conflicting theories. If the remedies afforded be predicated upon consistent theories, the suitor may use one or all of them; there can

be but one satisfaction. Where the remedies afforded are inconsistent, the election of one operates as a bar."

The first action, whatever it may be called, was brought upon the theory that the title to the property wrongfully obtained had passed to Waymire. Although she had not contracted a sale of it to him, her action in treating the property as his and asking for its value operated as a transfer of title. When she chose that remedy, as she had a right to do, the law implied an obligation upon his part to pay for the property converted, and this obligation was the foundation of that action. The cases cited clearly demonstrate that the remedy first chosen is wholly inconsistent with that invoked in the second action brought to recover the specific property. Having chosen one remedy, the other was no longer available to her.

Nor does the fact that the action did not proceed to judgment affect the application of the principle. The commencement of an action or any decisive act of a party determines the question, and gives finality to the election, whatever may be its result. In *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693, where an election by plaintiffs to affirm or avoid a contract was under consideration, it was said:

"They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract."

The court further held that the discontinuance of the action was immaterial. See, also, *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803.

The judgment of the district court is affirmed.

All the Justices concurring.

(107 Kan. 274)

**McMULLEN v. ATCHISON, T. & S. F. RY. CO.** (No. 22593).\*

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Master and servant §276(10)—Evidence held to show that brakeman was engaged in coupling air hose when killed.

The evidence fairly tends to show that the deceased brakeman was, when injured, engaged in the performance of his duty in attending to the air hose on the train then being made up by the switching crew.

2. Master and servant §286(33)—Negligence in transmitting kick signal to engineer held for jury.

The record presents a case rightfully submitted to the jury as to the defendant's negligence.

3. Master and servant §258(18)—Charge of negligence in kicking cars held to include wrong signals.

The charge of negligence in kicking certain cars violently and without warning against the deceased is held to include the transmission of a wrong signal by a member of the switching crew, which signal was the cause of such violent movement.

4. Master and servant §219(1)—Assumption of risk under federal Employers' Liability Act, defined.

Under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) assumption of risk does not depend on a danger so glaring that a person of ordinary prudence would not have encountered it, but an employé is not held to have assumed the risk unless the danger is so obvious that an ordinarily prudent person would observe and appreciate it.

5. Master and servant §213(5)—Brakeman held not to have assumed risk from kicking cars.

While it was a frequent thing to make up trains by kicking and shoving cars, the switching crew in this instance knew that some member of the train crew would be required to attend to coupling the air hose on the train being made up, and the deceased is not held to have assumed the risk of the sudden and violent propulsion of the cars against him without warning, under the circumstances shown by the record, and which the jury found was done in a negligent manner.

6. Master and servant §136—Lack of knowledge of dangerous position of brakeman coupling cars held not to excuse employées.

It was not error to refuse an instruction exonerating the defendant if the switching crew had no notice and were ignorant that the deceased was in a position of danger.

7. Special Interrogatories.

No material error arose by the refusal to require more definite answers to certain specified questions, or the refusal to set aside the answers to certain others.

Appeal from District Court, Harvey County.

Action by Esther I. McMullen, administratrix of the estate of Hugh Gale McMullen, deceased, against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and J. D. Houston, of Wichita, for appellant.

Branine & Hart, of Newton, for appellee.

WEST, J. The plaintiff recovered a judgment for \$10,000 for the death of her husband, alleged to have been caused by the negligence of the defendant in kicking certain cars against those connected with the caboose where he was working. The defendant appeals, and in its brief complains of

rulings refusing instructions, denying motions to set aside certain findings, and for judgment on the special findings, and refusing a new trial.

The deceased was in the employ of the defendant as a brakeman, and on the morning in question was engaged at Emporia in helping make up a west-bound freight train. The way car and six freight cars, coupled together, were standing on track No. 4, the way car being attached at the east end of the string and the deceased was at the east end of the way car. Another part of the train to be made up was propelled against these cars, and in some way he was caught and run over and suffered fatal injuries.

The petition alleged that his death was caused by the negligence of the defendant in this: That while he was at the rear or east end of the way car the defendant, its agents, servants, and employes, negligently ran the switch engine with freight cars attached thereto, and being shoved at a dangerous rate of speed, and negligently kicked the way car, and ran the engine and cars with great force and violence, and without warning and in a negligent manner, against the west portion of the train then made up, thereby negligently causing such portion of the train and way car to be suddenly moved backwards and over the body of McMullen.

The train was being made up on a curved track, so that the signals had to be relayed to the engineer, and it is claimed that the trouble arose from the fact that one of the train crew who received a signal to come ahead signaled to the engineer to make a kick, meaning to move his engine rapidly and then suddenly stop, so that cars uncoupled from those still attached to the engine would be kicked or propelled violently in the direction in which they had been started.

The defendant filed a general denial, and pleaded contributory negligence and assumption of risk. The jury with their verdict answered several questions, and, having been required to retire and answer certain ones more definitely, came in with 17 findings, one to the effect that the verdict was based on negligence of the switching crew in transmitting signal to the engineer, another that the evidence did not show what the deceased did to protect himself from the time he placed himself in the position where he was struck. As to whether there was anything to prevent McMullen from seeing, hearing, and ascertaining that the switching crew were engaged in shifting and moving cars in and about the making up of the train the answer was:

"McMullen had a right to assume that switching crew knew where he was at that time. No evidence to show that McMullen did not know switching crew were making up train."

"(15) If the come-ahead signal given by Switchman Moomaw had been correctly transmitted by the Switchman Phillips to the engi-

neer, and the engineer had obeyed the signal, would the brakeman Mr. McMullen have been injured? A. No."

"(17) Is it not a fact that Switchman Moomaw gave the come-ahead signal, and that the Switchman Phillips transmitted the kick signal to the engineer? A. Yes."

The defendant contends that it was guilty of no negligence towards McMullen. It is argued that his presence at the way car was unknown to any member of the switching crew engaged in making up the train; that the way car had been coupled to the switch engine and kicked a number of times before the accident; that McMullen just before the injury was in the way car, and knew what the switching crew were doing; that he was an experienced brakeman, and fully understood the manner in which trains were made up. It seems that the duty he had to perform was to connect the air hose on the cars as they were coupled up by the switching crew, and it is beyond dispute that kicking was a common practice of which he with his two years' experience was quite well aware. It was equally well known to the switch crew that it was the duty of some one of the train crew to be on hand to attend to this coupling, although it does not appear that they had any knowledge that McMullen was actually the one at work at this time. It was alleged in the answer that it was the duty of McMullen to see that the air hose on the train were in proper condition before the train started, and to attend to the coupling up of the cars therein.

One of the switchmen testified:

"They couple up the air between each of the cars and open up the angle cock. You have to go in between the cars when that is done. That is done by the brakeman when the train is being made up. That is the general rule. As the cars are put in they step in and couple up the air. That is the custom and practice. Our engine crew knew that fact."

It was testified that—

after the six cars and caboose were kicked down on track 4, a car was kicked to track 5, and it was desired to run it on the head end of the train, and it was left on track No. 5 temporarily. "Then we kicked 2 more towards 4 track. We gave them a little kick to kick them clear of No. 5. \* \* \* Those 2 cars did not clear track 5. The head car was pointed into 4, and the hind car of the two stopped so that it fouled 5, so that this car couldn't go into 5 without cornering it. In other words, the west end of those two cars didn't quite clear track 5. The drag was standing a little west of 5 track, about halfway between. I would imagine there were about 50 or 70 cars between the end of the drag that we had hold of and the west end of the car that stopped. When we kicked them down in there I stepped on the other side to see if the other cars went to clear No. 5, and I saw that they didn't, and I lined the switch back for the

lead, and I stepped over on the south side, and gave them the sign, to come ahead and shove them into the clear. \* \* \* When I gave the come-ahead signal Phillips gave the come-ahead signal. The engineer came ahead and shoved down against those 2 cars. When we coupled into them I gave the sign to come ahead, to come on in. I saw Phillips; he gave them a sign to give them a kick. \* \* \* When the high-ball, or kick signal, was given by Phillips the engineer opened her up and gave it a shot. As quick as I seen the high-ball and seen that the engineer was going to kick them, I commenced to stop him, flag him down. I gave a stop sign. \* \* \* After the 2 cars stopped, and we had come up to them, we intended to shove them in far enough to clear No. 5. \* \* \* The effect of the 2 cars coming up against the 6 cars that were standing on track 4 was this, the distance was so short between the string of cars attached to the way car, and the rest that we had hold of after we had coupled in to those that it hit those cars a pretty hard rap, and it had a tendency to give them a violent jar backwards. I should judge that the caboose moved about four car lengths by reason of that impact. A car length is generally figured about 40 feet. \* \* \* The difference in the movement of those cars by reason of the high-ball, or kick signal, being given by Phillips, instead of the slow and easy come-ahead signal, caused them to hit the drag of cars and give them a lurch backwards. \* \* \* If the engineer had only responded to the come-ahead signal that Taylor and I were giving at that time, we would not have hit the west end of those standing cars at that time."

The condition of the deceased's body when found showed that he had been dragged for some distance, and cinders were ground into the wounds. The engineer of the switching crew testified:

"A. If it was kicked hard enough to move the way car four car lengths, it was an awful hard lick they got. I don't know that it was moved that far.

"Q. Assuming that it did move that far, you would say it got an awful hard lick? A. Yes, sir; if it moved it that far, it must have got an awful kick."

This is not a case of a trespasser or track-walker, or even of a switchman working where he could be seen by the engineer and those in charge of the train movement. It was the duty of the switching crew to make up the trains, except attending to the air hose, and that was the deceased's duty. A rule of the company provided that brakemen must be at their trains and ready for duty 30 minutes before leaving time, and earlier if required.

"Brakemen of freight trains will be expected to couple air hose in making up trains at terminal points, and have train in readiness to test air when engine reaches train. They will begin invariably at the rear end of train, and see that stopcock in train pipe at rear of last air car is closed, and all other stopcocks in

train pipe at end of cars are open; that the hose are all coupled; that the stopcock in branch pipe of each car is open; the handle of pressure-retaining valve on each car turned down, and all hand brakes released, unless they are needed to hold the cars while making up train."

It was testified that—

These cars were equipped with automatic air brakes. "There is a hose between each car, and when they are coupled up and the angle cock is open, and they are coupled on to the engine, there is an air pump, and the engine pumps air into the reservoir and into the train line, so that when they want to stop and want to set the brakes, the engineer makes a reduction, and that squeezes the train line and the reservoir, and that has a tendency to push the brake cylinder ahead and set the brake. \* \* \* In coupling up the air hose and air line, the first thing for a man to do in connection with that duty on that morning would be to shut the angle cock. \* \* \* He would have something to do with reference to the tail hose. \* \* \* It has always been customary for the rear brakeman to couple up the air hose."

The conductor testified that—

He said nothing to McMullen about the work to be done that morning. "He knew what was to be done. All there was left for him to do was to couple up the hose on the train. He would commence at the rear end of the way car, then turn the angle cock. He was supposed to commence his duties 30 minutes before the time come to leave. \* \* \* McMullen was supposed to hang up the tail hose on the hook provided for it."

After the injury Conductor Tenney examined the rear end of the way car, and found the angle cock closed. He did not believe the tail hose was hung up. He thought it was hanging down. He had gotten four cars ahead of the way car in checking the train when the injury occurred. The witness said that, assuming McMullen was hanging up the tail hose or adjusting the angle cock, he would say that he was in the performance of his duty at that time.

Phillips, one of the switching crew, testified that when they gave the kick signal, the distance between the ends of the cars they had hold of and the train on the track was about 10 or 12 feet. Another brakeman of the train crew testified that he went on duty at 6:30. McMullen was in the way car when he arrived. After the witness left the way car he proceeded to check the train the same as the conductor did, and while they were checking up the train all that McMullen had to do would be to couple up the air hose. McMullen's first duty to perform in connection with the coupling up of the air line would be to go to the rear end of the way car and couple up the tail hose and turn the angle cock on the rear end of the way car. At the time



they arrived at the way car the angle cock would be open and the tail hose down. He examined the rear end of the way car after McMullen was injured. The angle cock was closed. The tail hose was still down. If McMullen was at the rear of the way car closing the angle cock and hanging up the tail hose at the time he was injured, he would then be in the performance of his duty. There would not be any other occasion for his being back there at all, except to close the angle cock and hang the tail hose up.

Counsel for defendant in their brief say:

"There was no eyewitness to the accident, nor was there any testimony as to how it occurred. It may be assumed, however, that very shortly after the conductor and brakeman left the way car, he left the car and closed the angle cock, and at that time the cars were kicked in on track 4, and by the impact, while he was between the rails on track 4, and at the rear end of the way car, was knocked down and run over. This assumption is based entirely on the situation appearing after the accident. \* \* \* The duty of the conductor and brakeman of the train crew was to examine the seals and check the cars in the train, and that of McMullen was to close the angle cock, hang up the tail hose, and couple up the air hose on the train. This was usually done after the train was made up, and just before or after the road engine was attached to the train. Although, from what he told Dr. Eckdall, it was not the proper time to do so, he thought it had to be done, and he would perform that duty while the train was being made up."

[1] From all this testimony and the rules of the company referred to and the condition of affairs assumed by counsel for defendant, it seems unreasonable to hold that McMullen was not engaged in the performance of his duty when injured, or that he was not located and engaged as the switch crew knew he or some other brakeman ought to be.

[2] While it may not have been the duty of the switch crew to keep a lookout under ordinary circumstances for a member of the train crew attending to the air couplings, the violent collision caused by the wrong signal and its effects were such as to make it a question for the jury whether such operation was negligent or not. *Saar v. Railway Co.*, 97 Kan. 441, 155 Pac. 954.

[3] But it is urged that the negligence on which the jury based the verdict was other than that alleged in the petition. We hold, however, the charge that the switch engine and cars were shoved at a dangerous rate of speed and run with great force and violence without warning against the other cars of the train, causing the way car suddenly and violently to move backwards over the body of McMullen, fairly includes the cause of such alleged violence, which was the transmission of the wrong signal. *Linker v. Railroad Co.*, 82 Kan. 580, 109 Pac. 678.

[4, 5] It is also urged that the deceased assumed the risk, thereby exonerating the defendant. In *Spinden v. Railway Co.*, 95 Kan. 474, 148 Pac. 747, we held that, in an action under the federal Employers' Liability Act it was error to instruct that the assumption of risk could only be established by showing that its danger was so glaring that a person of ordinary prudence would not have attempted it. In the opinion it was said:

"The employé is not regarded as assuming unknown or unappreciated risks arising from his employer's neglect, unless they are so obvious that an ordinarily prudent person would observe and appreciate them" (at page 476 of 95 Kan. at page 748 of 148 Pac.).

The federal Supreme Court, in *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, held that Congress in enacting this legislation based the action upon negligence only, and excluded responsibility of the carrier to its employes for defects not attributable to negligence. Touching risks not naturally incident to the occupation, it was said:

"These the employé is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them." 233 U. S. at page 504, 34 Sup. Ct. at page 640 (58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475).

The same court, in *Reese v. Phila. & R. Ry.*, 239 U. S. 463, 36 Sup. Ct. 134, 60 L. Ed. 384, held that a railroad is bound to exercise under the circumstances the care towards its employes "which the exigency reasonably demands in furnishing proper roadbed, tracks and other structures" (Syl. par. 1), and that failure to exercise this care constituted negligence. In *Ches. & Ohio Ry. v. De Atley*, 241 U. S. 310, 38 Sup. Ct. 564, 60 L. Ed. 1016, the plaintiff was the head brakeman on a fast interstate freight train, and was directed by the engineer to go to a telephone at a certain station to ascertain the whereabouts of another train, so as to determine whether it was safe to proceed ahead of it. He was unable to understand the operator and so reported to the engineer, then got into the cab, and rode until it stopped for coal and water. He was then directed by the engineer to go forward and ascertain the whereabouts of the other train. He at once left the cab, and saw the other train approaching. When it reached the platform he attempted to board the engine. He could not accurately judge the speed of it, but it appeared to be going slowly enough for him to board it. But in attempting to do so he fell beneath the wheels, and his arm was cut off. He had

been employed about six weeks, and had made two round trips to get familiar with his duties. He had frequently been called on to leave the train and go forward for signal orders. On this occasion the train was running about 12 miles an hour. The case went to the jury under instructions making the defendant's liability dependent upon whether the engineer, with knowledge of the plaintiff's presence and of his attempt to board, operated the train at such a speed as to make the attempt unusually hazardous. There was a verdict for the plaintiff. The court said:

"It is insisted that the true test is, not whether the employé did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is, not that it is the duty of an employé to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employé may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinary careful person, under the circumstances, would observe and appreciate them." 241 U. S. at page 315, 36 Sup. Ct. at page 566 (60 L. Ed. 1016).

It was further stated that the court was unable to concur in the view that there was no question for the jury.

"Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence." 241 U. S. at page 317, 36 Sup. Ct. at page 566 (60 L. Ed. 1016).

In *Ches. & Ohio Ry. v. Proffitt*, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102, the plaintiff was head brakeman on a fast interstate freight train comprising about 40 cars which had just come into the terminal yards and were about to be taken forward. He got upon the road engine, and this was attached to the train, plaintiff making the coupling. Just after this he met the yardmaster, who directed him to cut out 3 cars at the head end of the train and switch them off on a side track and come back and couple up. The plaintiff went with the engine and crew to take out the three cars, and returned to the main track with the engine and one car, coupled the latter to the forward end of the train and was in the act of coupling up the air hose, an operation which required him to step between the rails. While he was in this position a

collision took place, caused by the acts of the yard crew who, unknown to the plaintiff, under orders of the yardmaster were engaged in switching cars at the rear end of the train and drove a cut of 29 cars into the standing cars with undue violence. The impact was such that the plaintiff was knocked down, run over, and injured. There was the usual conflict in the testimony about what happened and what the custom of the railroad men was. The trial court instructed that if the jury found the method of making up trains employed by the defendant on this occasion was such as a reasonably prudent man would have adopted in the conduct of his business, then the plaintiff assumed the risks reasonably and usually incident thereto. It refused to give a requested instruction that if the method employed was the usual and ordinary method then the plaintiff assumed all the risks incident thereto. The Supreme Court said:

"To subject an employé, without warning, to unusual dangers not normally incident to the employment is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employé assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employé has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work), and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known it. The employé is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence." 241 U. S. at page 468, 36 Sup. Ct. at page 622 (60 L. Ed. 1102).

In *Chicago, R. I. & P. Co. v. Ward*, 252 U. S. 18, 40 Sup. Ct. 275 (64 L. Ed. —) decided by the same court March 1, 1920, it was held:

"In the absence of notice to the contrary, a switchman on a cut of cars to be cut off from the engine had a right to act on the belief that the usual method would be followed and the cars cut off at the proper time, so that he might safely proceed to perform his duty of setting the brake to check the cars." Syl. par. 4.

"A switchman, whose duty it was to set the brake on a cut of cars after it had been cut off from the engine, and who was injured by the sudden checking of the cars, due to the engine foreman's failure to make the disconnection when the speed of the engine was reduced, did not assume the risk, as the injury did not result from an obvious condition of danger, but from the negligent operation of the particular cut of cars." Syl. par. 5.

The trial court instructed that when an employé knows, or in the exercise of reasonable and ordinary care should know, the risk to which he is exposed, he will as a rule be held to have assumed such risk. The Supreme Court said this charge was not applicable, and quoted from the *De Atley* decision that it is not the duty of the employé to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or those for whose conduct he is responsible, and that the employé may assume that the employer has exercised proper care for his safety until notified to the contrary, unless the want of care and danger arising from it are so obvious that an ordinarily careful person under the circumstances would observe and appreciate them. The United States Circuit Court of Appeals, Second Circuit, in *Erie R. Co. v. Linnekogel* (decided January 16, 1917) 248 Fed. 389, 160 C. C. A. 399, held that when one acting as brakeman, while assuming the risk of falling from the car on which he was riding did not assume the risk of being thrown therefrom by the negligent act of the company, "for such risks are not risks incidental to the employment assumed under the act." Syl. par. 1.

While, as already observed, it was a frequent thing to make up trains by responding to the kick signal, and the jury were asked whether on this occasion the switching crew were engaged in making up trains by kicking, shoving, and shifting cars in about the same manner as defendant's employes had frequently done before, and the answer was, "No, on account of transmitting signals," in reply to another question (No. 7) whether it was customary and necessary to kick and bump cars against each other in order to make up trains, they said, "It was customary, but done in negligent manner at time of deceased's injury."

[6] The trial court is criticized for refusing to instruct that if the members of the switch crew had no notice and were ignorant that the deceased was in a position of danger, when the cars were moved against him they should find for the defendant, and cite *Ivey v. Railroad Co.*, 99 Kan. 613, 162 Pac. 288. But in that case the jury found that no member of the switching crew other than the plaintiff had reasonable cause to think he was in a position of danger when the car in which he was working was moved, while here the switching crew, not only ought to have known, but did know, that in the ordinary operation of the train the deceased, or some one else, would be engaged in coupling the air hose; hence the refusal to give the instruction was not error.

[7] Fault is found with the refusal to re-

quire more definite answers to questions Nos. 4, 5, and 13. No. 4 asked if any of the switching crew knew that McMullen was in a position of danger, and the answer was they knew he was on duty. Under the evidence that they knew he or some other employé ought to be on duty, this answer was not so evasive as to render the ruling materially prejudicial. To question No. 5, as to what McMullen did to protect himself from the time he placed himself where he was struck, the answer was "Evidence don't show." This was about the only correct answer that could have been given, for there was no evidence on this point. Question No. 13 inquired whether in making up trains the switching crew often kicked and bumped cars as hard and often lighter than they were kicked on this occasion, and the answer was: "Yes, when signals call for such movements." We see nothing wrong with this answer, which was evidently intended to mean that hard kicks were frequently given when signals therefor were made, but it was not intended by this to find that it was customary to give wrong signals therefor.

Findings Nos. 6, 7, and 9 were sought to be set aside as against the evidence and not supported thereby. No. 6 wanted to know whether or not the switch crew were making up the train "by kicking, shoving, and shifting cars in about the same manner as defendant's employes had frequently done before in defendant's yards," and the jury said, "No, on account of transmitting signals." We regard this as a direct and fair answer borne out by the evidence. No. 7 has already been given. We can find in the record no ground for setting aside this finding. No. 9 was an inquiry as to what there was to prevent McMullen from learning that the crew was engaged in shifting and moving cars in making up the train had he taken pains to look and listen:

"A. McMullen had a right to assume that switching crew knew where he was at that time. No evidence to show that McMullen did not know switching crew were making up train."

This was not a very direct answer, but we cannot perceive that failure to set it aside worked any material prejudice.

Following the applicable rules which have been laid down by the national courts, and which are our guide in cases under the federal act, we find no material error in the record, and the judgment is affirmed.

All the Justices concurring.

BURCH, J., concurs in the affirmance of the judgment.

(107 Kan. 268)

**SWADER v. KANSAS FLOUR MILLS CO. et al. (No. 22469.)\***

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Master and servant ¶258(20)—Averment held to include failure to procure skilled workman.

The charge of negligence fairly included failure to procure a skilled workman to build the platform by means of which the plaintiff's decedent met his death.

2. Master and servant ¶278(19), 279(1)—Negligence held shown by the evidence.

The two principal findings returned by the jury were supported by the evidence, and it was error to set them aside.

3. Master and servant ¶278(8)—Evidence held to show negligence causing collapse of false floor in grain bin.

The evidence examined, and held to support the general verdict.

4. Appeal and error ¶719(5)—Exclusion of evidence, not covered by assignments of error, cannot be considered.

A ruling, excluding certain evidence not covered by the assignments of error, cannot now be considered.

5. Trial ¶37—Plaintiff's failure to prove appointment of administrator or legal representative held waived.

Under the circumstances shown by the record, the defendant cannot avail himself of the claimed error in overruling his demurrer to the plaintiff's evidence.

Appeal from District Court, Dickinson County.

Action by Cora J. Swader against the Kansas Flour Mills Company and R. W. Hoffman. Judgment for defendant last named notwithstanding the verdict, and both parties appeal. Reversed and remanded.

Lee Monroe and C. M. Monroe, both of Topeka, and L. B. Morris, of Junction City, for appellant.

Hurd & Hurd, of Abilene, for appellee.

WEST, J. This case, originally brought against the Milling Company and the defendant Hoffman (Swader v. Flour Mills Co., 103 Kan. 378, 703, 176 Pac. 143), was this time tried as against defendant Hoffman only. The petition alleged that he was the managing agent of the company, and had full and complete charge of its business and the operation and management of its plant; that it was his business and duty to keep the premises in proper and safe condition, and that he had full control and authority over the deceased Henry Swader, as well as other workmen, and that he willfully and wrong-

fully directed that a false floor or platform in the bin be constructed, and ordered certain workmen to construct such false floor or platform, and that it was constructed in accordance with his directions. It was further alleged that the floor was constructed of material of inferior quality and apparent defective condition as to strength, and in an unskillful and unworkmanlike manner, and was insufficient to support the weight for which it was intended, all of which facts were known to the defendant, or in the exercise of reasonable diligence could have been known to him. The defendant demurred to the plaintiff's evidence. This was overruled, and the defendant stood on his demurrer and introduced no evidence. The jury returned a verdict in favor of the plaintiff for \$10,000, and in replying to questions as to whether Hoffman selected the material or any part of it used in the construction of the false floor, or whether he directed the joists to be laid flatwise, or had anything to do with the way in which the cleats were fastened to the sides of the bin, said, "We don't know." They were also asked if at the time of the accident Hoffman had any notice or knowledge of the manner in which the false floor was constructed, and the amount of wheat thereon, or any other fact or circumstances in connection with the matter at the same time not known to Henry Swader, to which the answer was, "We don't know."

"Thirteenth Question. If you find from the evidence that the defendant R. W. Hoffman was guilty of any act of negligence or omission of duty which resulted in the death of Henry Swader, state fully what act of negligence or omission of duty was said defendant guilty. A. By not procuring a skilled workman to build said platform. \* \* \*

"Eighteenth Question. Did the defendant R. W. Hoffman direct Henry Swader to go upon the bin and level the wheat? A. Yes."

The defendant moved to set aside the thirteenth and eighteenth findings, which motion was sustained, also for judgment notwithstanding, which was granted. The plaintiff appeals, and alleges that these rulings were erroneous.

The defendant by way of cross-appeal assigns as error the overruling of his demurrer to the plaintiff's evidence, and contends that there was no testimony to show that any administrator or personal representative had been appointed.

It was alleged in that part of the petition leveled against the corporation that the false floors were put in the bins in order to deceive the railroad companies as to how much grain the elevator company might ship with milling in transit privileges. It is undisputed that

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 29, 1920.

Swader met his death by breaking through one of these false floors.

Without going into details, it is sufficient to say that the testimony showed that the false floor was put in in a very insecure and weak manner, so that the death of Mr. Swader was very naturally the result.

One witness who was working at the mill at the time of the accident testified that R. W. Hoffman was in charge and was general manager. Another testified, that he observed the condition of the false floor after the injury, and early Monday morning helped to build two other false floors in adjoining bins. It was attempted to show by him that Hoffman ordered these false floors, but an objection was sustained. The witness said that Kellogg built the floor which caused the injury to Mr. Swader.

"Q. Who was Mr. Kellogg? A. He was employed around there as a carpenter and millwright, whatever you might call him.

"Q. Do you know what sort of a carpenter or millwright he was? A. Well, I won't call him a first-class millwright."

The defendant himself testified:

"Q. I wish you would state, Mr. Hoffman, whether or not you directed any one or ordered any one to build the false floor or temporary platform which caused Mr. Swader's death, as testified by these witnesses. A. I did.

"Q. Was it Mr. Kellogg that you ordered? A. Yes, sir.

Carl Erick testified that he carried the lumber used in building the false floor, and had been a carpenter, and in his judgment the lumber was not first class. He overheard a conversation shortly after the accident between Hoffman and Kellogg.

"Q. What was said by Mr. Hoffman or by Mr. Kellogg at that conversation? A. Mr. Hoffman told him that it was a hell of a job he did; he killed Henry. And then Kellogg told him, he said, 'I done it just as you told me to.'

"Q. Did Mr. Hoffman make any reply to what Kellogg said when Kellogg said, 'I have built it just exactly as you told me to'? A. I never heard anything after that, that he should have said. \* \* \*

"Q. Would you have heard a reply if one had been made by Mr. Hoffman? A. Yes, sir; I would have heard him."

In explaining its rulings the trial court made some extended remarks saying that, construing "We don't know" as "No," Hoffman was not guilty of negligence in the respects covered by the five special questions thus answered. The court said the answer to question No. 18 was absolutely without any support in the evidence; that there was not a word of testimony that Hoffman directed Swader to go upon the bin and level the wheat; that to set aside this answer would leave the verdict to rest alone on the answer to question No. 13; that Hoffman was

negligent in not procuring skilled workmen to build the platform. This was said to be entirely outside of any charge of negligence made in the petition; the charge that he willfully and wrongfully directed the false floor to be constructed did not mean that he employed the workmen, but that the company employed them. However, the express allegation was that Hoffman himself willfully and wrongfully directed the false floor to be constructed and ordered certain workmen employed by the company to construct such floor or platform.

[1] The court said that the fact that he gave the workmen directions did not mean that he selected them, and that the selection of nonskilled workmen was not covered by the allegations of the petition. We do not agree with this view of the matter. The averments, already set forth, were broad and comprehensive enough to cover and include negligently permitting unskilled work to be done by the unskilled workmen, and very good proof of an unskilled workmen is a botch job done by him, on the familiar theory that a workman is known by his chips.

[2] In order to justify the setting aside of finding No. 18 it was necessary to construe such finding as meaning that Hoffman in express words directed Swader to go upon the bin. But in view of the evidence that he was the general manager of the elevator, and that Swader was one of his employees and did go upon the bin, it is no distortion of language or of ideas to construe this as meaning that, in the general management of the elevator by Hoffman, Swader in carrying out his duties went upon this fatal floor, and under the familiar rule the answer should, if reasonably possible, be harmonized with the general verdict. Young Swader, who worked in the elevator, was asked, "Did you at any time hear any one tell your father to level the grain or wheat in the false floor or bottom?" and answered, "Yes, sir," but on objection of the defendant he was not permitted to say who it was. As the defendant was the general manager and in charge of the elevator, who else could or naturally would have directed Swader to go on the floor? Hoffman was the only one on the premises having any authority to give directions to Swader, and hence this testimony of the son is of peculiar significance. It is also necessary, in order to exonerate the defendant, to give the petition the very narrow construction already indicated, a construction which we hold is not justified by the language used. *Linker v. Railroad Co.*, 82 Kan. 580, 109 Pac. 678; *McMullen v. Railroad Co.*, 107 Kan. 274, 191 Pac. 306.

In deciding the matter the trial court remarked that—

It was a difficult matter for the jury to get away from the motive or illegal purpose for

which the platform was constructed, "the purpose for which the same was to be used, to deceive and defraud the grain inspector, and no doubt for the purpose and advantage of the Kansas Flour Mills Company, and resulting from which the unfortunate accident and death of Henry Swader resulted. And the mere fact that R. W. Hoffman is local manager of the Kansas Flour Mills at Enterprise, Kan., and may have quite general authority in conducting and controlling the running of the business at said place, is not enough to raise the inference that he is to be held responsible for planning and putting in operation the purpose to be attained by means of the platform in question in this case, for such a plan and policy. \* \* \* We must look higher up to the directors or corporation officers for responsibility for such an act."

[3] But in view of all the facts and circumstances shown, including the defendant's position, his orders, his statement after the injury, and the death-trap nature of the platform built, the jury believed and found the defendant to be responsible, and the record compels us to hold that they were justified in so doing.

[4] Complaint is made that the testimony of the two inspectors which tended to show the purpose for which this false floor was constructed was excluded; but, as there is no assignment of error touching this matter, it is not before us for consideration.

[5] The defendant contends that the court erred in overruling his demurrer to the plaintiff's testimony because there was no proof of the appointment of an administrator or other legal representative. Ordinarily this must be alleged and proved, and the plaintiff's counsel so concede. They say, however, that the action was begun against the Flour Mills Company and Hoffman, and both pleaded in bar that a certain award had been made under the Workmen's Compensation Act; that the case came to this court, and this branch of it was remanded for further proceedings. They state that the case was tried as against Hoffman on the theory that all these formal matters had been admitted. Hoffman's answer admits the death of Swader, the relationship of the plaintiff and that of the children to him, and sets up an arbitration under the Workmen's Compensation Act on the part of the company, and alleges that—

"The liability of this defendant on account of the injury and death of Henry Swader has become duly litigated, adjudicated, and is a bar to any action that may be had by said plaintiff."

While these allegations followed a general denial of all the averments except such as were expressly admitted, the allegation of the petition was that no administrator or other legal representative had been appointed. Counsel for the plaintiff say that in the opening statement it was suggested to the jury that all formal matters had been admitted, and that no question remained to be determined except that of the liability of Mr. Hoffman, and no exception to this statement was made by counsel for the defendant, and no objection throughout the trial to the introduction of evidence on the ground that plaintiff had not shown capacity to sue. A demurrer to the evidence was filed and argued before the court. Counsel say:

"Nothing was said throughout the argument which would in any way suggest to the court or to counsel that any claim was being made regarding the appointment of an administrator. No instructions were requested along that line, nor was any reference whatever made to the proposition in the argument to the jury. Throughout the trial, the case was tried upon the theory that all of these matters had been admitted."

It is further stated that in the argument, oral and written, on the motions this point was not suggested and that the first time it was touched upon was in the defendant's brief on cross-appeal. If these things are true, it would seem that the matter is presented now for the first time, and therefore too late for our consideration. The nonappointment of an administrator or legal representative was a matter easily ascertainable by an inspection of the probate record, and we have no hint that such inspection would show anything of benefit to the defendant. In *Railway Co. v. Kansas City*, 92 Kan. 300, 140 Pac. 1040, complaint was made that no proof was offered that consent of the tax commission to exceed a certain tax levy had been received by the city. But it was said the matter could have been made clear by a telephone call, and that the point was so technical that neither party should be permitted to lose or gain thereby unless the facts justified it. And here, the technicality relied on, even if not presented too late, must, in view of the undisputed statements referred to, be deemed to have been waived.

The judgment in favor of the defendant on the findings is reversed, and the cause remanded for further proceedings including disposition of the defendant's motion for a new trial.

All the Justices concurring.

(107 Kan. 397)

**FIELD et al. v. BOARD OF COM'RS OF RENO COUNTY.**

**FEGETT et al. v. SAME.**

(Nos. 22873, 22961.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Highways ⇨107(1)—Law providing for improvement of country roads held constitutional.

The decision of *State ex rel. v. Raub*, 106 Kan. 196, 186 Pac. 989, involving the constitutionality of the statute providing for the improvement of country roads, followed and applied.

2. Highways ⇨107(1)—Statute construed to prevent withdrawal of names from improvement petition.

The limitation in the act that signers of a petition for the improvement of roads shall not be permitted to withdraw their names from the petition after the same has been filed with the board of county commissioners prevents a withdrawal or striking of names from the petition after the prescribed time, even if they were procured by the misrepresentation of those who circulated them.

3. Highways ⇨107(1)—Representations as to costs of improvement held mere expression of opinion.

Representations by the solicitors of signatures as to the cost of the improvement to be made at a future time, and during a period of fluctuating and advancing prices of material, were mere expressions of opinion, upon which the petitioners could not rely as grounds of fraud.

4. Highways ⇨107(1)—Petitioners could not rely on representation of interested solicitor as to costs of material.

Nor could the petitioners rely on representations of a solicitor interested in the sale of brick as to the cost of the road, where the petition provided that concrete or brick might be used in the improvement, since the determination of whether it should be built of concrete or brick was left to the discretion and judgment of the board of county commissioners.

Appeal from District Court, Reno County.

Separate actions by Frank Field and others and J. L. Fegett and others against the Board of County Commissioners of Reno County. Demurrer to petition sustained in each case, and plaintiffs appeal. Affirmed.

Taylor & Connaughton, of Hutchinson, for appellants.

Wm. H. Burnett, F. Dumont Smith, C. M. Williams, and A. C. Malloy, all of Hutchinson, for appellee.

JOHNSTON, C. J. These cases involve the validity of the statute providing for the improvement of country roads, and also of pro-

ceedings taken under the statute. In each of the cases the court sustained a demurrer to plaintiffs' petition thereby upholding the validity of the statute and the proceedings taken under it, and from these rulings plaintiffs appeal.

[4, 2] The plaintiffs attacked the validity of the statute upon many grounds, but their contentions were fully considered and rejected in *State ex rel. v. Raub*, 106 Kan. 196, 186 Pac. 989. Having these cases in mind, which were pending when the *Raub* Case was submitted, counsel for plaintiffs obtained permission and filed briefs as friends of the court in that case, and then earnestly contended that the statute was violative of the state and federal Constitutions upon grounds that are again urged in these cases. We see no reason for disturbing the conclusions reached in that case, nor any occasion for further comment upon the questions involved.

In the Fegett appeal a question is raised that was not determined in the earlier case. In the second count of their petition, wherein plaintiffs charged that the signatures of the petition for the highway were obtained by fraudulent representations of those circulating them, they asked that their names be stricken from the petition, and, if stricken, there would be a lack of the number required by statute, and hence they prayed that the defendant board be enjoined from letting the contract or taking further steps towards the construction of the road. The allegations in more detail were to the effect that those circulating the petitions represented that the cost of the road would not exceed \$22,000 per mile, of which sum the federal government would furnish \$10,000 towards the construction of the road, when they knew that by reason of the price of material necessary to the construction of the road the cost would be approximately \$50,000 per mile. It was averred that these representations were made to include plaintiffs to sign the petitions, and that they, relying on the representations made, attached their signatures to the petition. There is a further allegation that one, Harry Tidd, who was active in procuring the circulation and signing of the petitions, represented certain brick manufacturers, and that he joined in the representations that were made to the plaintiffs, knowing that the road would cost a sum much greater than was represented, and that this was done to create a market for brick the companies represented by him desired to sell.

It may be stated that the petitions were presented under chapter 285 of the Laws of 1917. The board of county commissioners did not act upon the petition until May 9, 1918, at which time it found the petitions to be sufficient, and the proposed road was de-

clared to be a public utility. No action was taken by the plaintiffs to contest the validity of the proceedings until this action was brought on October 1, 1919.

The sufficiency of the petition, which asked that the plaintiffs' names be stricken from the road petitions, was challenged on the ground that a limitation in the statute barred a withdrawal of the names of petitioners. The act under which the petitions were filed provides that—

"After the filing of a petition with the board of commissioners no signer thereon shall be permitted to withdraw therefrom." Laws 1917, c. 265, § 1.

This provision was amended so that a withdrawal is now permitted within 30 days after the filing of the petition if the board has not before that time acted upon it. Laws 1919, c. 246, § 1. *Heidel v. Geary County*, 106 Kan. 382, 187 Pac. 866. The statute of 1917 was in force when the petitions herein were filed, and by the rule of that act the right of plaintiffs to secure a withdrawal of their names must be determined. It is contended by plaintiffs that the statutory limitation of the right of petitioners to have their names withdrawn or stricken from the petition is not a bar where there is fraud in procuring their signatures. They say that fraud vitiates everything that it touches, and therefore we should read into the statutory limitation an exception as to matters of fraud.

Assuming for the time being that the charges alleged amount to fraud, is the court warranted in enlarging the statute by putting this exception into it? The Legislature evidently anticipated that contentions might arise as to the necessity and expediency of improving highways, and that persons who had signed a petition and initiated proceedings might be induced by arguments and reasons, good and bad, advanced by contending parties, to withdraw their signatures, and thereby delay or interfere with a proposed improvement, and providently prescribed the limitation upon withdrawal. Considerable time is necessarily occupied in the initiatory steps required to be taken before an improvement is begun. Much expense may be incurred in the preliminary proceedings, such as the making of surveys of the road, maps, and profiles of the benefit district, plans and specifications of the improvements, estimates of the cost, alterations and widening of established roads, the establishing of those not laid out, the purchase or condemnation of additional lands that may be needed, the advertising for bids and the letting of contracts. To void unnecessary delay in providing an essential public utility and preventing the useless waste of money and effort that might result from a change of mind of petitioners, after the approval of the petition and the inauguration of the work, the Legislature in effect said to the petitioners, If for any rea-

son you are disposed to change your minds and ask that your names be stricken from the petition, it must be done within the prescribed time. The limitation is quite similar in purpose and effect to the special limitation prescribed in respect to challenging the regularity and legality of preliminary steps taken towards the making of improvements of city streets. There was a provision that a suit questioning the validity of an assessment or of the preliminary proceedings in such cases could not be brought after the expiration of 30 days from the date the assessment for the improvement was ascertained. In a case where the legality of the petition of property owners was in question and the rule of the limitation was invoked, the court held that it was competent for the Legislature to prescribe such a limitation, and that the act was not unconstitutional on account of the restriction as to the time when the question of invalidity could be raised. *Wahlgren v. Kansas City*, 42 Kan. 248, 21 Pac. 1068.

In a later case, where it was charged that members of the city council had a pecuniary interest in the contract for the improvement, and that there was fraud in the letting of it, the court held that: The limitation applied to fraud the same as to other claims of illegality. *City of Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82.

In another case, where the validity of the petition upon which the improvement was ordered was challenged, it was held that the limitation "applies and cuts off defenses that the improvement proceedings are void by reason of fraud or other defects." *Rockwell v. Junction City*, 92 Kan. 513, 141 Pac. 299, Ann. Cas. 1916B, 315.

In a petition for a rehearing of the *Rockwell* Case, the fact that fraud had been practiced in obtaining the petitions was strongly pressed upon the attention of the court, and they contended, as is done here, that where signatures are obtained by fraud, an exception should be read into the statute, but the contention was again rejected, the court saying:

"If fraud was practiced and this had been brought to the attention of the council, it would have held the petition to be invalid and have rejected it. The council, however, passed on a petition which appeared to be sufficient, and held, not only that it contained a sufficient number of legal petitioners, but that it was valid and sufficient in all other respects. The Legislature has provided that interested parties cannot attack the sufficiency and validity of any proceeding in making an assessment after the expiration of the 30-day limitation. This limitation applies whether the defect is a slight irregularity, a lack of sufficient signers to the petition, or because of fraud in obtaining them." *Rockwell v. Junction City*, 98 Kan. 1, 142 Pac. 268.

And in *Park Association v. City of Hutchinson*, 102 Kan. 488, 171 Pac. 2, where the



limitation was under consideration, it was held that it applies to every defect in the proceedings whether it be an irregularity or invalidity, and in support of the policy and validity of the limitation, it was said:

"The intention of the Legislature was that public improvements should not be long delayed by contests of this character, nor the assessment proceedings interrupted by belated litigation; and so, property owners who propose to challenge an assessment for any kind of defect are required to do so promptly, or not at all. The validity of such a law is beyond question."

See, also, *Railroad Co. v. Kansas City*, 73 Kan. 571, 85 Pac. 603; *Kansas City v. McGrew*, 78 Kan. 335, 96 Pac. 484; *Railway Co. v. City of Chanute*, 95 Kan. 161, 147 Pac. 836; *Arment v. Dodge City*, 97 Kan. 94, 154 Pac. 219; *Wyandotte Co. v. Haskell*, 97 Kan. 304, 154 Pac. 1029.

The rule declared in the cited cases is, we think, applicable to the analogous provision limiting the time in which the names of the signers may be withdrawn or stricken from road petitions.

[3, 4] While this view practically disposes of the case, it may not be amiss to add that the facts recited in plaintiffs' petition hardly amount to actionable fraud. The statements of those circulating the petitions as to the cost of the road were no more than representations or matters of opinion. As all know, the World War was on, and prices of road material and labor were rapidly advancing. What the prices would be when the preliminary proceedings were completed and the time of letting the contracts would be reached no one could tell. Ordinarily no one has a right to rely on mere expressions of opinion. *Eise v. Freeman*, 72 Kan. 666, 83 Pac. 409; *Woods v. Nicholas*, 92 Kan. 258, 140 Pac. 862; *Subke v. Gonder*, 97 Kan. 414, 155 Pac. 793; *Mathews v. Hogueland*, 98 Kan. 342, 157 Pac. 1179; note, 35 L. R. A. 436. And a representation as to what may occur in the future or as to future values, prices, or profits is mere matter of opinion. Note, 35 L. R. A. 437; note, 37 L. R. A. 607. Again, the signers of the petitions had the same means of information as those who circulated them. The sources of information as to future prices and cost were equally open to both classes, and under the circumstances neither had a right to rely on the statements of the other as to cost of construction. Likewise the amount which the federal government would contribute towards the construction of country roads was fixed by a public regulation, available alike to every one who

chose to inquire. The signers of the petition could not shut their eyes and ears as to public laws and rules or matters of general information, and be heard to say that the facts had been unlawfully stated or withheld from them by the circulators. In *Fox v. Allensville, Center Square & Vevay Turnpike Co.*, 46 Ind. 31, it was claimed by plaintiff that false representations had been made to him by a solicitor for subscriptions to be used towards the building of a road, that the road would be constructed in a particular manner, which was not done, and by reason of the false representations on which he relied he made the subscription. It was held that he had no right to rely on the representations, as the manner of construction was to be determined by directors at some future time as they might deem expedient.

Since the representations made to plaintiffs related to matters which were as much within their knowledge as of the circulators of the petitions, and as the information was equally available to them upon inquiry, they are chargeable with knowledge of all that they might have learned by inquiry, both as to prices and to federal aid. There are certain well-recognized exceptions to this rule, but none of them are applicable to the circumstances of this case. *Smith on Law of Fraud*, §§ 75, 126; 12 R. O. L. 380; note, 37 L. R. A. 597.

In respect to the allegation that Harry Tidd who joined in soliciting petitioners, and who it is said was an agent of certain brick companies which desired to sell brick for the construction of the road, if it was ordered, it may be said that no one had any assurance that the road would be built of brick in case the improvement was made. The petition recited that it was to be constructed of concrete or brick on a concrete base. The board of county commissioners had the authority to determine of what material the road would be constructed, and there is no hint that the commissioners were in collusion with the brick companies, no averment of their purpose to select brick as building material, and no imputation against their good faith in the matter. If the representations were made by Tidd, as we must assume, the plaintiffs had no right to rely on them, because neither Tidd nor the petitioners could know whether brick would be adopted and used in the construction.

No error was committed in sustaining the demurrer to plaintiffs' petition, and in each case the judgment of the district court is affirmed.

All the Justices concurring.

(97 Or. 212)

**NEHALEM TIMBER & LOGGING CO. v. COLUMBIA COUNTY et al.**

(Supreme Court of Oregon. July 20, 1920.)

**1. Appeal and error  $\S$ 833(4) — Petition for rehearing insufficient.**

Under Supreme Court rule No. 25 (173 Pac. xi), as to form of applications for rehearing, an application not specifying error, nor indicating what modification of the opinion was desired, *held* insufficient.

**2. Pleading  $\S$ 214(1) — Demurrer assumes truth of allegations.**

Whether the allegations of a complaint be in fact true or not is not to be determined on demurrer, but they must be taken as verities.

Department 1.

Appeal from Circuit Court, Columbia County; James A. Eakin, Judge.

On petition for rehearing. Petition denied. For former opinion, see 189 Pac. 212.

Richard Sleight, of Portland, for appellants.

Glen R. Metsker, of St. Helens, for respondent.

**BURNETT, J.** [1] The petition of the defendants for rehearing is in these words:

"Now come the respondents above named and respectfully petition the court for a rehearing of the above-entitled cause and for a modification of the opinion of the court therein."

This so-called petition is clearly insufficient under rule 25 of this court (173 Pac. xi), requiring that:

"All applications for rehearing shall be by typewritten or printed petition, signed by counsel, setting forth without argument wherein it is claimed the court has erred."

There are no specifications of error; neither is there the slightest indication of what modification of the opinion is desired. Under these circumstances the petition properly might be summarily dismissed.

Referring, however, to a brief filed on behalf of the defendants, and another filed by a special assistant of the United States Attorney General as *amicus curiae*, we divine that the defendants fear the opinion has gone to the length of deciding that in all the history of the land grants mentioned the interest of the railroad companies in the lands involved never amounted to more than \$2.50 per acre. It seems that the defendants apprehend the result of this would be that the different counties containing railroad lands would be compelled to refund to the United States moneys which the general government has paid to them for taxes assessed on the full actual cash value of the lands in the name of the railroad companies while in that ownership, which payments were made in adjustment of the title to the land, as between the general

government, the railroad companies, and the several counties.

We must remember that the decision brought here for review was on a demurrer to the complaint, and that it concerned only the taxes of 1916. It is common learning that on general demurrer the complaint must be taken as true. It appears from that pleading in the case in hand that in litigation between the United States and the railroad companies to adjudicate the rights of the several parties in the lands involved, with others, it was decreed that the interests of the railroad companies in the property amounted only to \$2.50 per acre, that the remainder was the property of the United States, and that the companies were restrained from selling the land or the timber until Congress should provide for a sale of the property and the extinguishment of the railroad title. As an ancillary part of the procedure, by consent of all parties to the litigation a sale of the timber separate from the land was ordered. In pursuance of this the plaintiff here did not actually purchase the timber, but contracted to buy it. As to the lands particularly involved, it had not paid for the timber. The complaint shows that as to the taxes of 1916 the plaintiff was not the owner of the timber on March 1 of that year, the date to which taxability of property is referable, but that the lands themselves had been assessed to it not at the value of \$2.50 per acre, alleged to have been fixed by the litigation in question in the federal courts, enforcing the covenant of the grant, but at what the assessor deemed to be their actual cash value, ranging from \$30 to over \$400 per acre.

[2] Whether these allegations be in fact true or not is not to be determined on demurrer. They must be taken as verities. Even if true, they have nothing to do with the taxes assessed against the property while the railroad companies were confessedly the owners of the full title thereto. The instant litigation has to do only with the taxes of 1916. The taxes for preceding or succeeding years are not to be adjudicated by anything in this proceeding. As pointed out in the former opinion, the plaintiff acquired only an equity in the lands, and that, too, only as to the timber. The assessor had no right to list the realty as the property of the plaintiff, and a proceeding thereunder to sell the land as the property of the plaintiff would cast a cloud upon its equitable title to the timber.

The petition for rehearing is insufficient to present any question. The arguments contained in the briefs are not by the mark, as they refer to matters not here involved. The petition is therefore denied.

**BEAN, BENSON, and HARRIS, JJ., concur.**

(97 Or. 343)

**CODY v. BLACK.\***

(Supreme Court of Oregon. July 13, 1920.)

1. Appeal and error  $\S$  1078(1)—Assignments not referred to are waived.

Assignments of error not referred to in appellant's brief will be treated as abandoned.

2. Appeal and error  $\S$  501(5)—Assignments not supported by exceptions shown in record not considered.

Where the record fails to disclose that appellant excepted to findings of fact made to basis of assignments of error, or that he requested different findings and excepted to the court's refusal to make them, such assignments cannot be considered.

3. Boundaries  $\S$  36(3)—Surveyor's plat held competent notwithstanding failure to make test of instruments.

In an ejectment action, admission in evidence of a surveyor's plat held not incompetent, notwithstanding it did not appear that the surveyor had made a test of his instruments, and his chain; such facts going merely to the weight of the evidence.

**Department 1.**

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Ejectment by B. Cody against Hugh Black. Judgment for plaintiff after a trial to the court without a jury, and defendant appeals. Affirmed.

This is an action in ejectment. The complaint alleges that plaintiff is the owner and entitled to the possession of the west one-half of the southeast quarter of section 24, township 29 south, range 4 west of Willamette Meridian, and that defendant wrongfully withholds possession thereof. The answer denies that defendant is in possession of the land. The real purpose of the action is to establish the true boundary line between plaintiff's land, above described, and defendant's land, which is the west one-half of the northeast quarter of the same section.

By stipulation, there was a trial by the court without a jury, which resulted in findings and a judgment in favor of plaintiff from which defendant appeals.

O. P. Coshaw, of Roseburg, for appellant.  
Dexter Rice, of Roseburg (Rice & Orcutt, of Roseburg, on the brief), for respondent.

BENSON, J. (after stating the facts as above). [1] Defendant's assignments of error numbered 2, 3, 4, and 5 challenge the correctness of the court's rulings in admitting certain testimony over defendant's objections. None of these assignments is referred to in defendant's briefs, and we must therefore treat them as waived and abandoned. *Donohoe v. Portland Railway Co.*, 56 Or. 58, 107 Pac. 964.

[2] Assignments numbered 5 and 6 charge error in the making of findings of fact numbered 2 and 5. However, the record fails to disclose that defendant excepted to either of these findings, or that he requested different findings and excepted to the refusal of the court to make them. It follows that they cannot be considered upon this appeal. *Tatum v. Massie*, 29 Or. 140, 44 Pac. 494; *Casidy v. Wilson*, 76 Or. 595, 149 Pac. 1018.

[3] This brings us to assignment of error numbered 1, which is:

"The court erred in overruling defendant's objections to the testimony of the witness Frear, and the admission into the evidence of the case of the plat made by said Frear, showing the result of his survey of the premises involved. Bill of Exceptions, pages 1, 2, 3 and 4."

An examination of the bill of exceptions shows the objections to have been directed to the admission of the plat made by the witness, based upon the ground that in making the survey, of which the plat is an exemplification, it is not shown that he had made a test of his instrument or of his chain. The witness testified that the plat was made from the field notes of his actual survey upon the ground, and that it was in every way accurate and correct. Under these conditions it was clearly competent, and the absence of tests of his instruments and his chain would go only to its weight and value; a subject with which, in the face of the findings, this court cannot be concerned.

The judgment of the lower court is affirmed.

McBRIDE, O. J., and HARRIS and BURNETT, JJ., concur.

(97 Or. 39)

**Ex parte DOUROS.****DOUROS v. HURLBURT, Sheriff.**

(Supreme Court of Oregon. July 13, 1920.)

1. Habeas corpus  $\S$  85(1)—Petitioner has burden of proving want of jurisdiction of committing magistrate.

In proceedings for habeas corpus against a sheriff who held petitioner in custody under a commitment by a justice of the peace, it will be presumed that the appointment of the justice was regular, and that he was acting in the lawful exercise of his jurisdiction, and it devolved upon the petitioner to allege and prove that the justice was not in fact such, and had no authority to make the commitment, in view of *L. O. L. §§ 790, 3164, 3436*.

2. Habeas corpus  $\S$  85(1)—Committing justice held de facto officer under facts.

In a habeas corpus proceeding, where the jurisdiction of the justice of the peace committing petitioner was attacked, facts held to show

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Petition for rehearing denied 192 Pac. 222.

that he was a justice of the peace at least de facto.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Proceedings for habeas corpus by Tom Douros against T. M. Hurlburt, Sheriff of Multnomah County. From a judgment dismissing the writ, and remanding petitioner to the custody of the sheriff, he appeals. Affirmed.

The plaintiff filed a petition for a writ of habeas corpus, claiming that he is unlawfully detained, imprisoned, and restrained of his liberty by the defendant as sheriff of Multnomah county; that John Philip pretends and assumes to be a justice of the peace in and for district No. 6 of Columbia county; that he is not, and never was, a resident of that district, but is a resident of district No. 2, registered and voting therein; that Philip is not, and cannot be or act as, a justice of the peace for district No. 6; and that all acts or things done by him in that capacity are without jurisdiction or authority of law. On November 8, 1918, on a warrant issued by Philip as justice of the peace, the petitioner was arrested by the sheriff of Columbia county, and imprisoned in the county jail. He states that the justice of the peace advised him that he would accept a \$500 cash bail or a bond for \$1,000; that the plaintiff is a Greek, does not understand the English language or know the meaning of or the procedure of courts of justice; that he believed that there was an examination concerning his bail; that he did not have any attorney; and that on the night of November 9 he was taken before the justice of the peace, and without any trial or examination was returned to the county jail at St. Helens, where he was imprisoned until November 15, when he was removed to the county jail of Multnomah county, where he is now restrained by the defendant.

The defendant made a return to the writ which was issued, from which it appears that the defendant was charged with the crime of selling intoxicating liquor, and pleaded guilty; that he was sentenced to jail for 60 days and fined \$500; that in default of payment of the fine he was ordered to be confined one day in jail for each \$2 thereof; and that this judgment was rendered and signed by John Philip, justice of the peace for the sixth district of Columbia county.

On November 26, 1918, a trial was had in the circuit court on the petition and return, in which it was stipulated by the attorneys that the writ which was issued might stand as the plaintiff's reply to the return, and that the matters and things stated in the petition and reply should be deemed denied by the defendant. This was for the purpose of expediting the hearing and to obviate the necessity of the plaintiff's filing a written re-

ply. Testimony was taken, and at the conclusion of the trial the court rendered judgment dismissing the writ, and remanding the petitioner to the custody of the sheriff of Multnomah county. On the following day the plaintiff filed a formal reply, in which he sought to raise and plead other and different defenses than those upon which the case was tried. Plaintiff appeals.

John Ditchburn, of Portland, for appellant.  
Glen R. Metsker, of St. Helens, for respondent.

JOHNS, J. (after stating the facts as above). The only question upon which the court below tried the case was whether or not John Philip was a justice of the peace, and clothed with the powers and duties of that office.

Section 799, L. O. L., provided for certain disputable presumptions, which may be controverted by other evidence, and (subdivision 14) "that a person acting in a public office was regularly appointed to it;" (subdivision 15) "that official duty has been regularly performed;" (subdivision 16) "that a court, or judge acting as such either in this state or any other state or county, was acting in the lawful exercise of his jurisdiction."

Section 3164, L. O. L., provides:

"It shall be the duty of the county court in the several counties of the state, at any regular term, whenever the court shall deem it necessary, to set off and establish or modify the boundaries of justice of the peace and constable districts within the county."

This section further provides that it shall not apply to cities having 100,000, or more population.

Section 3436, L. O. L., enacts that:

"When at any time there shall be in either of the offices of county clerk, sheriff, coroner, or any county or precinct office, no officer duly authorized to execute the duties thereof, some suitable person may be appointed by the county court to perform the duties of either of said offices."

It appears from the record that on January 8, 1916, the county court of Columbia county duly made and entered an order establishing justice of the peace district No. 6, which included voting precincts 1 and 3 as then existing, together with lots 1, 2, 3, and 4 in block 59 in the city of St. Helens, and at the same time and by the same order appointed John Philip justice of the peace of the newly organized district. Mr. Philip promptly filed his certificate of appointment and oath of office with the county clerk. At that time he was residing on the said lots in block 59, which were included within district No. 6, as the boundaries thereof were defined by the order of the county court on January 8, 1916, and Philip had been a resident on such lots more than six months prior to his appointment.

It further appears that after filing his oath of office Philip has continuously performed the duties of the office, and has been in the exclusive possession of its docket, files, and records, and that his right to the office was never previously questioned.

[1] Under section 3164, L. O. L., when deemed necessary, it was the duty of the county court to set off, establish, or modify the boundaries of justice of the peace and constable districts within the county. It was under that provision that the boundaries of district No. 6 were enlarged and defined, of which Philip was appointed justice of the peace. The law presumes that his appointment is regular, and that he was acting in the lawful exercise of his jurisdiction, and, the defendant having shown that he held the plaintiff under a commitment from Philip, as justice of the peace of Columbia county, it devolved upon the plaintiff to allege and prove that Philip was not a justice of the peace, and had no authority to make the commitment, and that the order was void.

Upon these questions there is a failure of proof. There is no evidence whatever to overcome the statutory legal presumptions. The testimony is undisputed that the plaintiff knew and understood the English language; that there was a compliance with all of the legal formalities; that the charge was read to him, and that he was advised of his legal rights; that he stated that he was guilty and did not want an attorney; and that he pleaded guilty. Based upon that plea sentence was pronounced, and he was committed.

[2] Assuming that Philip was not a justice of the peace de jure, the record is conclusive that he was de facto. The distinction is clearly defined in *Hamlin v. Kassafer*, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176, where it is said:

"An office is the right to exercise a public function or employment, and to take the fees and emoluments belonging to it. From its inherent nature, no less than from reasons of public policy, there cannot be two persons in the possession of an office at the same time.

"To constitute a person an officer de facto he must be in the actual possession of the office, and in the exercise of its functions, and in the discharge of its duties, and when this is the fact, necessarily, there can be no other incumbent of the office. An officer de facto is one who has the lawful right to the office, but who has either been ousted from or never actually taken possession of the office.

"The mere claim to be a public officer is not enough to constitute one an officer de facto. There must be some color to the claim of right to the office, or without such color a perform-

ance of official duties, with the acquiescence of the public for such a length of time as to raise a presumption of colorable right."

Ruling Case Law, vol. 12, p. 1203, says:

"It is generally held, however, that this rule has no application to the case of de facto judges, and that a person convicted by a judge de facto, acting under color of office, although not de jure, and detained in custody in pursuance of his sentence, cannot be properly discharged upon habeas corpus."

The questions sought to be raised in plaintiff's reply could not be litigated in a habeas corpus proceeding. It appears from the record that the plaintiff was arrested, pleaded guilty, and was sentenced in Columbia county, and that he is now confined in the county jail of Multnomah county.

Section 1595, L. O. L., provides:

"Whenever it shall appear to the court, at the time of giving judgment of imprisonment in the county jail, that there is no sufficient jail in the proper county suitable for the safe confinement of the defendant, the court may order the judgment to be executed in the jail of any county in the state, and the expense thereof shall be refunded to such county by the county in which the defendant should have been imprisoned."

And section 1596, L. O. L., provides:

"Except as provided in the last section, a judgment of imprisonment in the county jail must be executed by confinement in the jail of the county where the judgment is given, unless where the place of trial has been changed, in which case the confinement must take place in the jail of the county where the action was commenced."

There is nothing in the return of defendant which shows why plaintiff is now in the custody of the sheriff of Multnomah county. It is very apparent that this was an oversight, but it makes no difference to the petitioner whether he be confined in the Multnomah county jail or the jail of Columbia county.

Ten days will be allowed within which Philip, as justice of the peace, may issue the certificate to the defendant, provided for in section 1595 above quoted, and for failure to issue such certificate the plaintiff will be remanded to the custody of the sheriff of Columbia county.

Judgment affirmed.

BEAN, BENNETT, and BENSON, JJ., concur.

(97 Or. 45)

**WARD v. MCKINLEY et al.**

(Supreme Court of Oregon. July 13, 1920.)

**1. Contracts §10(4)—Test of mutuality of contract to furnish lumber stated.**

A contract to furnish lumber, if the purchaser is bound thereby to order and receive the minimum amount of lumber provided for so that the sellers would have a remedy for damages for failure to order such amount, is not wanting in mutuality; but, if the purchaser is not so bound, it is a mere option, failure to exercise which creates no liability.

**2. Contracts §153—Courts should incline to construe contract in favor of mutuality.**

Courts should incline, where such a construction is reasonable, to construe a contract in favor of mutuality.

**3. Contracts §10(4)—Contract for delivery of lumber under specifications which purchaser should "furnish" held mutual.**

A contract, whereby plaintiffs were to cut a minimum amount of lumber each year for defendants, defendants to furnish specifications whereby it was to be delivered and to pay for all lumber shipped on orders furnished by the purchaser, held not void for want of mutuality in failing to require defendants to order lumber; the agreement to hold the entire output subject to plaintiff's order and not to sell it to other parties being a sufficient consideration, and the word "furnish" meaning to be furnished.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Furnish.]

**Department 1.**

Appeal from Circuit Court, Deschutes County; T. E. J. Duffy, Judge.

Action by G. F. Ward against A. M. McKinley and others, copartners doing business as the McKinley-Hampson Lumber Company. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This is an action for damages for breach of a contract for sale and delivery of lumber. The facts as alleged in the complaint, are as follows:

"II. That on or about July 2, 1917, said defendants as such copartners made and entered into a certain contract with plaintiff, whereby for a valuable consideration said defendants agreed to sell and deliver to plaintiff, f. o. b. cars at Bend, Oregon, and plaintiff agreed to buy all of the one-inch and thicker grades of No. 3 common and better pine lumber that said defendants should saw and manufacture at their mill situated on the northwest quarter of the northeast quarter of section 26, township 18 south, range 12 east, W. M., Deschutes county, Or., during the period from the 21st day of May, 1917, to the 1st day of January, 1920.

"III. That by the terms of said contract defendants agreed to saw, manufacture and de-

liver unto plaintiff during the period covered by said contract, a total minimum of 10,000,000 feet of lumber, board measure; and that defendants by said contract further agreed that they would saw, manufacture and deliver to plaintiff at least 4,000,000 feet, board measure, of lumber for each sawing season covered by said contract; all of which plaintiff agreed to pay for according to the terms and conditions of said contract.

"IV. That of the 4,000,000 feet, board measure, of lumber which defendants by their said contract agreed to saw, manufacture and deliver to plaintiff for the sawing season of the year 1917, defendants have delivered to plaintiff 628,231 feet, board measure, of lumber, and no more, leaving a balance of 3,371,769 feet, board measure, of lumber which defendants have failed, neglected and refused to deliver to plaintiff under said contract for said sawing season of the year 1917; and that defendants have delivered elsewhere all of the remainder of the output of their said sawmill for the said sawing season of the year 1917, after the date of the commencement of said contract, in breach of the conditions of their said contract with plaintiff.

"V. That the sawing season of the year 1918 has more than half elapsed and that of the 4,000,000 feet, board measure, of lumber agreed to be sawed, manufactured and delivered to plaintiff by defendants under said contract for said sawing season of the year 1918, 2,000,000 feet, board measure, or more, should have been delivered to plaintiff prior to this date; that defendants have failed, neglected and refused to deliver unto plaintiff any lumber at all from the lumber sawed and manufactured at their said sawmill during said sawing season of the year 1918, but have delivered and are continuing to deliver elsewhere all of the output of said sawmill for said sawing season of the year 1918, in further breach of their said contract with plaintiff.

"VI. That plaintiff has fully performed all of the conditions of said contract on his part required to be performed, in so far as the acts of the defendants have permitted such performance; and that plaintiff has been at all times since said contract was entered into and is now ready and willing to perform all of the conditions thereof on his part to be performed.

"VII. That by reason of the failure, neglect and refusal of defendants to deliver unto plaintiff all of the 4,000,000 feet, board measure, of lumber contracted to be delivered under said contract for the season of the year 1917, as hereinbefore set forth; and by reason of the failure, neglect and refusal of defendants to deliver any of the 2,000,000 feet, board measure, of lumber which by the terms of their said contract they were required to deliver to plaintiff prior to this date from the output of their said sawmill for the sawing season of the year 1918, plaintiff has been damaged in the sum of \$48,345.92."

There was a second cause of action pleaded, but the same is not material here.

Defendants answered denying every allegation in paragraph II of the complaint,

except that they admitted the execution of a certain contract with plaintiff on July 2, 1917, which contract was made an exhibit to the answer, and is as follows:

"This agreement made and entered into this 2d day of July, A. D. 1917, by and between A. M. McKinley, S. L. Hampson and P. F. Hampson, copartners doing business under the firm name and style of McKinley-Hampson Lumber Company of Bend, Oregon, parties of the first part, and G. F. Ward of Spokane, Washington, as party of the second part, witnesseth:

"That for and in consideration of the sum of one (\$1.00) dollar, lawful money of the United States of America, paid by party of the second part to parties of the first part, the receipt whereof is hereby acknowledged, the parties of the first part hereby agree to sell and do hereby sell and agree to deliver unto party of the second part, all the one (1") inch and thicker of the grades of No. 3 common and better pine lumber that parties of the first part saw and manufacture at their mill situated on the northwest quarter of the northeast quarter of section 28, township 18 south, range 12 east, W. M., Deschutes county, state of Oregon, during the period from the 21st day of May, 1917, to the 1st day of January, 1920.

"Said parties of the first part agree that the minimum amount of lumber that they will saw, manufacture and deliver unto party of the second part, under the terms of this contract, will be at least four million (4,000,000) feet board measure for each sawing season, making a total minimum of ten million (10,000,000) feet, which said party of the second part agrees to pay for according to the terms and conditions hereinafter set forth, provided, however, that said first parties shall not be compelled to furnish said amount of lumber in any one season or altogether if prevented by some contingency or happening beyond their control.

"Said parties of the first part agree to log, saw, pile, surface, cut, mill, plane, or otherwise work and deliver said lumber f. o. b. cars at Bend, Oregon, at such times, in such quantities and in such manner as party of the second part may from time to time direct. Said parties of the first part further covenant and agree to deliver unto party of the second part all of said lumber free and clear of taxes, claims, liens or incumbrances of every nature, description and kind.

"Said parties of the first part further guarantee and agree that all shop lumber of 5/4 and thicker surfaced two sides to standard thickness or shipped rough, shall not weigh in excess of twenty-four hundred (2,400) pounds per thousand feet, and that all one (1") inch pine lumber, surfaced two sides or otherwise worked, shall not weigh in excess of two thousand one hundred (2,100) pounds per thousand feet, and that any freight caused by excess over said stipulated weights shall be paid by parties of the first part.

"Said parties of the first part further covenant and agree to insure all lumber on which advances have been made for at least twelve (\$12.00) dollars per thousand feet board measure, said insurance to be placed in a reliable insurance company, the premium thereon to

be paid by parties of the first part, the policies to be made payable to the party of the second part as his interests may appear, and said policies to be at once delivered unto said party of the second part. In the event parties of the first part fail promptly to insure said lumber, as hereinbefore provided, then the party of the second part reserves the right to cause said lumber to be so insured, and said parties of the first part agree to pay the costs of obtaining said insurance.

"Party of the second part hereby covenants and agrees to pay for said lumber when manufactured according to the specifications furnished from time to time by party of the second part, and delivered f. o. b. cars at Bend, Oregon, free and clear of all taxes, liens, claims or incumbrances, at the following prices: \* \* \*

"Party of the second part agrees, if so requested by party of the first part of this contract, it will advance to parties of the first part nine dollars (\$9.00) per thousand feet board measure for all one (1") inch and thicker #3, and better common and all one (1") inch 'D' select and better lumber that parties of the first part have on hand and in finished piles on the first day of the month, cut the previous calendar month, and said parties of the first part agree to pay unto party of the second part, interest at the rate of eight per cent. (8%) per annum on all such advances until the same are either taken up by shipment of lumber or otherwise paid. Said party of the second part to estimate said lumber and furnish the parties of the first part a copy of such estimate, by the 10th day of the month following, and said party of the second part agrees to deliver the money therefor to the parties of the first part in Bend, Oregon, not later than the 14th day of the said month, in order that said parties of the first part can meet their pay roll and current expenses.

"Said parties of the first part further agree that at the time of receiving of said advancement, to execute unto the party of the second part their joint and individual promissory note for all the moneys so advanced, and to assign unto the party of the second part, all their right, title and interest in and to the ground and premises upon which the said mill and lumber yard is located. Also to execute unto the party of the second part a bill of sale for all lumber in finished piles, this to include 5/4 and thicker #3, shop and better, on which advances have been made, and #3 common, and one (1") inch 'D' select, and better; it being understood by the parties hereto that moneys advanced by party of the second part, on such one inch #3 and better common, and one inch 'D' select and better, will cover all the 5/4 and thicker #3, shop and better from time to time, as advances are made, until all moneys that have been so advanced by parties of the second part to parties of the first part have been taken up by shipments of said lumber, or otherwise paid, provided, that in case there is not sufficient one inch lumber as above described to cover said advances, said party of the second part will take shop lumber of sufficient quantity to make up such deficiency.

"It is further agreed between the parties hereto that the party of the second part shall have a lien on the lumber output of said mill as hereinbefore described, which is operated by parties of the first part, as security for all advances and other lawful charges now existing or hereafter made, and all lumber upon which an advance is made shall be at the time of said advancement placed in possession of said party of the second part, same to include all 5/4 and thicker #2 shop and better, which advances are included in the #3 and better common and 1" 'D' select and better.

"Said parties of the first part agree that during the entire time of the life of this contract they will not sell, or offer for sale, any of the lumber as hereinbefore described in this contract, except, what lumber green from the sawmill will be necessary to take care of the local trade, with the understanding that the parties of the first part are not to sell any lumber from finished piles, except as herein-after provided, or ship any in cars, provided, that the said parties of the first part hereby reserve the right, and the said party of the second part grants them the right to sell not to exceed one-half million (500,000) feet during any one season; and provided further, that none of such lumber shall be taken from finished piles, but all of the same to be common and delivered green from the saw; and provided further, that said parties of the first part shall be permitted to pile not to exceed thirty thousand (30,000) feet of 2x4, 2x6, and 1x12, collectively, to take care of the local trade, after closing down for the season.

"The parties of the second part agrees to pay the parties of the first part for all lumber that parties of the first part ship on orders furnished by the party of the second part, as herein provided, according to the prices hereinbefore set forth, ninety (90%) per cent. of the face of the invoice, less two (2%) per cent. cash discount, upon the presentation and surrender by parties of the first part to the party of the second part, at the office of the party of the second part in the city of Spokane, Washington, through the Fidelity National Bank of Spokane, Washington, of the invoice with the original bill of lading attached, for each shipment so made, deducting from such ninety (90%) per cent., all advances, and other lawful charges, if any, on any such shipments or otherwise, and party of the second part agrees to pay the balance of such invoice, less advances and lawful charges, if any, on receipt of railway freight expense bill by party of the second part from their customers to whom such lumber may be sold, final shipment of the lumber in this agreement to be made on or before January 1, 1920, time being the essence hereof.

"It is further agreed between the parties hereto that the party of the second part will furnish a competent lumber inspector, said inspector to be acceptable to the parties of the first part. The duties of said inspector shall be to inspect lumber as the same shall be loaded aboard cars and shipped. Said parties of the first part hereby agree to pay the salary of said inspector, whose inspection at Bend shall be final."

The answer contained denials sufficient to put all other material allegations of the complaint in issue.

The reply admitted the identity of the contract, pleaded in the answer, and the case came on for trial. The defendants objected to any testimony being offered upon the cause of action above stated, for the reason that the contract was unilateral in that it did not bind plaintiff to order or receive any lumber, and was therefore unenforceable, and the court, sustaining this contention, directed a nonsuit as to this cause of action. The plaintiff thereupon took a voluntary nonsuit as to the second cause of action, and judgment was rendered against him for costs, from which he appeals to this court.

Ross Farnham, of Bend, for appellant.

H. H. De Armond, of Bend (Charles W. Erskine, of Bend, and Fred L. Everson, of Portland, on the brief), for respondents.

McBRIDE, C. J. (after stating the facts as above). [1,2] There is but one question raised on this appeal: Is the contract pleaded in defendants' answer unilateral? If it is, the judgment of the circuit court must be affirmed. If not, there must be a reversal. If plaintiff is so bound by the contract, to order and receive the minimum amount of lumber therein provided for, the defendants would have a remedy against him for damages for failure to order such amount, in which event there is no want of mutuality. This is the test. If plaintiff is not so bound, the agreement does not rise beyond the dignity of a mere option to purchase from the failure to exercise which no cause of action will arise. It is a well-established rule of law that courts should incline, where such a construction is reasonable, to construe a contract in favor of mutuality. *Minnesota Lbr. Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; *Dreiske v. Davis Colliery Co.*, 156 Ill. App. 291; *Rice v. Miner*, 89 Misc. Rep. 395, 151 N. Y. Supp. 983.

In the case first above cited, the court said:

"Contracts should be construed in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view. The circumstances, which both parties had in view at the time of making the contract, may be referred to for the purpose of determining the meaning of doubtful expressions. Courts will seek to discover and give effect to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made; and greater regard is to be had to their clear intent than to any particular words which they may have used to express it."

The doctrine is well stated in the above excerpt. Courts naturally are reluctant in cases like the present, where parties have deliberately prepared a long and formal con-



tract, with many elaborate provisions, and have gone through the ceremony of signing and sealing it, to say that in spite of all this preparation and careful execution, they are not bound and that no contract has been in fact executed.

If the plaintiff was anything but a schemer and a dishonest man, he intended when he signed his contract that the defendants should understand that he was binding himself to take all the output of their mill, with the exception therein specified, at the prices agreed upon; and the defendants would not, if they were not lunatics, have signed except with that understanding. It is inconceivable that they would have tied up practically the entire output of their mills for a term of years and agreed to sell to no one but plaintiff, except with the understanding that he was to take that output.

At this stage of the case, in the absence of testimony to the contrary, we are bound to assume that plaintiff was ready and willing to perform every stipulation required of him, and that there has been no default in fact upon his part; that he had ordered, received, and paid for 628,231 feet of lumber, and was ready and willing to seasonably order, receive, and pay for the remainder, according to contract; and that defendants, on the pretext that the contract was not binding upon their part, refused to furnish him with any more lumber.

[3] It is idle to say, and counsel does not seriously contend, that there was no consideration passing to plaintiff. The agreement to hold the entire output subject to plaintiff's orders and not to sell it to other parties was itself a sufficient consideration.

We have before us then an agreement of the defendants, based upon a sufficient consideration, to sell and deliver to the plaintiff all the output of their mill for the period therein specified, to the exclusion of other parties. We will now proceed to construe the agreement as a whole, "taking it by its four corners," to ascertain if its true meaning and intent was to bind plaintiff to take and pay for that entire output, or whether it was intended to give him an option to take or refuse to take it—an option, if he saw fit so to do, to neglect to order a single foot of lumber and to compel defendants to manufacture and pile it in their yard and allow it to rot there at their own expense and without remedy. That such a condition was ever within the contemplation of the parties, when they prepared and executed the elaborate agreement involved in this suit, is not thinkable. If plaintiff is not bound to take what he bound the defendants to sell to him, it must be due to some mistake or deception in the preparation of the instrument, and we are not prepared to say that such is the case.

The contract, by its terms, is an agreement for a present sale and future delivery of lumber. The stipulation is:

"In consideration of one dollar \* \* \* paid by the party of the second part to the parties of the first part, \* \* \* the parties of the first part hereby agreed to sell and do hereby sell and agree to deliver," etc.

The defendants further agree that they "will saw, manufacture, and deliver unto the party of the second part" (plaintiff) "at least four million (4,000,000) feet board measure for each sawing season, \* \* \* which said party of the second part agrees to pay for, according to the terms and conditions hereinafter set forth." These stipulations constitute the framework of the contract. It is an agreement to sell and deliver not less than 10,000,000 feet of lumber on the one hand, and an agreement to pay for the lumber so delivered on the other. The manner of delivery and payment are matters of detail.

As to the manner of delivery, it is stipulated that it shall be delivered "f. o. b. cars at Bend, Oregon, at such times, in such manner and in such quantities as the party of the second part may from time to time direct." Meanwhile, it is to be insured by defendants at their expense for the benefit of plaintiff; this clause impliedly recognizing some property right of plaintiff in the lumber even before delivery upon the cars.

The lumber is to be paid for by plaintiff when "manufactured according to specifications forwarded from time to time by party of the second part and delivered f. o. b. cars at Bend," etc.

A fair construction of this clause binds plaintiff to not only pay for the lumber when delivered, but to furnish specifications whereby it may be delivered. The word "furnished" cannot be construed to have been used in the past tense, but to the future, and must therefore have the meaning of "to be furnished" and so construed.

Thus, in *Re Freeman*, 27 App. Div. 593, 50 N. Y. Supp. 520, a statute provided that an officer might be removed upon charges "duly furnished." The court held the word "furnished" meant that the charges should be furnished to some official body.

And in *State ex inf. v. Lewin*, 128 Mo. App. 149, 106 S. W. 581, it was held that the word "furnish" means to supply; therefore, we conclude that the words "to be furnished" means by interpretation that the plaintiff was bound to supply defendants' specifications for the lumber described in the contract.

Taking this construction, and there being no time fixed within which specifications—by which we understand particular kinds of lumber desired in a particular shipment—were to be ordered, the law would imply a reasonable time, which, under all the circumstances, would have been a question of fact for the jury.

Another clause in the agreement provides that—

"The party of the second part agrees to pay the parties of the first part for all lumber that the parties of the first part ship on orders furnished by the party of the second part, as herein provided," etc.

We think the two clauses last cited impliedly bound the plaintiff to furnish orders with reasonable promptness for all the lumber which defendants agreed to sell him, and that all of such orders were to be given and filled during the life of the contract and with reasonable diligence, from time to time during the life of the contract; and that if, after the contract was executed, the plaintiff had delayed unreasonably in furnishing orders from time to time, he would have been deemed to have abandoned the contract and been liable in damages for its breach.

Other clauses in the contract tend to sustain the theory of its mutuality.

Thus another clause reads:

"Final shipment of the lumber in this agreement to be made on or before January 1, 1920, time being the essence thereof."

When we consider the agreement that the lumber was to be shipped upon specifications which, as we interpret the contract, the plaintiff was impliedly bound to furnish, and that the whole quantity produced was to be shipped before January 1, 1920, it is fair to say that the defendants were bound to ship and the plaintiff to seasonably order for shipment all the lumber contracted for before January 1, 1920.

We have found no case cited by either party in which the contract sued upon was exactly like the one here in suit. *Livesly v. Johnston*, 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647, is similar in many respects and would seem to justify us in holding that the agreement on the part of the plaintiff to furnish and advance the sum of \$9 per thousand, at the request of the defendants, upon certain qualities of the lumber when cut and piled, itself redeems the contract from the charge of want of mutuality.

That an agreement to buy may be created by implication is the rule announced in many cases.

In *McCartney, Plaintiff in Error, v. Glassford*, 1 Wash. 579, 20 Pac. 423, the plaintiffs in error, defendants in the court below, contracted with Glassford to carry for them 100 tons of produce to the Little Dalles at the rate of 1½ cents a pound, one-half by April 16, and the other half by May 20, 1885; *McCartney & Co.* to pay the full amount of the freight charges at said rates upon delivery of the shipping receipts, certified as correct by their clerk. An action was brought to recover for freight charges on produce actually transported, and for damages caused by the refusal of the defendants *McCartney et al.* to furnish the remainder of the 100

tons contracted to be hauled. The defendants in the court below, *McCartney et al.*, demurred on the ground that the contract was not mutual in that they had not bound themselves to furnish 100 tons of freight to be shipped. Concerning this contention the court said:

"The real contention of the appellee, however, seems to be that the contract is wanting in mutuality, binding only the appellee to carry the freight, and not requiring appellant to furnish any; or, even if he is so required, that by the subsequent waiver of time, he is relieved from any time for performance. The rule that, if no time is fixed for the performance of an agreement otherwise regular, a reasonable time will be presumed to have been intended by the parties, we think settles the claim of want of time.

"The remaining question is whether appellant is equally bound by the contract set out above. It is evident that the consideration of appellee's assuming to carry said produce and incurring such liability was the implied promise of appellant to furnish it; and we believe the law will just as clearly and conclusively presume or imply such a promise on his part as if it had been set out in express words. To take any other view of a contract such as this would permit, in our judgment, a fraud and overreaching. There was a contract on the one part to carry, and on the other a contract to pay so much per pound; and there was from this just as clearly a corresponding and correlative obligation to furnish for carrying."

Here the price is agreed upon, the quantity of lumber to be delivered is agreed upon, and the date of final delivery is agreed upon. Nothing is left, except the detail as to particular consignments which are to be made upon orders to be furnished from time to time by the purchaser, and these by necessary implication are to be made from time to time before January 20, 1920. This is a stronger case of mutuality than that above cited.

The case of *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202, is also instructive. In this case the plaintiff and defendant entered into an agreement as follows:

"The Minneapolis Mill Company agrees to saw for said John Goodnow, in its Jones Mill, so called, \* \* \* six million feet or more of pine logs; said sawing to be done in good workmanlike manner, and as shall be directed from time to time by said John Goodnow or his agent. Said John Goodnow agrees to pay said Minneapolis Mill Company for sawing, scaling, loading, and delivering at his piling place," etc.

There was no express promise by Goodnow to furnish the logs to be sawed, and he claimed that for this reason the contract was unilateral, but the court held that such a promise was implied, saying:

"There is in this agreement no express promise on the part of Goodnow to furnish, for

plaintiff to saw, the 6,000,000 feet of logs which the plaintiff is to saw for him and as he shall direct. But that is necessarily implied. How could it saw the logs as he should direct, unless he should furnish them? There can be little doubt that, as the parties understood this agreement when they executed it, Goodnow was thereby engaging to furnish the 6,000,000 feet of logs for plaintiff to saw, and plaintiff was engaging to saw them in the manner and at the prices specified. A third party would so understand it. This being so, the contract was valid."

It is difficult to distinguish in principle the case last cited from the case at bar. The court then goes on to distinguish the case then under consideration from the case of *Bailey v. Austrian*, 19 Minn. 535 (Gil. 465), which is cited by counsel for defendants in this action; the distinction in the *Bailey* Case being that there was no specified amount to be furnished but only such amount as the purchaser "might want," instead of a fixed amount, or, as in the present case, the seller's entire output with certain definite exceptions.

To the same effect, see *Eastern Ry. Co. of Minnesota v. Tuteur*, 127 Wis. 382, 105 N. W. 1067; *Chicago R. I. & G. Ry. Co. v. Martin* (Tex. Civ. App.) 163 S. W. 313; *Thomas Huycke Martin Co. v. Gray*, 94 Ark. 9, 125 S. W. 659, 140 Am. St. Rep. 93; *Semon Bache & Co. v. Coopes*, 35 Ind. App. 351, 74 N. E. 41, 111 Am. St. Rep. 171.

There is no substantial disagreement between the cases cited above and those cited by defendants' counsel. In all the cases cited by defendants there was some important term, requisite to mutuality, missing and which could not be supplied by reasonable implication.

Thus in *American Refrigerator Transit Co. v. Chilton*, 94 Ill. App. 6, the seller agreed to sell and deliver to the purchaser all the ice the purchaser might require; but it was held unilateral because the contract did not bind defendant to take any ice. This case is very close to the line, and, with all deference to the ability of the court rendering the opinion, the writer is inclined to take a different view from that taken by it; but the case, on the face of it, is easily distinguishable from this case, where there is an agreement to sell the entire output to the purchaser, and not to sell to any one else, and where the time limit of performance is fixed and the obligation to furnish seasonable orders appears by necessary implication.

In *Santalla & Co. v. Lange Co.*, 155 Fed. 719, 84 C. C. A. 145, the plaintiff agreed to sell to the defendant (a cigar dealer) as many cigars of a particular brand, as the defendant "desired for his wants." This contract was held unilateral, and it was obviously so, since it left the purchaser at liberty to "desire" any quantity or none at all of that particular brand.

In *American Cotton Oil Co. v. Kirk & Co.*, 68 Fed. 791, 15 C. C. A. 540, the action was upon a contract for the sale of oil. The memorandum of the transaction was as follows:

"Dec. 23, 1891.

"American Cotton Oil Co.: 10,000 bbls. prime yellow cottonseed oil at thirty-two and a half cents per gallon, delivered in Chicago, with the option of taking the 10,000 bbls. in tank cars loose at thirty cents per gallon. Deliveries to be made per week as Kirk & Co. desire. Payments ten days after arrival of oil at our [Kirk & Co.] works. \* \* \*"

There was no time specified within which final delivery should be made, and the defendants might have ordered a barrel a week for 10,000 weeks and thus have prolonged the delivery indefinitely. In the case at bar the final delivery was to be made by January 1, 1920.

This distinction is pointed out and commented on in *Baumhoff v. Oklahoma City Electric Co.*, 14 Okl. 127, 77 Pac. 40, where the case was cited.

In *Morrow v. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998, the action was for breach of a contract with defendant to carry all the milk plaintiff might offer for shipment at a certain rate of carriage. It was held that this was unilateral because the contract did not bind plaintiff to furnish any milk for shipment, and it is plain that there is no reasonable or necessary implication that plaintiff should furnish any milk for transportation.

Without a further discussion of the authorities cited by able counsel for appellant, it may be said that all the cases cited by him are subject to the same distinctions from the case at bar, as those attempted to be drawn above.

Counsel's theory is ingenious and ably urged, but regard to fair dealing among men dictates that we must hold the contract in suit to have been valid and binding upon both parties, and send this case back for trial upon the merits. It appears from the transcript that in view of the ruling of the court, excluding plaintiff's evidence, both parties waived other causes of action and defense and counterclaim, which they probably would not have done had such ruling not been made. It is only fair that they should be permitted, if they so desire, to so amend and reform their pleadings as to try out all matters at issue between them.

This opinion may seem unnecessarily long, but the question presented is a difficult one, beset by many fine distinctions, and we have tried to so blaze the way that a final trial may proceed without subjecting the learned trial judge to the necessity of ruling in a moment, as he necessarily must, upon questions which require time for consideration.

The judgment is reversed, and the case remanded for trial.

BURNETT, BENSON, and HARRIS, JJ., concur.

(87 Or. 494)

PIERRARD et ux. v. HOCH et al.

(Supreme Court of Oregon. July 20, 1920.)

**1. Constitutional law §170—Moratorium law for soldiers does not impair obligation of contracts.**

A moratorium law in favor of soldiers in some form is valid, not being violative of the constitutional provision against the passage of laws impairing the obligations of contracts.

**2. Army and navy §34—Legislation protecting soldiers against suit within power of Congress.**

Federal legislation protecting soldiers against suit during war, as the federal Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078½a-3078½ss), held within the power of Congress under Const. U. S. art. 1, § 8, giving power to declare war, raise and maintain armies, etc.

**3. Army and navy §34—Federal Soldiers' and Sailors' Civil Relief Act superior to state act.**

Federal statute, protecting soldiers against suit during war, within power of Congress to enact under Const. U. S. art. 1, § 8, comes within article 6, declaring Constitution and laws of United States shall be supreme law of land, binding on judges of every state, so that federal Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078½a-3078½ss) is superior to Laws 1917, c. 275, forbidding mortgage foreclosure action where owner has enlisted in military service of United States during the war with Germany.

**4. Judgment §131—Judgment by default rendered by court against defendant on whom amended complaint not served not void.**

Judgment rendered by default by the court against a defendant on whom the amended complaint was not served, though irregular, is not treated as void, though the rule is otherwise respecting entry by the clerk of judgments by default under statute giving him that ministerial authority.

**5. Judgment §297—Decree void pro tanto properly canceled.**

Where decree was void pro tanto as a deficiency judgment, forbidden by L. O. L. § 426, as to surplus remaining after return of judicial sale on foreclosure had been made, it was properly canceled to such extent by the court.

In Banc.

Appeal from Circuit Court, Multnomah County; G. W. Stapleton, Judge.

On petition for rehearing. Former opinion set aside, and decree affirmed.

For former opinion, see 184 Pac. 494.

John W. Kaste, of Portland, for appellants Pierrard.

J. M. Haddock, of Portland (Louis H. Tarpley, of Portland, on the brief), for appellant Hoch.

BURNETT, J. The petition of the plaintiffs for rehearing urges the contention that the act of Congress of March 8, 1918, known as the Soldiers' and Sailors' Civil Relief Act, governs the matter of exemption of those in the military service of the United States from the operation of litigation in the state courts, and is paramount to and exclusive of the state legislation on the same subject as embodied in the act of February 19, 1917, "relating to and limiting suits to foreclose mortgages, and levy of execution upon judgments, upon and against lands of soldiers and sailors in the actual service of the United States during war." Laws 1917, c. 275. The petition also argues that the state legislation is unconstitutional, in that it impairs the obligation of the contract contained in the note and mortgage in suit.

[1] A re-examination of the validity of moratorium laws in general when measured by the constitutional standard forbidding the passage of laws impairing the obligation of contracts has led us to the same conclusion as before. Indeed, the regularity of the state statute alone is questioned here, and that only by the plaintiffs. All contracts are made in the light of all the terms of the national and state organic laws. Among them as indicated by the former opinion and the precedents there cited is the power by the legislative branch of government to suspend the operation of remedies—not the obligation of contracts—for a reasonable time, to the end that the soldier may not be hindered or impeded in the war service of his country. We regard it as settled, therefore, that a moratorium law in some form is valid.

The question that more directly concerns us in the present juncture is: Which of the twain shall prevail to the exclusion of the other, if at all, the act of Congress, or the statute enacted by the Legislature of this state on that subject?

The act of Congress of March 8, 1918, c. 20, 40 Stat. 440 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078½a-3078½ss), begins by stating that—

"For the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to

the military needs of the nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war." Section 100 (section 8078¾a).

The legislation goes on to define the terms "persons in military service," what is meant by the period of military service, it being from the date of the approval of the act as to all persons then in service and, for those entering afterwards, the date of such entrance, and the termination to be from the date of the discharge from active service, or death while in such service, but in no case beyond the expiration of the law. It is said therein that—

"The term 'court' as used in this act shall include any court of competent jurisdiction of the United States or of any state, whether or not a court of record." Section 101 (section 8078¾aa).

Under article 2 (sections 200-205 [sections 8078¾bb-8078¾ee]), if a defendant in the military service makes default of appearance in any litigation, it is required that a bond shall be given to save him harmless from loss or damage by reason of any subsequent judgment, before the court will make final determination of the action. Under certain circumstances the court may appoint an attorney for him, and provision is made for opening the final decree in his interest if the soldier has a genuine, valid defense. Much is left to the discretion of the court by the subsequent provisions of the act, so that the rights of both parties may be properly conserved. In short, the act of Congress very fully covers the procedure to be observed in case a soldier or sailor is a party defendant in any state court.

On the other hand, the Oregon moratorium law (chapter 275, Laws 1917), in substance, tersely declares that no suit or action shall be commenced to foreclose a mortgage or to collect the debt secured thereby if the land involved is wholly or partly owned by a volunteer soldier or sailor, nor shall the same be sold to satisfy a judgment against such an individual. The state act forbids such litigation. The national act provides for carrying it on to completion. The sale denied by the state is allowed by the nation, all under conditions which Congress evidently deemed reasonable.

It is well first to inquire whether or not such legislation is within the scope of the powers of Congress. It is said in section 8, article 1 of the United States Constitution, that—

"The Congress shall have power \* \* \* to declare war, \* \* \* to raise and support armies, \* \* \* to provide and maintain a navy, \* \* \* to make rules for the government and

regulation of the land and naval forces; \* \* \* and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

Respecting the implied powers of Congress, the text-writer in 12 C. J. p. 744, thus sums up the accepted doctrine:

"While the Constitution of the United States is a grant of power and the federal government possesses only the powers conferred upon it by that instrument, yet it possesses not only the powers expressly conferred, but also all powers reasonably necessary to carry into execution the powers granted. The word 'necessary' has been construed, not to mean 'indispensable,' but to include all powers which are appropriate for the accomplishment of a constitutional purpose, and not forbidden by the letter or spirit of the Constitution."

In the leading case of *McCulloch v. Maryland*, 4 Wheat. 316, 421 (4 L. Ed. 579), Chief Justice Marshall said:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Illustrations of approved exercise of implied powers of Congress ancillary to the enabling clauses of the Constitution are found in the national pure food laws, the federal Employers' Liability Law, and such as the Acts of Congress of March 3, 1863, c. 81, 12 Stat. 755, and May 11, 1866, c. 80, 14 Stat. 48, extending protection to all persons for acts done under military authority in conducting the Civil War. As early as March 16, 1802, the Congress enacted a statute (chapter 9, 2 Stat. 136), prohibiting the arrest of any soldier for a debt of less than the sum of \$20 contracted before enlistment, or for any debt contracted after enlistment. Similar legislation was enacted by Congress during the war with Mexico, 1846-1848. All these acts have been upheld. The law of Congress now under consideration thus far has had but little judicial attention, so far as our research has extended. In *Hoffman v. Charlestown Five-Cent Savings Bank*, 231 Mass. 234, 121 N. E. 15, the Supreme Court of Massachusetts expressly sustains the statute, saying:

"There can be no question of the constitutionality of the act. It is a war measure within the power of Congress, therefore the supreme law of the land. For this reason it governs the foreclosure of mortgages upon real estate within the territorial limits of the commonwealth."

[2, 3] It would therefore appear, as declared in substance in the preamble, that this legislation is a legitimate function of Con-

gress under its power to declare war and to maintain armies, to enact laws designed to protect its soldiers and sailors engaged in the prosecution of a war, and thus to maintain the morale of its armies. Within the doctrine announced by the great expounder of the Constitution, Chief Justice Marshall, it is constitutional because it is a convenient means of carrying out the declared power of Congress. This being true, it comes within the scope of article 6 of the national Constitution, declaring that—

"This Constitution, and the laws of the United States which shall be made in pursuance thereof \* \* \* shall be the supreme law of the land; and the judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

On this point the Supreme Court of Wisconsin, in *Konkel v. State*, 168 Wis. 335, 170 N. W. 715, upheld this very act as against the law of the state of Wisconsin covering common ground.

In the present juncture, the law of Congress, supreme as it is, has set down a certain procedure governing the issues here involved. Its authority is paramount to that of the state. There cannot be two rules covering the same subject-matter; for as said in *Prigg v. Pennsylvania*, 16 Pet. 539, 617 (10 L. Ed. 1060), quoted with approval in *N. Y. Central R. & Co. v. Winfield*, 244 U. S. 147, 37 Sup. St. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139:

"If Congress have a constitutional power to regulate a particular subject and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state Legislatures have a right to interfere, and as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

In the *Winfield Case* the question involved was: Which should prevail, the federal Employers' Liability Act of April 22, 1908, 35 Stat. at L. 65, c. 149 (U. S. Comp. St. §§ 8657-8665), or the New York Workmen's Compensation Act (N. Y. Laws 1913, chapter 816 [Consol. Laws, c. 67])? It was there held, according to the syllabus, that—

"The entire subject of the liability of interstate railway carriers for the death or injury of their employes while employed by them in interstate commerce is so completely covered by the provisions of the federal Employers' Liability Act of April 22, 1908, \* \* \* as to prevent any award under the New York Workmen's Compensation Act, \* \* \* where an employé was injured or killed without fault on

the railway company's part while he was engaged in interstate commerce, although the federal act gives the right of recovery only when the injury results in whole or in part from negligence attributable to the carrier."

The opinion of Mr. Justice Van Devanter discusses the question at length, and arrives at the conclusion that the federal act was exclusive; one of the reasons given being the desirability of having a uniform statute on the subject, so that interstate carriers should not be subject to new legislation every time they crossed a state line. That circumstance is peculiarly applicable to the case in hand, for the reason that the federal legislation is designed for the protection of soldiers in the service of the general government, and it would be deprecativ of the morale of the troops if it were allowable that those from Oregon should be affected by one kind of mortatorium law and those from other states by some greatly different. Congress clearly had the right to enter this field of legislation and make a uniform rule to the exclusion or supersession of all state laws on the same subject.

Mr. Justice Brandeis dissented in the *Winfield Case*, supra, and cited certain precedents as tending to support his views. Among them was *Sligh v. Kirkwood*, 237 U. S. 52, 35 Sup. Ct. 501, 59 L. Ed. 835. In that case a conviction under a state law forbidding the shipment of unripe fruit unfit for use was sustained, although it was an interstate shipment, for the reason that Congress had not, prior to that time, legislated on the subject. Another was *Atlantic Coast L. Ry. v. Georgia*, 234 U. S. 280, 34 Sup. Ct. 829, 58 L. Ed. 1312, wherein a statute of the state of Georgia prescribing a certain kind of locomotive headlight was sustained, because there was no federal legislation on the subject and notwithstanding it would incidentally affect railways engaged in interstate commerce. It was held in *Missouri, etc., Ry. v. Harris*, 234 U. S. 412, 34 Sup. Ct. 790, 58 L. Ed. 1377, L. R. A. 1915E, 942, that a statute of the state providing for an attorney's fee for the collection of all claims indiscriminately, including those against an interstate carrier, was valid, because in the first place it only incidentally affected interstate carriers, and, further, because Congress had not acted on that subject. *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, was an effort of a resident of Minnesota who manufactured what was called "International Stock Food" to avoid the effect of an act of the state of Indiana requiring a statement of the ingredients of such compounds to be placed on the package. The opinion by Mr. Justice Hughes affords a canon by which it may be determined which shall be paramount, a federal or a state law on the same subject, thus:

"When the question is whether a federal act overrides a state law, the entire scheme of

the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. \* \* \*

"But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

The principle that when the national Legislature has spoken on a subject within the scope of its powers it must prevail over any state legislation on the same subject was distinctly recognized in this case. The only holding applicable here was that in that instance there was nothing in the federal law covering the point in dispute, and hence that there was no conflict. *Missouri Pacific Ry. Co. v. Larabee F. Mills Co.*, 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352, merely decides that, in the absence of congressional or Interstate Commerce Commission's action the state was permitted to enforce the common-law duty of common carriers to treat all shippers alike. In *Asbell v. Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101, the inspection of cattle coming into a state and the rejection of those diseased was upheld in default of a United States law on the same subject. There also the principle already alluded to is recognized, but held not applicable under the legislation in question. *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401, distinguished between the inspection law of New York preventing the sale of adulterated food, and a similar law forbidding the importation of food, drugs or liquor adulterated with poisonous or noxious chemicals. The right of a state to protect its inhabitants from imposition by means of food adulterated in any manner was upheld, because the federal law restricted its operation to that adulterated with poisons, without reference to harmless alloys. *Reid v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, was another case respecting the transportation of live stock suspected to be suffering from an infectious disease. Discussing the question involved, Mr. Justice Harlan, speaking for the court, said:

"It is quite true, as urged on behalf of the defendant, that the transportation of live stock from state to state is a branch of interstate commerce, and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize, and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the

transportation of live stock from one state to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not, and such rules and regulations as Congress may lawfully prescribe or authorize will alone control."

After having thus declared the precept the opinion goes on to state:

"But the difficulty with the defendant's case is that Congress has not by any statute covered the whole subject of the transportation of live stock among the several states, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the states of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases."

*Missouri, etc., Ry. Co. v. Haber*, 169 U. S. 618, 18 Sup. Ct. 488, 42 L. Ed. 878, concludes that the federal Animal Industry Act does not override the Kansas legislation, giving a cause of action against the owner of imported diseased cattle which communicate their infirmity to cattle belonging to the plaintiff. The principle under consideration is thus recognized in the syllabus:

"A state statute, although enacted in pursuance of a power not surrendered to the general government, must in the execution of its provisions yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, without regard to the source of power whence the state Legislature derived its enactment."

*Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, upheld a regulation of the state of Alabama requiring locomotive engineers to be examined and licensed by the state, although the engineer in question was engaged in interstate commerce. But the reason was that there was no federal legislation on the subject. The opinion teaches that a federal law on the subject would be valid, and cites on that point *Sinnott v. Davenport*, 22 How. 227, 16 L. Ed. 243, upholding the supremacy of the federal law on the subject of enrolling and licensing vessels engaged in the coast trade. This remark of the court is significant:

"The power might with equal authority be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the states, and in that case would supersede any conflicting provisions on the same subject made by local authority."

In *Michigan Cent. Ry. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176, referring to the federal Employers' Liability Act, it was said:

"Congress has undertaken to cover the subject of the liability of railroad companies to their employes injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the states."

And in another part of the opinion it was said:

"We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury."

St. Louis, etc., Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, was an action under a state statute for the death of an employe engaged in interstate commerce, and the court said:

"There was a Texas statute on the subject and also the federal one. Both could not occupy the same field, and they were unlike. \* \* \* If the federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the national Constitution."

The defendant Hoch places much reliance upon the case of Carey v. South Dakota, 250 U. S. 118, 39 Sup. Ct. 403, 63 L. Ed. 886. The plaintiff there sought to escape prosecution under the laws of the state forbidding the shipment of ducks. He claimed immunity by virtue of the federal Migratory Bird Act of March 4, 1913, c. 145, 37 U. S. Stat. 828, arguing that, because Congress had legislated on the subject in any manner, the state law was superseded. But that federal enactment does not in any sense expressly or impliedly supersede the state legislation. On the contrary, it invites co-operation by the states, saying:

"Nothing herein contained shall be deemed to affect or interfere with the local laws of the states and territories for the protection of non-migratory game birds resident and breeding within their borders, nor to prevent the states and territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute."

This self-construction of the act is a vital part of the law. Like all other features of that statute it is included in the supremacy of federal legislation in matters respecting which Congress has constitutional power to pass laws.

In Charleston, etc., Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 35 Sup. Ct. 715, 59 L. Ed. 1137, Ann. Cas. 1916D, 333, where there was involved a penalty prescribed by South Carolina for failure to pay claims for damages to interstate shipments of merchandise, it was said:

"When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

Involved in Pennsylvania Ry. Co. v. Public Service Commission, 250 U. S. 506, 40 Sup. Ct. 38, 63 L. Ed. 1142, was a prosecution of the company before the commission for a violation of the Pennsylvania state law requiring a platform on the rear car of all trains. The court there said:

"But when the United States has exercised its exclusive powers over interstate commerce so far as to take possession of the field, the states no more can supplement its requirements than they can annul them."

In all of the precedents to which our attention has been directed, and in many others we have examined, the principle is maintained that, where Congress has authority under the Constitution to legislate on a subject, and has covered the field with its enactments, legislation on the part of the state on the same subject is superseded and laid out of the account. Chicago, R. I. & P. Ry. Co. v. Hardwick, etc., Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 814, 44 L. R. A. (N. S.) 257.

It is clear that under the war-making power the national Legislature has the authority to provide for the protection of its soldiers, to relieve them from anxiety and annoyance respecting litigation at home, and to make a general rule applicable alike to all those engaged in its service. In this instance it has occupied the whole field, which of necessity excludes all state legislation on the subject. To hold otherwise is to impeach the act of Congress as beyond the powers of that body, a task we should shrink from assuming.

It follows that the national legislation governing procedure in this case was the proper standard for the circuit court to follow, to the exclusion of the previous enactment on the subject by the legislative department of this state. This results because the two enactments are incompatible with each other. The state law forbids all action, while the national law countenances action under conditions more or less favorable to the military defendant. This conclusion renders it unnecessary for us to decide whether or not the act of the co-ordinate branch of the state government is valid, a work to be avoided unless its performance is strictly necessary. However that may be, it is clear that the subsequent law of Congress at least suspended the state legislation on the same subject, in the same way that congressional action suspends the insolvency laws of the state, or state legislation affecting interstate commerce, and the like.

The other question presented, respecting the action of the court limiting the recovery to the amount realized at the sale on foreclosure is governed by the majority opinions in Wright v. Wimberly, 79 Or. 628, 156 Pac. 257,



and 94 Or. 1, 184 Pac. 740. Together with Justice Benson and Justice Harris the writer refused to agree to the conclusion there reached by our Brethren. We three adhere to the views we there expressed, and apply the result of that case to the instant controversy solely on the doctrine of stare decisis.

[4] Contention is made by the defendant Hoch that the decree was void as against Guyer, because the amended complaint was not served upon him. *Hodgdon v. Goodspeed*, 60 Or. 1, 118 Pac. 167, cited by him, does not bear out the contention of Hoch on this point. The decree in this case was rendered by the court, and was not a ministerial act as narrated in the *Hodgdon-Goodspeed* Case; and it was there expressly stated that judgments of the kind rendered by the court, though irregular, are not treated as void, although the rule is otherwise respecting an entry by the clerk of judgments by default under a statute giving him that ministerial authority. Substantially the same doctrine is taught in *Gillard v. Gillard*, 88 Or. 95, 171 Pac. 557, also cited in behalf of Hoch.

[5] Complaint is made also that the court had no right to direct the cancellation of the decree as to the surplus remaining after the return of sale had been made, and that, too, after the term; but under the doctrine of *Wright v. Wimberly*, supra, the decree was void pro tanto, and, as taught in *Hodgdon v. Goodspeed*, supra:

"When a void judgment is called to the attention of a court in which it was entered, it is incumbent upon that tribunal to purge its records of the nullity by canceling the entry."

If, therefore, as taught in *Wright v. Wimberly* by the majority, the decree of the circuit court, so far as the unsatisfied surplus remaining after judicial sale is concerned, was a deficiency judgment forbidden by our statute (section 426, L. O. L.), it follows that it was pro tanto void, and that the court was correct in directing its cancellation when the matter was presented. These considerations lead to an affirmance of the decree of the circuit court.

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EMMONS v. SOUTHERN PAC. CO. et al.

(Supreme Court of Oregon. July 13, 1920.)

1. Railroads §317—Violation of speed ordinance negligence.

Running a train in violation of a speed ordinance is negligence per se.

2. Municipal corporations §106(3)—Enabling ordinance construed as to vote permitting more than one reading at one meeting; "unanimous vote."

General enabling ordinance, providing that "no ordinance shall pass more than two read-

ings at any one meeting, except by unanimous vote," held not to require a special unanimous vote to permit more than one reading at one meeting, the words "unanimous vote" having reference to the vote on the ordinance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unanimous.]

3. Municipal corporations §122(2) — Ordinances presumed regularly passed.

In the absence of affirmative showing to the contrary, the necessary requirements will be presumed to have been complied with in the enactment of ordinances.

4. Appeal and error §1033(1) — Appellant cannot complain of favorable error.

Appellant cannot complain of error in his favor.

5. Appeal and error §207—Remarks of counsel, not duly objected to, will not be considered.

Remarks of counsel will not be reviewed on appeal, where appellant did not object to court's ruling on objection to remarks, or did not ask for a ruling thereon.

6. Railroads §301—Rights and duties at public crossing stated.

It is the duty equally of travelers and trainmen to use reasonable diligence to avoid a collision at a crossing, but the train has the right of way and the preference in passing the point of intersection.

7. Railroads §333(3) — Automobile driver held contributorily negligent.

An automobile driver, who proceeded to cross the track with knowledge of approaching train and who so operated the automobile that it stalled on the track, and then made no effort to escape injury by the train held contributorily negligent.

8. Railroads §320—Duty to person on track stated.

In the absence of knowledge to the contrary or some fact which ought to arouse his suspicion, motorman of electric train has a right to presume that one seen at a public crossing is in possession of all of his senses, and that care for his own safety will induce him to use them and to act on the warnings conveyed through them.

9. Railroads §330(4)—Reliance on observance of speed ordinance held not justified.

An automobile driver approaching a crossing has a right to presume that the railroad will obey a speed ordinance, but cannot rely on such presumption when she has knowledge of train approaching at a greater rate of speed than that allowed by the ordinance.

10. Railroads §338—Last clear chance doctrine defined.

Railroad is not liable for injuries to person on track under last clear chance doctrine if the negligence of such person continues down to the moment of the collision.

**11. Negligence**  $\S$ 83—Last clear chance doctrine defined.

The "last clear chance doctrine" applies only where defendant had actual knowledge of plaintiff's peril in time to prevent injury by the diligent use of the means at hand.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

**12. Negligence**  $\S$ 119(6)—Last clear chance doctrine must be pleaded.

To invoke the last clear chance doctrine, plaintiff must plead it.

**13. Railroads**  $\S$ 344(8)—Complaint held not to plead last clear chance doctrine.

An automobile driver's complaint, alleging that the trainmen saw the automobile on the track in time to have stopped before reaching it, without alleging that they were aware that the driver was in danger, or that her engine had stopped while automobile was on the track, or that there was anything in her situation indicating that she was unable to move held insufficient to invoke the last clear chance doctrine.

**14. Railroads**  $\S$ 350(33)—Knowledge of peril held question for jury.

In an action for injuries to the driver of an automobile stalled on the track, whether the trainmen had actual knowledge of the driver's danger and her inability to extricate herself in time to avoid the injury held for jury.

**15. Trial**  $\S$ 139(2)—Directed verdict properly refused on sufficient evidence not within pleadings.

In an action for injury to an automobile driver in a collision, where the evidence was sufficient to go to the jury on the question of the railroad's liability under the last clear chance doctrine, though it was not sufficiently pleaded, the denial of motion for a directed verdict was proper, since plaintiff might be able to amend her complaint, and ought to have the opportunity to so do.

**16. Master and servant**  $\S$ 333 — Judgment against employer improper on verdict failing to find against alleged negligent employé joined as defendant.

In action against an electric railroad and motorman for injuries in collision based on negligence of motorman, judgment for plaintiff against railroad on verdict against railroad, but not against motorman, will be reversed, where no judgment has been rendered for motorman, since railroad's liability must be predicated on motorman's negligence.

**17. Appeal and error**  $\S$ 843(2)—Costs  $\S$ 236 —Prevailing party cannot recover costs and disbursements where defeated on appeal.

Where cause must be reversed for a new trial, no notice will be taken of complaints as to cost bill of plaintiffs, as in such case he is not entitled to recover costs of first trial.

**18. Appeal and error**  $\S$ 301, 843(2)—Error in entering judgment on insufficient verdict reviewable regardless of motion for new trial and error in refusing amendment of motion not considered.

Under L. O. L.  $\S$  172, the error in entering judgment on an insufficient verdict presents a question of law reviewable on appeal, where the pleadings, verdict, and judgment upon which the question of whether court erred depends are on file in the circuit court, and are shown by the record, and error in refusing leave to amend motion for new trial in reference thereto is therefore negligible.

Department 1.

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Oma Emmons against the Southern Pacific Company and another. Judgment for plaintiff against named defendant, and named defendant appeals. Reversed.

The plaintiff instituted this action against the Southern Pacific Company, a Kentucky corporation, and its motorman, Jesse Woodson, who resides in Oregon. She claims to have been injured by a collision of one of the defendant's trains with an automobile which she was driving, accompanied by her brother, in the town of Beaverton in this state. She alleges that at the time of the accident the defendant Woodson, as the employé of the defendant company, was the motorman in charge of its train causing the injury, and that the accident happened where the railway track running in an easterly direction crosses a public road known as the Portland-Hillsboro road. According to the complaint, this passageway is used each day by pedestrians, wagons, bicycles, automobiles, and other vehicles, and on the day of the accident the plaintiff was driving the automobile mentioned in a southerly direction and across the track at that point. The charging part of the complaint reads thus:

"That on the 3d day of August, 1916, at the hour of 7 p. m. the automobile which the plaintiff was carefully and cautiously driving became stalled upon the defendant's railway track just west of the depot at Beaverton, Or. That after the defendants saw the said automobile standing on the said crossing and while the automobile was so stalled on the defendant's railway track, an electric train owned and operated by the said defendants approached from the west at a rate of speed prohibited by ordinance No. 25 of the said town of Beaverton, Or., and at a rate of speed in excess of eight miles per hour, and said train came down upon and struck the plaintiff and the automobile in which plaintiff was seated. That the time after the defendants saw said automobile standing on the said crossing was ample in which to stop said train before it struck said automobile. That defendants carelessly and negligently and recklessly operated said train in a careless, negligent, and reckless manner upon said main line

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railroad, at a speed greatly exceeding a safe speed at that time and place. That defendant and defendant's employes carelessly and negligently allowed and permitted the said train to run through the said town at a rate of speed prohibited by the ordinances of the said town of Beaverton, and at a rate of speed in excess of eight miles per hour. That defendants carelessly and negligently and recklessly failed to control or stop said train after the motorman who was operating said train and who was in charge thereof saw and knew, or with the exercise of due care and caution could have known and seen, said automobile standing upon said railway track on the crossing ahead of said train; there being ample time within which said train could have been stopped and a collision with the plaintiff prevented. That defendants carelessly and negligently and recklessly, after the motorman who was operating said train saw and knew, or with the exercise of due care and caution could have known and seen, said automobile standing upon the said railway track on the crossing ahead of said train, carelessly and negligently allowed and permitted said train to violently strike and collide with the said automobile in which plaintiff was riding and the plaintiff, thereby throwing the said automobile and plaintiff off of the track without any fault of the plaintiff, causing her to be seriously and permanently injured."

The complaint also contains allegations descriptive of the injuries which plaintiff received, and averments of her damages.

The answer traverses the allegations of the complaint already quoted, and particularly its averments respecting Ordinance No. 25 of the town of Beaverton, regulating the speed of vehicles. It admits the corporate character of the town and the location of the railway track and its crossing of the Portland-Hillsboro road at grade in Beaverton, and that the plaintiff at the time and place mentioned in her complaint was driving an automobile in a southerly direction on the road and across the track near the defendant company's station at Beaverton. The answer joins issue with the complaint on other matters not necessary to detail. Affirmatively, defendant's pleading states, in substance, that at the time and place mentioned in the complaint the defendant company's train, while approaching the station at Beaverton and operated in a careful manner, struck the automobile driven by the plaintiff. It charges that the collision and consequent injury to the plaintiff, if any, were the result of her own carelessness and negligence in operating the automobile and in failing to stop it at a safe distance from the track, although she had a full and unobstructed view of the track and the approaching train; that she slowed down her car as she approached the track until it stopped, or its motion was barely perceptible, and then suddenly, in disregard of the whistle and ringing of the bell on the train, started the automobile forward, and then stopped it on the track immediately be-

fore the train, so that the collision was inevitable, notwithstanding the defendants used every means possible to stop and prevent the collision; and that the same was the accident described in plaintiff's complaint.

A further defense sets out the corporate character of the town of Beaverton, the passage by its town council of Ordinance No. 11, regulating the enactment and taking effect of ordinances, and the attempted passage of Ordinance No. 25, regulating the speed of vehicles in the town; and charges that by reason of certain alleged defects in the passage of the latter ordinance it is null and void. Under this head it is specified that Ordinance No. 25 was introduced, read three times, and passed all at the same meeting of the council on August 5, 1912, without vote, consent, or authorization by the council allowing the third reading or posting of the said ordinance, and without any first or third or any reading of said ordinance by sections, and that the certificate of the town recorder does not specify in what particular public places said Ordinance No. 25 was posted. The answer is challenged by the reply in material particulars.

The cause was submitted to the jury, which returned the following verdict on February 8, 1919:

"In the Circuit Court of the State of Oregon for Multnomah County. Oma Emmons, Plaintiff, v. Southern Pacific Co., Defendant. Verdict. We, the jury, having been first impaneled and duly sworn and truly to try the above-entitled cause, find for the plaintiff and assess the amount of damages at \$5,000."

This was signed by the foreman and ten other jurors. The court discharged the jury, and entered judgment against the Southern Pacific Company alone, for the amount of the verdict. A cost bill was filed, and certain objections were made by the company to the same. This defendant within the time allowed by the court filed a motion for a new trial on the following grounds:

"(1) The admission in evidence of Ordinance No. 25, of the town of Beaverton, Or., relating to the regulations of speed in said town; and  
"(2) Submitting to the jury a prior negligence of the defendant in running at excessive speed, under the ordinance of said town of Beaverton, under the doctrine of the last clear chance."

For want of time to hear unfinished business, the cause was continued until the following term, at which time the defendant company moved for leave to file an amended motion for a new trial, urging the following grounds in addition to those already mentioned:

"(3) In the execution and reception of an alleged verdict, purporting to be against the Southern Pacific Company, a corporation, alone, in that:

"(a) Said alleged verdict is ambiguous, uncertain and void; and

"(b) Said alleged verdict purports to bind the Southern Pacific Company, a corporation, and does exonerate Jesse Woodson, employé and codefendant with said Southern Pacific Company, a corporation, upon whose negligence the defendant Southern Pacific Company could only be held liable."

The company also moved at the same time to vacate the judgment rendered against it on the verdict already quoted, and to enter a judgment in its favor and against the plaintiff, for the reason that the verdict exonerated the defendant Woodson, on whose negligence alone the defendant company could be held, and that the company cannot be held liable when its employé is exonerated from negligence by the verdict.

The defendant Woodson, appearing separately, moved for judgment in his favor against the plaintiff, on the ground that the verdict is not against him, but in his favor. The court denied all of the motions mentioned, and directed the judgment to stand as originally entered against the Southern Pacific Company, after making certain modifications in the cost bill filed by the plaintiff. The company alone appeals.

R. C. Nelson, of Portland (A. C. Spencer and Robert R. Rankin, both of Portland, on the brief), for appellant.

Chester A. Sheppard and Norman S. Richards, both of Portland (Richards & Richards, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above.) Apparently there was an attempt in the complaint to state a cause of action for negligence of the defendants, and another count for injury inflicted in violation of what is known as the last clear chance doctrine. No motion to require the plaintiff to elect between these two different phases in her pleading appears in the record.

One of the chief complaints of the company is about the admission of Ordinance No. 25 in evidence. It is urged that this enactment was not passed in the manner required by the general Ordinance No. 11, regulating the passage of ordinances by the council of Beaverton. The first section of this general ordinance requires that every ordinance shall be read three times before passage, the first and third readings to be by sections and the second reading permissively by title only. This requirement appears therein:

"No ordinance shall pass more than two readings at any one meeting, except by unanimous vote. The final vote upon an ordinance shall be by ayes and nays, and the names of those voting aye and those voting nay shall be entered in the journal and no ordinance shall be deemed passed, unless it receives the affirmative vote of three members of the council."

It is also prescribed that upon the passage of any ordinance the enrolled copy shall be submitted to the mayor to write upon it "approved," with the date thereof, and sign with his official title. The next step required is that the recorder shall, within five days of the enactment, post a copy of the ordinance in three public places in the town and thereupon certify the posting upon the enrolled copy of the ordinance, which certificate shall state the date and places of posting of said ordinance. This enabling enactment was passed June 7, 1909. Ordinance No. 25, regulating the speed of vehicles, etc., forbids the movement of any steam or electric engine, train, car, or automobile or other vehicle mentioned, within the corporate limits of Beaverton, at a greater speed than eight miles an hour. The minutes of the council introduced in evidence show that there were present the mayor and all members of the council. So far as the passage of Ordinance No. 25 is concerned, the following excerpt from the minutes of the council meeting at which it was enacted is all that appears of record:

"Ord. 25. First reading: Con Sprainer, Yes. Con Summers, Yes. Con Boring, Yes. Con Bolger, Yes. Declared passed first reading.

"Ord. 25. Second reading: Con Summers, Yes. Con Sprainer, Yes. Con Boring, Yes. Con Bolger, Yes. Declared passed on second reading.

"Ord. 25. Third and last reading: Con Sprainer, Yes. Con Summers, Yes. Con Boring, Yes. Con Bolger, Yes. Declared passed by the council."

[1] By the exhibits introduced in evidence it appears that this ordinance was approved by the mayor on the date of its passage. The recorder's affidavit appended thereto is that on August 5, 1912, "I posted three copies of the foregoing ordinance in three of the most public and conspicuous places in the town of Beaverton, and that they remained posted for the time required by law." The importance of this ordinance as an instrument of evidence rests in the holding of this court to the effect that violation of an ordinance in matters of the kind here in question is negligence per se. *Northwest Door Co. v. Lewis Investment Co.*, 92 Or. 186, 180 Pac. 495; *Rudolph v. P. R. L. & P. Co.*, 72 Or. 560, 144 Pac. 93; *Morgan v. Bross*, 64 Or. 63, 129 Pac. 118. Earlier decisions of this court were to the effect that a violation of a statute or an ordinance was merely evidence of negligence, but the later decisions have committed the court to the doctrine that the violation of a statute or ordinance is negligence per se.

[2] Recurring to the question of whether the ordinance was enacted or not, we learn from the minutes that the council was unanimous on all the votes on the first, second, and third readings of the ordinance. The

language of the general enabling ordinance relating to the passage of city laws says:

"No ordinance shall pass more than two readings at any one meeting, except by unanimous vote."

[3] This does not bear out the contention of the defendant, to the effect that there must appear of record a special unanimous vote to permit more than one reading of a proposed city law at one meeting. As the vote was unanimous on all of the readings, it brings the procedure within the exception, "by unanimous vote." In other words, as the vote was at all times unanimous, it sufficed to pass the ordinance under the terms of the exception. Moreover, if it were anywhere provided in the rules of the council that a separate vote, giving unanimous consent to three readings at the same meeting, should be necessary, it would still be presumed, in the absence of any showing to the contrary, that the condition had been observed. As said in *Portland v. Yick*, 44 Or. 439, 442, 75 Pac. 706, 707 (102 Am. St. Rep. 638):

"Every reasonable presumption is to be made in favor of the legislative proceedings; and when the Constitution does not require certain proceedings to be entered in the journal, the absence of such a record will not invalidate a law. It will not be presumed, from the mere silence of the journal, that either house has exceeded its authority or disregarded constitutional requirements in the passage of legislative acts."

This same rule was followed in *State ex rel. v. Boyer*, 84 Or. 513, 165 Pac. 587. We hold, then, that in the absence of any affirmative showing on the subject, the mere silence of the city record on the subject does not establish that the rules were violated in the passage of the ordinance. The failure of the recorder properly to certify the performance of his ministerial duty to post the ordinance after its passage cannot be allowed to thwart the legislative will of the city council as expressed in its ordinance. We are of the opinion, therefore, that on the showing made, the validity of the ordinance is not impeached, and that the court committed no error in admitting it in evidence.

In connection with the ordinance complaint is made of this instruction to the jury:

"If you find from a preponderance of the evidence that this accident occurred within the corporate limits of the town of Beaverton; that there was then in force an ordinance of said town limiting the speed of trains to eight miles an hour; that at the time and place of this accident the defendants operated defendant's train at a rate of speed in excess of eight miles per hour, in violation of said ordinance, then the defendants would be guilty of negligence."

[4] It is argued that this left to the jury the question of whether the ordinance was in

effect or not. Section 90, L. O. L., prescribes a mode of pleading an ordinance of any incorporated city, town, or village to the effect that it shall be sufficient to refer to such ordinance by its title or the date of its approval, and that courts shall take judicial notice thereof. The error complained of, so far as the charge of the court left it to the jury to determine whether or not there was such an ordinance, was favorable to the defendant, because it placed an additional obstacle in the way of plaintiff's recovery. The court with all of the record before it, and in the absence of anything affirmatively to dispute the validity of the ordinance, ought to have told the jury that it was the law of the city and that a violation of it was negligence. For the reasons stated, the defendant cannot complain of this error.

[5] A motion for postponement of the trial had been filed by the defendant on the ground of absence of witnesses. To avert the consequent delay, the plaintiff admitted that the witnesses would testify as stated, if they were called. During the reading of the statement of the expected testimony of those desired witnesses, counsel for the plaintiff remarked to the jury in substance that the statement of one of the witnesses was not taken before a proper tribunal, but was taken before a board called by the Southern Pacific Company for an investigation. The bill of exceptions shows that the defendant objected to this remark of counsel for plaintiff, but did not object to any ruling of the court or ask for a decision by the court. This presents nothing for review; it is only erroneous rulings of the trial judge duly objected to that can be reviewed in this court.

[6] By way of protasis, it is proper to reiterate the oft-repeated rule that the rights of travelers on a highway and of a railway company on its track intersecting the public street or road are reciprocal, and that it is the duty equally of the traveler on the highway and those who operate the train on the railway track to use reasonable diligence to avoid collision at a crossing, with the qualification that the train has the right of way and the preference in passing the point of intersection. *Palmer v. P. R. L. & P. Co.*, 56 Or. 262, 108 Pac. 211; 50 Am. & Eng. R. Cas. (N. S.) 68; *Robison v. O.-W. R. & N. Co.*, 90 Or. 490, 176 Pac. 594. It is thus stated in *Vizacchero v. Rhode Island Co.*, 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188:

"It was just as much the duty of plaintiff's intestate to avoid the consequences of the defendant's negligence, if there was any, as for the defendant's servant to avoid the consequences of the intestate's negligence, if by any care and foresight he could have done so."

Automobiles and electric trains, especially, are self-propelled vehicles, measurably on the same footing in possibilities and capabilities

respecting each other at crossings. Instead of being all or largely on one side, the obligation to use care and prudence rests alike upon both parties. As its direction of movement is fixed by its rails and it has acquired the right of way by the exercise of eminent domain, the railway manifestly has the preference at the point of passage, over the automobile which can vary its course.

The scene of the accident in question is in Beaverton, where the highway leading from Portland to Hillsboro passes through the town and across the tracks of the defendant company. The highway enters Beaverton from the east practically parallel with the railway track, and at a distance of probably 40 or 50 feet from the rails, turns south, and crosses the railroad just west of the station at Beaverton. On the occasion mentioned, the plaintiff, accompanied by her brother, was driving an automobile on their way from Portland to Beaverton. They stopped for a few minutes at a confectionery store on the street running east and west. From this point, even, they had an unobstructed view of the railway track to the west from whence the train came, for at least a quarter of a mile. Having finished their errand at the confectionery, they proceeded on their way and turned south to cross the railway track. At the turn, both the plaintiff and her brother say that they saw the train approaching from the west, about, as they say, at "the second switch," which the scale on the map introduced in evidence shows to be between 350 and 400 feet from the crossing. The plaintiff testifies:

"Just as we got on the track the engine died from some cause or other, and the train struck us soon after that. When the automobile stopped, the train was probably about the second switch. I was realizing—I realized then the predicament we were in; that the train was coming at a very high rate of speed, coming down upon us, and I didn't do anything, only I was thinking probably for some reason or other I could get the machine to go on, or it might go on; and my brother was standing up in the car in the meantime. \* \* \* I don't know what I did. I was thinking that some way or other I might get the machine to go on, but, of course, it wasn't a self-starter, and I realized that I couldn't start it that way, so I did nothing but just sit there."

Her brother testifies, in substance, that they saw the train after they turned towards the track; that they were about 25 feet from the rails; that the train was about at the second switch; and that it was then approaching at about 12 or 15 miles an hour. He stated further:

"The engine went dead just as we went onto the track. \* \* \* I stood up, turned, and looked at the train, and waved to the motor-man to stop."

Questioned on the subject, he answered:

"Well, I don't know as I tried to start the auto, or anything. I know that I didn't, because there was no use. \* \* \* I thought there was more chance of stopping the train."

The testimony discloses that the front wheels of the automobile had cleared the track and the rear wheels were between the rails when the train struck the automobile and turned it around, so that it headed north instead of south and was pushed off the track. The brother was pitched through the windshield, sustaining some minor injuries, while the plaintiff herself was not thrown out of the car, but received some injuries to her right shoulder and upper arm.

[7] Recurring to the quasi double aspect of the case made by the complaint, and considering the phase thereof in which negligence of the defendants is charged by the pleading and opposed by a counter charge of contributory negligence, it would seem that a strong case of contributory negligence was made out against the plaintiff. She admits seeing the train approaching, and that it was coming at a high rate of speed. It is true, on the one hand, as stated in *Adams v. Union Electric Co.*, 138 Iowa, 487, 116 N. W. 332, a case of collision between a horse and buggy and a street car:

"Upon observing a car in the distance the driver of a vehicle can neither recklessly drive upon the crossing in a race with the car, nor is he arbitrarily required to stop his vehicle and wait for its passage. The right of each to the use of the highway is protected, and neither is permitted recklessly to expose the other to danger. If the driver observes a car on the line at such distance that in the exercise of ordinary prudence he believes he can safely cross, and in undertaking to do so a collision occurs, this cannot be attributed to negligence on his part."

[8] On the other hand, in the absence of knowledge to the contrary or some fact which ought to arouse his suspicion that this is not true, the man in charge of the train has a right to presume that any one seen at a public crossing or elsewhere on the track is in possession of all of his senses, and that care for his own safety will induce him to use them, and then to act on the warnings conveyed through them. *Union Pacific Co. v. Cappler*, 66 Kan. 649, 72 Pac. 281, 69 L. R. A. 513, and notes and authorities at page 550 of the latter citation.

[9] It is argued that the plaintiff had a right to presume that the defendant would obey the ordinance and not exceed the speed limit prescribed. This is true as a principle, where there is nothing to notify one to the contrary. It does not apply when, as in this case, according to the plaintiff's own statement, she saw the train being operated at a greater speed than the ordinance allowed,

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and that the defendants were in the very act of doing so. It is not sound reason to say that in the face of such knowledge one can rely upon such a presumption. It is akin to the corresponding principle, further to be noted, that although the engineer has a right to presume that any one on the track will take care of himself and get out of the way before the train strikes him, yet this depends upon the absence of any other condition informing him to the contrary. As in other aspects of such situations, the rights and duties of the two parties are to be measured by practically the same standards. If the railway company were charged with negligence in running its train over an injured man, it would be poor answer for it to say:

"It is true, my train ran against you, but the reason was that my engineer in charge was unskillful, and so managed the locomotive that instead of applying the brakes he put on more steam and accelerated the train."

On the other hand, as in this instance, it would be poor answer to a charge of contributory negligence to say:

"It is true, I saw the train coming at a high rate of speed, within 400 feet of the crossing, yet, instead of either stopping or hurrying along across the track, I proceeded very slowly, and so managed my engine that I stopped it and stalled the car on the track immediately in front of the train."

Considering the case, therefore, as one of negligence charged on one side, and contributory negligence on the other, it would seem that the testimony of the plaintiff herself makes out a plain case of contributory negligence. It is like the case of *Lawrence v. Fitchburg, etc., Ry. Co.*, 201 Mass. 489, 87 N. E. 898. In that instance the plaintiff stalled his automobile adjacent to the track of the railway company where the train would strike it. There was evidence that the automobile could have been seen by the trainmen for at least 500 feet away, especially as the plaintiff's wife was standing up on the seat of the automobile, signaling to the train. After setting this down as negligence on the part of the defendant, Mr. Justice Sheldon said:

"The plaintiff and his wife both realized fully their dangerous position. They knew that cars passed the place once about every 15 minutes. They had overtaken and passed this very car about one mile back from the place of the accident. After their machine was stalled, and while the plaintiff was endeavoring to crank it and get it into motion, they saw the headlight of this car, at a distance which the plaintiff at first said in his testimony 'might have been 1,000 feet,' later putting it at 'fully 700 feet,' and afterwards at 'about 500 feet away when I first saw it.' Mrs. Lawrence, however, made no effort to get out of the car, and merely when the car was about 100 feet away, stood up and signaled with her hand to the motorman. The only effort which the plaintiff made

to get himself or his wife out of their perilous position was that, in his own words, he 'did the best he could to crank the car, and used his best effort to start it.' It is true that the machinery of the automobile would have been in the way of Mrs. Lawrence's getting out of it on the right-hand side, which was that away from the car; and the plaintiff testified that it would have been unsafe for her to step in front of the approaching car, even when it was 500 feet away, coming at the rate that it was. He said in direct examination that the reason why he did not get out of the way was because he thought the car would stop. In cross-examination he said that it never occurred to him to get out of the way. \* \* \* She [Mrs. Lawrence] testified that when she first saw the electric car coming around the corner she would have had plenty of time to get out, and that the reason she did not do so was because she thought the motorman would see the automobile and stop."

After this statement the court said:

"It is impossible to avoid the conclusion that both of these plaintiffs chose to put all the responsibility for their personal safety upon the defendant's motorman. Upon their own testimony they made no attempt either to put themselves in safety or to give any warning to the motorman, either by signal or outcry or by running back, until it was too late to avoid the collision. \* \* \* They failed to take not only due care, but any care."

The result was that in the case of the wife the exceptions to her judgment were sustained, and a like order was made in the action of the husband, unless he should elect to take judgment only for the damage to his automobile.

As to a question of negligence on one side and contributory negligence on the other, the case is plain that the plaintiff's negligent management of the automobile contributed directly to her injury. If, instead of loitering along at a slow rate of speed, she had driven across the track promptly, the collision would not have occurred. But it is manifest that she not only loitered on the way, but so managed her machine as to stop the engine at the point of greatest danger. Such faulty control of the vehicle on the part of the railway company would be the greatest negligence. The same rule applies to the other party.

[10, 11] The only attack upon the evidence was a motion for a directed verdict. A disposal of this question is affected by two considerations: One is, that the result of a directed verdict is to conclude the controversy beyond recall; the other is that there is an attempt in the complaint to ground the case not merely on the negligence of the defendants, but also on the doctrine of the last clear chance. We proceed at this point, then, to consider this doctrine. It may be stated thus in brief that, notwithstanding the negligence of the plaintiff or injured party in getting into a situation of danger, yet if that

negligence has spent itself so that it becomes a condition rather than a factor, and the agent inflicting the injury, notwithstanding his previous negligence, has arrived at knowledge and appreciation of the plaintiff's danger, and then fails to use such means as it has at hand to avoid the injury, it is liable for the consequent damage. Or, stating it differently, it is the possession of the last or only remaining chance to avert the injury that charges the defendant, if at all. If simultaneously the plaintiff has a chance to escape the injury by exercising ordinary diligence, and does nothing to extricate himself from danger, the doctrine of last clear chance does not apply. Such a situation is one where the negligence of the plaintiff continues in operation to and including the very moment of collision. In other words, it is a distinct instance of contributory negligence. It is settled by the decisions of this court that the rule of last clear chance applies only where the defendant has actual knowledge of the perilous position of the plaintiff. *Stewart v. P. R. L. & P. Co.*, 58 Or. 377, 141 Pac. 986; 63 Am. & Eng. R. Cas. (N. S.) 794; *Twitchell v. Thompson*, 78 Or. 285, 153 Pac. 45; *Provo v. S. P. & S. Co.*, 87 Or. 467, 170 Pac. 522.

Some courts have decided that the rule applies where the defendant knew, or by the exercise of reasonable diligence ought to have known, of the peril of the plaintiff. An example of such precedents is *Nicol v. O.-W. R. & N. Co.*, 71 Wash. 409, 128 Pac. 628, 43 L. R. A. (N. S.) 174, in which the opinion, probably through inadvertence, but none the less erroneously, criticizes the deliverance of this court in *Stewart v. P. R. L. & P. Co.*, *supra*, in this language:

"The decision in the *Stewart Case* was by a divided court. The minority were of the opinion that the negligence of the plaintiff had culminated before the injury, and hence that if the defendant by exercising ordinary care could have discovered his peril and prevented the injury, it was liable for not having done so."

The truth is that the decision in the *Stewart Case* was unanimously rendered. This court has never to this writing divided on the doctrine under consideration. In the *Nicol Case* the plaintiff had stalled his automobile at night on the railway track by getting off the planking between the rails, and could not extricate the car. Accordingly, he left it and ran along the track towards the approaching train several hundred feet, striking matches and waving his arms in an effort to signal the engineer, but without avail, although the engineer could have seen him in ample time to stop. In holding the defendant liable the court said:

"We have found no case involving facts similar to those present in this case, but we think the case readily accommodates itself to the

principles announced in the authorities which we have reviewed."

The opinion in the *Nicol Case* bears internal evidence of haste in preparation, and neither in its facts nor in its principles ought it to be regarded as controlling of the issue before us. In our judgment, the addition of what the defendant ought to have known is not sound as a matter of law. It introduces the question of comparative negligence. It does not deal between the parties with equality. It excuses the negligence of the plaintiff at a certain point, but does not excuse that of the defendant at the same point. The true doctrine is that, granting that both parties are negligent as they approach the climax of the transaction, a situation may develop where the defendant on his part arrives at a knowledge and appreciation of the peril of the plaintiff and his inability to extricate himself therefrom, on the one hand; and, on the other, that the plaintiff's negligence has ceased to operate as a factor, but remains only as a condition. At this point a new condition supervenes, in which all previous negligence of both parties is laid out of the account, and a new duty, dating only from that moment, arises on the part of the defendant, who is required then, and not until then, under the last clear chance doctrine, to use all of the means he has at hand to avert the injury. The obligation to avoid injury, however, is alike incumbent upon both parties, and if at that time the plaintiff had a chance to escape harm, and yet did nothing to accomplish that result, he cannot complain because he himself did not embrace the last clear chance; and, further, his own negligence continued to operate to the very point of collision. The rule is thus stated in 20 R. C. L. p. 143:

"Not only must the defendant have had actual knowledge of the plaintiff's dangerous situation, but he must have been aware also of the plaintiff's unconsciousness or of inability to avert the peril. The plaintiff's right of recovery exists when the defendant, after having discovered his peril, having also reasonable ground to believe him unconscious of danger, or unable to avoid it, might himself, by the exercise of ordinary diligence, have prevented the mischief which followed. It is when the engineer or motorman sees that a person 'is apparently placing himself in a position of danger without being aware of the approaching train or car that 'it is plainly his duty to take cognizance of that fact and avoid injury to him if practicable.' If, on the other hand, the trainmen see a person on or near the track, and there is nothing to indicate that he is unconscious of danger from the train, no duty devolved upon them to stop. And so where the motorman of an electric car sees a person on the track at a place where the car is plainly visible, he has the right to assume that such person will use his senses and get off the track in time to avoid injury. The doctrine of 'last clear chance,' under such circumstances, does not



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require the motorman to exercise care and diligence to ascertain whether such person, when first seen on the track, is so intoxicated that he will fail to use his senses and to avoid obvious danger. It follows from what has been stated that if the trainmen, being careful and experienced individuals, in the exercise of their best discretion do not regard a person on the track as being in danger, until, on getting nearer to him, he appears to be unconscious of his peril, and they then do all in their power to prevent an injury to him, the company is not liable. Any evidence of 'discovered peril' will usually make the case for the jury."

As to the necessity of showing actual knowledge on the part of the defendant, of the peril of the plaintiff, as a basis of recovery on the ground of the last clear chance, the principle is thus stated in the case of *Saginaw Lime & Lumber Co. v. Hale* (Ala.) 81 South. 15:

"Where plaintiff's intestate was killed while walking upon defendant's track, the duty of defendant's switchman, riding on a car pushed by an engine, so far as subsequent negligence is concerned, dated, not from his discovery of intestate upon the track, but from the moment he became aware that intestate was ignorant of the approaching train."

In the case of *Texas & P. Ry. Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410, it is said:

"The principle, however, has no application in the absence of actual knowledge, on the part of the person inflicting the injury, of the peril of the party injured, in time to avoid the injury by the use of the means and agencies then at hand. If he had no such knowledge, the new duty was not imposed, though it be clear that by the exercise of reasonable care he might have acquired same. The burden of proof was upon plaintiff in this case, in order to recover for a breach of such new duty, to establish, not that the employes might by the exercise of reasonable care have acquired such knowledge, but that they actually possessed it."

See, also, *Oklahoma City Ry. Co. v. Barrett*, 30 Okl. 38, 118 Pac. 350.

*Denver City Tramway Co. v. Cobb*, reported in 164 Fed. 41, 90 C. C. A. 459, was a case in which the plaintiff was injured by walking in front of a moving car. The court, speaking by Judge Van Devanter, said there were two reasons why the last clear chance doctrine was not applicable: First, the exception does not apply where there was no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuous and operative down to the moment of the injury; and, second, the exception does not apply where the plaintiff's negligence or position of danger was not discovered by the defendant in time to avoid the injury. A long list of authorities is cited in support of the rule announced by the court.

In *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651, quoted with approval in

*Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 134 Pac. 709, it was held that the liability under the doctrine in question "is based upon the fact that defendant did actually know of the danger not upon the proposition that he would have discovered the peril of plaintiff but for remissness on his part. Under this rule a defendant is not liable because he ought to have known." Many other precedents might be adduced to the doctrine that the last clear chance depends upon the actual knowledge and appreciation of the danger of the injured party; but the rule may be regarded as settled by our former decisions, already noted.

The other element, applicable to the plaintiff, is that the negligence of the injured party must have ceased to operate at the time of the collision, so as to become, not a factor, but a condition. The precept is thus taught in *French v. Grand Trunk Ry. Co.*, 76 Vt. 441, 58 Atl. 722:

"It is true that, when a traveler has reached a point where he cannot help himself, cannot extricate himself, and vigilance on his part cannot avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true that, if a traveler, when he reaches the point of collision, is in a situation to help himself, and, by a vigilant use of his eyes, ears, and physical strength to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case, the negligence of the plaintiff is concurrent \* \* \* and operative at the time of the accident. When negligence is concurrent and operative at the time of the collision, and contributes to it, there can be no recovery."

And, as said in *O'Brien v. McGlinchy*, 68 Me. 552:

"This rule applies usually in cases where the plaintiff, or his property, is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent an injury. \* \* \* But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them."

It was held in *Norfolk & Western Ry. Co. v. Dean's Adm'r*, 107 Va. 505, 59 S. E. 389, that where the presence of a person upon the track is observed by careful and experienced men operating the train, and they, in the exercise of their best discretion, do not regard him in danger, until on getting near to him he appears to be unconscious of his peril, and they then do all in their power to prevent an injury to him, the company is not liable.

The plaintiff must show that at some time, in view of the entire situation, including his

own negligence, the defendant was thereafter culpably negligent, and that such negligence was the latest in succession of causes. In such a case the plaintiff's negligence is not the proximate cause of the injury. But this doctrine has no application to a case where both parties are equally guilty of the violation of an identical duty, the consequences of which continue on the part of both to the moment of the injury, and proximately contribute thereto. *Southern Ry. Co. v. Bailey*, 110 Va. 833, 87 S. E. 365, 27 L. R. A. (N. S.) 379.

In *Green v. Los Angeles, etc., Ry. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, a woman was walking on a path diagonally along the railway track, and was caught by an oncoming train. The case was twice heard before the Supreme Court of California, and finally concluded by denying her recovery. This excerpt is taken from the syllabus:

"The doctrine of last clear chance applies in cases where defendant, knowing of plaintiff's danger, and that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury, but has no application to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it.

"A locomotive engineer has the right to assume that one approaching a crossing has taken the precautions which the law requires him to take to insure his own safety, and that he is aware of the situation, and will remain in a place of safety, and the mere fact that he gives no evidence of a knowledge of the approach of the train does not indicate to the engineer that he is about to pass in front of it. \* \* \*

"Where, immediately after a person approaching a railroad track stepped upon the track, the engineer did all in his power to avert the accident, blowing the whistle, applying the air brakes, and reversing the engine, but without avail, he did all that the law required of him."

The prevailing opinion was written by the late Mr. Justice Lorigan, who seems to have exhausted the subject in his discussion.

In the early case of *Cogswell v. O. & C. R. R. Co.*, 6 Or. 417, Mr. Justice Boise wrote to the effect that an engineer in charge of a train approaching a man on the track "had a right to suppose that the deceased would observe the train by his senses, and that he was in no danger until the train was so near him that he ought to be leaving the track to avoid it." The opinion there points out, also, the impracticability of requiring a train to stop whenever any one appears on the track ahead. It is true that Cogswell's decedent was walking laterally along the track, and was in a sense a trespasser; but when we take account of the railway's right of preference in passage, it is clear that the

same presumption applies to one crossing the track on a public road.

In *Butler v. Rockland, etc., Ry. Co.*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267, the plaintiff drove out of a private alley or passageway in front of a train, and was injured. It was held that his contributory negligence continued up to the time of the collision, and that the defendant had a right to assume that one crossing the track would continue his movement or stop in safety. See, also, *Dyerson v. Union Pacific Ry. Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, 11 Ann. Cas. 207; *Himmelwright v. Railroad Co.*, 82 Kan. 569, 109 Pac. 178. In many of the cases treating of the appearance of some one on the track, it is said to be the duty of the engineer or motorman in charge to sound an alarm by whistling or ringing a bell, or some such procedure. This is for the purpose of warning the individual who is subsequently injured. But where the plaintiff saw the train approaching, the failure of the trainmen to sound a whistle or ring a bell has no causal connection with the injury. *Lambert v. S. P. Co.*, 146 Cal. 231, 79 Pac. 873. In the instant case it is conceded that the plaintiff saw the train approaching, and had all the notice that could have been given to her by any whistle or bell. As to trespassers upon a track, it has often been held that a railway company owes them no further duty than to avoid willfully injuring them. The plaintiff here, however, was not a trespasser. She had all the rights of a traveler to cross the track. To her, as to all others, the presumption applies that she would take ordinary care of her own affairs, and would either cross the track without dalliance, or stop in safety; and, in the absence of any notice to the contrary, the motorman was entitled to rely upon that presumption until it actually became apparent to him that she was in a position of peril and unable to extricate herself.

[12] Resuming, then, the elements of the last clear chance doctrine or that of discovered peril, it depends upon these conditions: That the defendant must have had actual knowledge of the peril of the injured party in time to have prevented the accident by diligent use of the means at hand, irrespective of the negligence of the defendant occurring prior to this discovery. If, under such circumstances, the defendant errs in judgment only, he is not liable. The doctrine is also affected by the condition that it will not apply if the negligence of the plaintiff continues operative at the time of collision. If a plaintiff would recover by means of the last clear chance exception to the general rule that contributory negligence will defeat a recovery, the complaint should state facts to which the exception will apply. As stated by Mr. Justice McBride in *Stewart's Case*, supra:

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"In order to invoke the 'last clear chance doctrine,' plaintiff must plead and prove that the defendant, after perceiving the danger and in time to avoid it, negligently failed to do so"—citing *Drown v. Northern Ohio T. Co.*, 76 Ohio St. 234, 81 N. E. 327, 10 L. R. A. (N. S.) 421, 118 Am. St. Rep. 844.

[13] The complaint in the instant case avers only that the defendants saw the automobile on the track in ample time to have stopped before reaching the machine. There is no allegation that they knew more than this. It is not intimated that the defendant engineer was aware that plaintiff was in danger. The pleading contains nothing to eliminate the presumption upon which the trainmen had a right to rely, that she was in the possession of her faculties and would take care of herself and get off the track before the train reached the crossing. It is not stated, either in the pleadings or in the testimony, that the motorman knew that her engine had stopped, or that there was anything in her situation to indicate that she was unable to move. In short, the pleading must show a state of facts to which all the elements of the last clear chance doctrine would apply, if the plaintiff would rely upon that exception to the general rule in order to recover. It is one thing so negligently and unskillfully to operate an automobile as to "kill" its engine in a critical situation, and quite another to be inextricably caught in a perilous predicament within the knowledge of one inflicting a subsequent injury. It is a close question of fact as to whether the defendant knew of her peril in time to avoid the injury by subsequent diligence.

An extended note to *Union Pacific Ry. Co. v. Cappler*, supra, cites with approval the opinion of Mr. Chief Justice Martin in *Campbell v. Railway Co.*, 55 Kan. 536, 40 Pac. 987, teaching the doctrine to be that the man in charge of a train, seeing any one on the railway track apparently in the possession of all of his faculties, not suffering from any disability and aware of the approach of the train, has a right to rely upon the presumption that the individual in view will get off the track, and this until the last moment, when it becomes apparent that, owing to inadvertence or some disability, the man on the track is unable to extricate himself from the danger. The opinion there is to the effect that this moment means the last moment in which it would, or ought to, seem practicable to stop the train before collision, and that for a slight error of judgment on the part of the engineer the railway company ought not to be held responsible. Many authorities are cited in support of this rule.

[14] The complaint, as above indicated, is not sufficient in its allegations of facts to justify the application of the 'last clear chance doctrine. There is enough in the testimony, however, to have carried this case

to the jury on the question of fact involved. For instance, on behalf of the plaintiff, as showing her position of peril, we have the fact that she was stationary on the track. There is the testimony of her brother that he stood up in the car and waved his hand as if to stop the train. On the other hand, we have the presumption, already referred to, that the engineer was entitled to rely upon, to wit, that the plaintiff would get off the track before the train arrived; that she would take care of herself; and that there was nothing to indicate her danger except as stated. It was for the jury to weigh these opposing fragments of evidence, and determine by the preponderance of them whether the defendant actually perceived the danger of the plaintiff and her inability to extricate herself, in time to avert the injury. This, of course, leaves out of view the question of whether the negligence of the plaintiff continued operative at the time of the collision. Thus restricted, the case on this point presents a situation where there is a question of fact to be determined, namely, whether the defendant's motorman discovered the position of peril of the plaintiff in time to avoid the injury by subsequent diligence.

Although the plaintiff might be considered negligent in not attempting to start her car after it stopped on the track, yet a jury might think she did not have time before the train collided with her machine. This, in turn, might disclose that if she did not have time to start her car, neither did the motorman have time to stop his train after discovering that she could not move, with the result either that her negligence continued operative to and including the moment of impact, or that the accident was unavoidable. The testimony seems to present a mixed question of law and fact respecting the application of the last clear chance doctrine to be submitted to the jury.

In *Ridley v. Portland Taxicab Co.*, 90 Or. 529, 177 Pac. 420, this court, speaking by Mr. Justice Harris, discussed the distinction between a motion for a nonsuit and a motion for a directed verdict, saying, in effect, that they give rise to the same inquiry as to the sufficiency of the evidence, but that, while a nonsuit dismisses the action without prejudice to another on the same ground, the directed verdict is conclusive against any subsequent effort to recover for the same injury. The conclusion reached is stated thus:

"Even though a complaint omits some material allegation, a motion for a directed verdict, based upon the fact of such omission, should be denied, especially where the objection can be cured by an amendment, and the plaintiff's evidence, if true, makes a case against the defendant"—citing authorities.

[15] For this reason, there was no error in denying the motion for a directed verdict, although the ruling might have been different

if presented on a motion for a nonsuit. It seems possible that the plaintiff may be able to amend her complaint so as to state a cause of action within the exception known as the last clear chance doctrine, eliminating her previous contributory negligence. She ought to have the opportunity thus to amend. Whether she will be able to prove her case so newly stated remains to be seen.

We pass to a consideration of the verdict already quoted. Construing it as any other writing, by its actual terms, there is nothing in it to charge the defendant Woodson. He is not in any way mentioned therein. No judgment against him properly could be rendered on such a verdict. It would be at least erroneous. But the liability of the defendant company, under the allegations of the complaint and the undisputed testimony, depends entirely and exclusively upon the liability of Woodson, under the rule of respondeat superior. The only negligence imputed by the complaint is predicated upon his action or want of action. A leading case on this subject is *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649. This was an action brought against a railway company and its conductor for an injury inflicted upon the plaintiff by a train in charge of the conductor; and, as in the instant case, the only negligence appearing was that of the conductor. The verdict was in this language:

"We, the jury, sworn and impaneled to try the above-entitled cause, find for the plaintiff and against the defendant, the Oregon-Washington Railroad & Navigation Company, and assess his damages at the sum of \$15,100 and the costs of this action."

On this verdict judgment was rendered in favor of the defendant Root, the conductor, for his costs and disbursements, and against the defendant company for the amount of the verdict, together with the plaintiff's costs and disbursements. The opinion was written by Mr. Justice Fullerton, a learned and clear-headed jurist. He reached the conclusion that the defendants were not jointly or severally liable, but that the blame rested on the conductor primarily and the company successively, because of the principle of respondeat superior. After distinguishing between joint tort-feasors acting together in the same capacity and a case where they are involved successively, the opinion goes on to state:

"But the defendants in this character of action are in no sense joint tort-feasors, nor does their liability to the plaintiff rest upon the same or like grounds. The act of an employé, even in legal intentment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligence of an employé not directed or ratified by the employer, the employé is liable because he committed the act which caused the

injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior—the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employé, and when the employer is compelled to answer in damages therefor he can recover over against the employé. \* \* \* So, where the employer is sued separately for the wrong, he can bind the employé in any judgment that may be obtained against him, by notifying the employé to come in and defend the action. \* \* \* So, also, in such an action, whether brought against the employer severally, or jointly with the employé, the gravamen of the charge is, and must be, the negligence of the employé; and no recovery can be had unless it be proved, and found by the jury, that the defendant was negligent. Stated in another way: If the employé who causes the injury is free from liability therefor, his employer must also be free from liability."

Thus far the *Doremus* Case is like the instant action. As stated, the trial court had entered a judgment in favor of the defendant Root, and based permissibly and probably upon the proposition that the court had jurisdiction of the persons of the litigants and of the subject-matter, and that the judgment in favor of the conductor was one which was possible within the issues of the case, the court held that it was not void, but merely erroneous, and, not having been attacked by appeal or other direct proceeding, it was a final adjudication of the issues between the plaintiff and the conductor. Going further, the court held that, inasmuch as the conductor was completely released by the final adjudication in his favor, nothing remained but to render also a judgment in favor of the defendant company. The court said, however:

"Were the judgment against Root void, or were it before us for review on this appeal, or on a separate appeal by the present respondent, we would have no hesitancy in reversing both judgments and remanding the cause for a retrial on the whole of the issues."

Substantially, that is the situation which confronts us in the present instance. While the verdict does not fasten any liability upon Woodson, and hence does not charge the defendant company, there is no adjudication in favor of Woodson to act as an obstacle in reversing the judgment against the company. Confronted with the indispensable condition of proving negligence of Woodson in the manner charged, the plaintiff has failed to establish such remissness of his duty, and hence has no basis for a recovery against the defendant company, his employer.

In *Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119, *Fleming* had previously failed in an action against a com-

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tractor for improving a street in the city of Anderson for injuries suffered by her in falling into an excavation left by that defendant unguarded in the street. She then brought an action directly against the city, which successfully set up the judgment in favor of the contractor in that former action in bar of the latter action. The case was made to depend upon the principle that primarily the city was responsible for keeping its streets in repair, but that, having contracted with another party to repair the street, providing as one of the terms of the stipulation that the contractor should keep the street safe for the use of pedestrians, it would have a right to call him in to defend an action against it. Hence, if owing to the failure of the injured party to recover from the contractor in a suit directly against him, his liability was barred, then the liability of the city also was extinguished. Its rights would be prejudiced by a judgment against it under such conditions, because it had lost its right to compel the contractor to respond over to it, as he had been exonerated by the judgment in his favor and was immune against reimbursement of the city.

In *Indiana Nitroglycerine, etc., Co. v. Lip-pincott Glass Co.*, 165 Ind. 361, 75 N. E. 649, in an action against the corporation and its servant for negligence solely of the latter, it was held erroneous to charge the jury that a verdict might be rendered against either or both, as such an instruction would tend to deprive the corporation of its right of subrogation against the negligent servant. To the same effect in principle are *Jones v. Southern Ry. Co.*, 106 S. C. 20, 90 S. E. 183, and *Sparks v. Atlantic Coast Line Ry.*, 104 S. C. 266, 88 S. E. 739. In *St. Louis, etc., Ry. Co. v. Williams*, 55 Okl. 682, 155 Pac. 249, the jury erased from the form of verdict the name of the engineer who was codefendant with the company, and upon whose negligence alone the plaintiff predicated its cause of action. A judgment against the company upon this verdict was reversed. The same ruling was made in *Chicago, R. I. & P. Co. v. Austin*, 43 Okl. 698, 144 Pac. 1069; *McGinnis v. Chicago, etc., Ry. Co.*, 200 Mo. 347, 96 S. W. 590, 9 L. R. A. (N. S.) 680, 118 Am. St. Rep. 661, 9 Ann. Cas. 656. See, also, *Childress v. Lake Erie, etc., Co.*, 182 Ind. 251, 105 N. E. 467; *New Orleans, etc., Co. v. Jones*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919; *Chicago, R. I. & P. Co. v. Reinhart*, 61 Okl. 72, 160 Pac. 51; *Stevick v. Northern Pacific Ry. Co.*, 39 Wash. 501, 81 Pac. 999; *Pangburn v. Buick Motor Co.*, 211 N. Y. 288, 105 N. E. 423; *Fimple v. Southern Pacific Co.* (Cal. App.) 177 Pac. 871.

[16] The case before us, then, is like the *Doremus Case*, so clearly discussed by Mr. Justice Fullerton, up to the rendition of the judgment against the defendant. It is not cumbered, as that case was, by a judgment in favor of the codefendant from which no appeal had been taken. The case is ripe for the determination which the court there said would have been reached but for the judgment in favor of the conductor. The result is that the judgment of the circuit court must be reversed, and the cause remanded for further proceedings, with leave to the parties to apply to the circuit court for permission to file amended pleadings if they are so advised.

[17] Many errors are assigned respecting the instructions and refusals to instruct the jury. Owing to the length of this opinion, it is deemed impracticable to notice them in detail, as the rules respecting the doctrines of last clear chance, contributory negligence, discovered peril, and the like have been sufficiently indicated for the guidance of the circuit court. Some complaint was made about the ruling of the court on the cost bill of the plaintiff. No notice will be taken of this, as it becomes negligible under the rule laid down in *Jones Land & Live Stock Co. v. Seawell*, 90 Or. 236, 242, 176 Pac. 186, where on the authority of *Wade v. Amalgamated Sugar Co.*, 71 Or. 75, 142 Pac. 350, and *City of Seaside v. Oregon Surety Co.*, 87 Or. 624, 171 Pac. 396, it was held that the party successful in the circuit court, but who was defeated on appeal, has no right to recover the costs and disbursements of litigation the error of which transpired on appeal.

[18] Neither is it necessary to review the action of the circuit court in refusing to allow the company to amend its motion for a new trial. All the data required for the examination on appeal of the validity of the judgment in the respect embodied in the desired amendment appear in the record. It presents a case under the second clause of section 172, L. O. L., where it is said:

"No exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court."

The pleadings are here, the verdict is here, and the judgment is here. The error of entering such a judgment on such a verdict is one of law, made wholly upon written documents on file in the circuit court, and hence is reviewable on appeal on the record thus made.

The judgment is reversed.

McBRIDE, C. J., and BENSON and HARRIS, JJ., concur.

(97 Or. 137)

**ANDERSON et al. v. FARR et al.**

(Supreme Court of Oregon. July 20, 1920.)

1. Constitutional law  $\S$  205(5), 206(4), 230(4), 287—Hawkers and peddlers  $\S$  2—Statute requiring license for selling of medicines valid.

Gen. Laws 1913, c. 164,  $\S$  19, regulating the practice of pharmacy, and the possession and disposal of poisons and other drugs, and requiring itinerant peddlers selling the same to pay a license fee of \$200, does not contravene Const. art. 1,  $\S$  20, relating to special privileges or immunities, or Const. U. S. Amend. 14,  $\S$  1.

2. Statutes  $\S$  107(1)—Statute as to pharmacy held to embrace only one subject.

Gen. Laws 1913, c. 164, regulating the practice of pharmacy, and requiring itinerant dealers to pay a license, does not embrace more than one subject.

3. Hawkers and peddlers  $\S$  4(1)—Itinerant vendors of medicines in original packages need not pay licenses.

Itinerant vendors or peddlers, selling proprietary or patent medicines in the original packages, are not required to pay a license under Gen. Laws 1913, c. 164,  $\S$  19, being expressly excepted by section 12.

In banc.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Suit by F. R. Anderson and others against Rose A. Farr and others, as members of the State Pharmacy Board and others. Decree for defendants, and plaintiffs appeal. Reversed, and decree entered in favor of plaintiffs.

This is a suit brought by plaintiffs, who are itinerant vendors of certain patent or proprietary medicines, which may be described generally as Watkins Family Remedies, to enjoin their arrest and prosecution under section 19, chapter 164, General Laws 1913.

The complaint alleges, in substance: That the J. R. Watkins Medical Company of the state of Minnesota manufactures these medicines and certain extracts for domestic use; that the plaintiffs, by contract with said company, conduct the business of selling said medicines and extracts each in his own particular locality, selling the same to the general public in original packages and under the full label and not otherwise, and that each conducts his business as dealer in such remedies and extracts from a wagon or automobile drawn or propelled from place to place, within the district or locality in the state of Oregon, described in the contract with the Watkins Medical Company, under which he operates, and each maintains a home station, or storehouse, where he keeps

on hand a surplus stock of said medicines and extracts such as their business may require; that sales are made by each of the plaintiffs within his respective district or territory from said wagon, automobile, or storehouse, directly to the consumer, or upon orders as the same may be received; that each of the plaintiffs is a citizen and resident taxpayer of the state of Oregon, and not a transient traveling or itinerant peddler, or vender of fake medicines, drugs, or nostrums.

Then follow allegations showing that each of the plaintiffs has gone to great trouble and expense in building up a business, that each has his regular customers, upon whom he calls at regular intervals, supplying their requirements from his stock of medicines, remedies, and extracts; that the business so required is of great value to the plaintiffs; that there is a general demand throughout the state for such remedies, etc., which are valuable, and that plaintiffs have not been guilty of any fraud, deceit, or misrepresentation in the sale thereof, nor charged therewith.

That plaintiffs' business brings them into competition with city and country druggists, and drug stores, who handle and deal in the same, and other patent and proprietary medicines, but who maintain an established and fixed place of business, and who, for the purpose of crushing out competition, have invoked and are now invoking the use of section 19, chapter 164, General Laws 1913, entitled "An act to regulate the practice of pharmacy and the possession and disposal of poisons and other drugs," etc.

That the state pharmacy board has caused defendants Scott and Jeffries to be appointed as special agents and representatives of the board, with the power of deputy sheriffs, and has sent them out over the various counties where plaintiffs transact business to procure evidence against plaintiffs of sales made by them from these wagons and automobiles, and to stop plaintiffs upon the highways and, by feigning sickness, seek to purchase some of said remedies, with the intent of arresting plaintiffs under the provisions of said act.

That each of plaintiffs buys said medicines at wholesale from the Watkins Medical Company, and sells at retail, and all are engaged in said business wholly as a means of livelihood for themselves and their families, and that, being general dealers in such commodities, they have not taken out or paid for a license under section 19 aforesaid.

That the pharmacy board, Walter H. Evans, district attorney, and defendants Scott and Jeffries have caused the arrest of a number of these plaintiffs, on a charge of violation of section 19 aforesaid, and have caused them to be fined a minimum fine of \$200,

which cases are now on appeal and undetermined. There are allegations showing irreparable damage to plaintiffs by reason of such arrests, and further allegations showing that defendants threaten and intend to continue such arrests and prosecutions.

It is alleged that section 19 of chapter 164 aforesaid has no application to dealers in such commodities as plaintiffs handle, and that plaintiffs are specifically exempted from its operation by section 12 of the same act. It is further alleged that the act is unconstitutional and void:

(1) Because it undertakes, by section 12, to exempt from its terms general dealers in such commodities as are handled by plaintiffs, while pretending by section 19 to exact a license fee of \$200 from each of the plaintiffs for dealing in the same commodities, thereby placing the act in conflict with section 20 of article 1 of the Constitution, which provides:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

(2) That the act is in contravention of section 1 of article 14 of the Constitution of the United States.

(3) That the passage of said act is not within the police power of the Legislature of the state of Oregon, as its effect is not to protect the public health or morals, or the peace, quiet, and good order of society; nor is it for the public welfare.

(4) That it is void for the reason that the license fee of \$200 per annum, exacted by section 19, is unreasonable, excessive, and oppressive, and renders it impossible for plaintiffs to continue their business.

The prayer is, that the court declare plaintiffs exempt from the provisions of said act, that the act be declared unconstitutional because in contravention of the Constitution of the United States and of the state of Oregon, and that further prosecutions be enjoined, and for general relief.

A general demurrer having been overruled, defendants answered, putting in issue the material parts of the complaint, alleging that at all the dates mentioned plaintiffs were itinerant and traveling hawker vendors of drugs, nostrums, applications, and ointments for the professed cure of human ailments, and were offering the same for sale in the state of Oregon, and carrying on said business by passing from house to house, haranguing people upon the public streets and highways and in public places, and using the customary devices for attracting crowds, and thereby disposing of their wares.

That plaintiffs had not taken out or paid for the license required by section 19. (The intent to prosecute them for failure to take

out the license and selling their remedies without the same was admitted.)

A reply having put the case at issue, the court made findings for the defendants, and rendered a decree dismissing the suit, from which decree plaintiffs appeal.

B. A. Kliks, of McMinnville, for appellants.  
George Mowry, Deputy Dist. Atty., of Portland (Walter H. Evans, Dist. Atty., of Portland, on the brief), for respondents.

McBRIDE, C. J. (after stating the facts as above). Before proceeding to discuss the principal and most difficult question raised on this appeal, we will dispose of those questions which we deem easy of solution.

[1] The objection that the act in question contravenes section 20 of article 1 of our state Constitution has been decided adversely to plaintiffs' contention in *State v. Miller*, 54 Or. 381, 103 Pac. 519, and need not be further considered. We are satisfied that both by plaintiffs' own pleadings and the testimony, plaintiffs are "itinerant vendors" of drugs, etc., within the meaning of the law.

[2] The claim that the act in question embraces more than one subject is also negated by the same decision.

Neither does the act violate section 1 of the Fourteenth Amendment to the Constitution of the United States. *Bacchus v. Louisiana*, 232 U. S. 387, 34 Sup. Ct. 439, 58 L. Ed. 627; *Ex parte Gilstrap*, 171 Cal. 108, 152 Pac. 42, Ann. Cas. 1917A, 1086.

[3] In view of our construction of the act itself, it is unnecessary to consider its constitutionality in other respects, for, conceding without deciding that it is perfect constitutionally in all respects, we are of the opinion that plaintiffs are expressly excepted from its operation by section 12 thereof.

It seems to be clearly shown by the testimony that plaintiffs are engaged in the general business of selling and dealing in proprietary or patent medicines in the original packages, properly labeled and purchased from manufacturers outside the state. The fact that they are also selling extracts, soaps, and perhaps other articles cuts no figure in the case.

Section 19 of the act, as it stood at the date of filing this complaint, is as follows:

"Any itinerant or traveling vender or hawker of any drug, nostrum, ointment or application of any kind for the treatment of any disease or injury, before offering any such drug, nostrum, ointment or application for sale shall pay to the treasurer of the Oregon board of pharmacy an annual fee of two hundred dollars (\$200) upon the receipt of which the secretary of the board shall issue a license for one year from the date of said payment; one-half of all such license fees shall be devoted to defraying the expenses of the board and the remainder shall be paid as it is received by the treasurer of the Oregon board of pharmacy into the state

school fund. Itinerant venders under the meaning of this act shall include all persons who carry on the business above described by passing from house to house, or by haranguing the people on the public streets or in public places, or use the various customary devices for attracting crowds and therewith recommending their wares and offering them for sale. Any violation of this section shall be a misdemeanor and any person shall upon conviction thereof pay a fine of not less than two hundred dollars (\$200) nor more than three hundred dollars (\$300), and in default of such payment shall be imprisoned in the county jail for the period of one day for each two dollars (\$2.00) of such fine. In case of prosecution under this section it need not be proven that the defendant has not a license, but the fact that he has a license may be a matter of defense; provided, however, that nothing in this act shall be construed to prevent the collection of any tax or license that may be imposed by any county or municipal authority."

If this section stood alone without qualification, its provisions would amply justify the prosecutions instituted and threatened by the state; but, perhaps unfortunately for the public, it is qualified by section 12, which, among other provisions, contains the following:

"Nothing in this act shall apply to or interfere with any practitioner of medicine or dentistry who is duly registered as such by their respective state board of examiners of this state, with supplying his own patients, as their physician or dentist and by them employed as such, with such remedies as he may desire, and who does not keep a pharmacy, open shop or drug store, advertised or otherwise, for the retailing of medicines or poisons; nor does this act apply to the exclusively wholesale business of any dealer, nor to the manufacture or sale of proprietary medicines or patent medicines, or to the sale of any household remedies and medicines, by general dealers not druggists, in the original packages, when properly labelled."

These plaintiffs are clearly "general dealers not druggists," engaged in selling "household remedies in original packages properly labeled," and are within the language of the exception. As pointed out by counsel for plaintiff, the exception goes to the whole act, and not to the particular section in which it is found, and we would be compelled to construe the exception as meaning something entirely different from what the language used imports in order to hold these defendants guilty of an offense. Sections 12 and 19 may, without any distortion of language, be construed together without necessary conflict, because there may be itinerant venders of drugs, nostrums, and remedies not proprietary and not put up in original packages and not properly labeled, and who therefore, would incur the penalties denounced in section 19.

Counsel for the state ably and plausibly

argue that the exception in section 12 was not intended to apply to the venders required by section 19 to take out a license, and this may be true; but it is dangerous to attempt to extend the operations of a penal law by construing it beyond its plain language. The framers of the law may have intended to confine the operation of the exception in section 12 to that particular section, or to some other sections, but they have in fact and by express language made it applicable to the whole act, and we must take the act as we find it, leaving to the Legislature the correction of supposed errors.

The decree of the circuit court will be reversed, and a decree entered here, restraining further prosecutions of these plaintiffs for sales of proprietary or patent medicines, or household remedies, in original packages properly labeled.

(97 Or. 145)

#### TEMMINCK et al. v. DOERING et al.

(Supreme Court of Oregon. July 20, 1920.)

1. Appeal and error  $\S$  415—Defendant appellant held required to serve notice of appeal on other defendants.

Where it is practically conceded that all the defendants, including those brought in by order of the court and at appellants' instance, were proper and necessary parties, it was incumbent on defendant appellant to serve each properly with a copy of the notice of appeal, where not made in open court, under L. O. L.  $\S$  550, subd. 1, as amended by Gen. Laws 1913, p. 617.

2. Appeal and error  $\S$  424—Service of notice of appeal on nonresident attorneys for a resident corporation ineffective.

L. O. L.  $\S$  550, subd. 1, as amended by Gen. Laws 1913, p. 617, requires, where appeal is not taken at time of the decision, that appellant shall serve notice on all adverse parties or their attorneys at any place in the state, and an attempted service by mail on attorneys residing without the state, representing a corporation defendant within the state, is of no avail.

In Banc.

Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by H. A. M. Temminck and another against H. E. Doering, in which W. B. Robertson and others were subsequently made defendants. From a part of the decree therein rendered, the plaintiffs and the defendants W. B. Robertson, Portnomah Land Company, and F. B. Waite appealed, and the defendant H. E. Doering subsequently filed notice of appeal from the whole decree, and plaintiffs move to dismiss the appeal of defendant Doering. Motion granted.



This is a motion to dismiss the appeal of defendant H. E. Doering, and is based upon the following facts:

On October 25, 1917, plaintiffs began a suit in the circuit court of Douglas county against H. E. Doering to have declared forfeited a certain contract for the purchase of a tract of land in Douglas county, and to quiet the title thereto, and to have the defendants barred and foreclosed of any right or interest therein. It was claimed in the complaint that in 1914 one F. B. Waite, then the owner of the land, had entered into a contract with Doering to sell him the tract, the agreement being set forth in the complaint, and that before the plaintiffs purchased the tract Doering had defaulted in his payments under the agreement, and had no further interest under his contract.

Plaintiffs claimed title through mesne conveyances from Waite to the Balfour Guthrie Trust Company, then from said company to W. B. Robertson, from W. B. Robertson to the Portnomah Land Company, an Oregon corporation, having its office and principal place of business in Portland, Or., and from said company to the plaintiffs.

The defendant Doering answered, setting up an equitable title in himself under his contract with Waite, and by way of cross-bill asked equitable relief, and moved to have Waite, Robertson, and the Portnomah Land Company brought in as defendants and necessary parties to the full determination of the suit. They, being so brought in, filed practically identical answers, setting up their own title at the time of purchase by them, and alleging the invalidity of defendant Doering's claim, and the forfeiture of his rights under said contract.

The cause, having been put at issue, came on for trial, and the court rendered a decree foreclosing Doering of all right and interest in said property, unless he should pay to the plaintiffs, within four months, the sum of \$42,372, with interest thereon at the rate of 6 per cent. per annum from the date of such decree, said sum to be distributed by the court among the parties as their interests might thereafter appear, and that plaintiffs recover from defendants their costs and disbursements.

On October 25, 1919, plaintiffs and the defendants Robertson, Waite, and the Portnomah Land Company appealed from so much of the decree as required the defendant Doering to pay interest at the rate of 6 per cent. on \$42,372, from August 27, 1919, and exempting him from the payment of interest on said sum prior to said date, and from a subsequent order overruling a motion by defendant Robertson to correct the original decree, by requiring defendant Doering to pay interest on said sum of \$42,372 from September 1, 1914, at the rate of 8 per cent. per annum, which appeal is now pending in this court.

On October 27, 1919, defendant Doering filed in the clerk's office a notice of appeal from the whole decree; the return on said notice showing due and timely service by mail upon all the defendants, except the Portnomah Land Company, and an attempted service by mail upon said company by depositing in the post office a copy of the notice, directed to Lee & Kimball, the attorneys for said company, at their residence and post office address at Spokane, in the state of Washington.

Plaintiffs move to dismiss the appeal for alleged irregularities in mailing, including the invalidity of the service upon the Portnomah Land Company.

O. P. Coshaw, of Roseburg, James L. Conley, of Portland, Lee & Kimball, of Spokane, Wash., and Charles F. Hopkins, of Roseburg, for appellants.

O. H. Foster and Charles A. Hardy, both of Eugene, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] It is practically conceded that all the defendants, including those brought in by order of the court, were proper and necessary parties to the suit; indeed, Waite, Robertson, and the Portnomah Land Company were brought in at the instance of defendant Doering for that reason. This being so, it was incumbent on him to properly serve each defendant with a copy of his notice of appeal, and in default of such service upon any one of the defendants the appeal must fail. In re Waters of Chewaucan River, 89 Or. 659, 171 Pac. 402, 175 Pac. 421; Thomas v. Thruston, 87 Or. 650, 171 Pac. 404; D'Arcy v. Sanford, 81 Or. 323, 159 Pac. 567.

[2] Service upon a nonresident attorney, outside of the state, was a nullity, where the defendant, upon which such attempted service was made, was an Oregon corporation. Subdivision 1 of section 550, L. O. L., as amended by chapter 319, Gen. Laws of 1913, among other things, provides:

"If the appeal is not taken at the time the decision, order, judgment or decree is rendered or given, then the party desiring to appeal may cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action or suit, or upon his or their attorney, at any place in the state, and file the original with proof of service indorsed thereon, with the clerk of the court in which the judgment, decree or order is entered."

The defendant Portnomah Land Company was a resident within the state, and had an office therein, and was therefore capable of being served within the state. The fact that its resident attorney, Mr. Moody, had removed from the state subsequent to the trial, made it incumbent upon defendant Doering to serve the notice upon such company.

Much as we dislike to dismiss a cause without a hearing on the merits, we cannot

find any authority for a service upon a non-resident attorney, where the appellee is a resident of the state; and the appeal of this defendant is therefore dismissed.

(97 Or. 149)

**HENDERSON et al. v. CITY OF SHERIDAN et al.**

(Supreme Court of Oregon. July 20, 1920.)

**Municipal corporations** §294(4)—Notice of intention to improve street indefinite.

Notice of intention to improve street in city of Sheridan, given pursuant to Sheridan City Charter, § 59, *held* insufficiently definite to give the city jurisdiction to make the improvement, as not stating how thick the wearing surface of asphaltic concrete pavement was to be, or what was the proper grade, crown, thickness, and wearing surface.

**Department 2.**

Appeal from Circuit Court, Yamhill County; H. H. Belt, Judge.

Suit by E. U. Henderson and others against the City of Sheridan, a municipal corporation, and E. F. Dack, Marshal of the City. From a decree for plaintiffs, defendants appeal. Affirmed.

This is a suit brought to enjoin the city of Sheridan from the collection of an assessment for an improvement upon Bridge street in said city. Section 59 of the charter of Sheridan is as follows:

"Such notice must be given by the recorder by order of the council, and must specify with convenient certainty the street, or part thereof, proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made and the time when the council will hear and determine objections and remonstrances thereto, if any."

The notice of intention to improve the street is as follows:

**"Notice of Proposed Street Improvement.**

"Notice is hereby given to all persons having and owning property adjacent and abutting upon Bridge street, from the south end of the south wooden approach to the bridge across the Yamhill river, south to the north line of Mill street, all in the city of Sheridan, Oregon.

"Take notice: That the common council of the city of Sheridan contemplates the passage of an ordinance requiring the improvement of Bridge street from the south end of the south wooden approach to the bridge across the Yamhill river, southerly to the north line of Mill street, at the cost and expense of the abutting and adjoining property, in the following manner, to wit:

"By resurfacing said portion of Bridge street from curb to curb, with a wearing surface of asphaltic concrete pavement, and bringing said

surface to the proper grade, crown, thickness, and wearing surface, and by constructing inlets and providing the proper drainage of said streets where necessary, 'and to assess the cost and expense thereof against the adjoining property to said street.'

"That the common council has so declared its intention to make the above-described improvement by duly passing a certain resolution on the 16th day of June, 1919, and approved as of the same date, and which resolution is referred to and made a part of this notice. Said resolution may be read by any interested property owner by making application to the city recorder.

"Now, therefore, all persons interested in said proposed improvement of said portion of Bridge street, south of the Yamhill river and north of the north line of Mill street, and especially the owners of property abutting and adjoining thereon, are hereby notified that the common council will meet in the council chambers in the city hall of Sheridan, Oregon, on the 30th day of June, 1919, at the hour of 8 o'clock p. m. on said date, to hear and determine any and all objections, if any there be, to the making of said proposed improvement, and to attend at said time and place and make known your objections to the making of said improvement, if any you have.

"Done by order of the common council of said city on the 16th day of June, 1919.

"Witness my hand and the official seal of the city of Sheridan, this 17th day of June, A. D. 1919.

"(Signed)

J. R. Sanders,

"Recorder of the City of Sheridan, Oregon."

Upon the trial the court held that the notice was insufficient to give property owners notice of the kind of improvement, which it was proposed to be made, and entered a decree enjoining the city from collecting the assessments, from which decree defendants appeal.

Otto W. Helder, of Sheridan, and Frank S. Grant, of Portland, for appellants.

W. O. Sims, of Portland, for respondents.

McBRIDE, C. J. (after stating the facts as above). The object of requiring notice of the proposed improvement, and of incorporating therein a description of the improvement with convenient certainty, is to enable the property owners abutting the street to be improved to make a reasonable estimate of the probable cost, so as to determine whether or not he will remonstrate against the proceeding. Of course, such description is not required to be technically accurate, but only as nearly so as the circumstances will reasonably permit. Such a description, with plans and specifications, must be made in any event, before the contract is let; and a preliminary estimate and description can usually be made before giving the notice of intention to improve, without materially adding to the expense. While this is not required by the

charter, and no technical preliminary estimate is required in any event, yet there should be something approaching reasonable certainty in the description of the main characteristics of the proposed improvement.

Here the property holder is left entirely in the dark as to the thickness or depth of the improvement which was upon the street, upon which the grade had been established, and which had been theretofore improved only by the voluntary act of the property owners. What are the uncertainties here?

(1) The street is to be improved "by resurfacing it from curb to curb with a wearing surface of asphaltic concrete pavement." How thick is this wearing surface to be? The notice does not state, and in the absence of such statement how is the property owner to be enabled to make any estimate of the cost?

(2) The improvement is to be further continued "by bringing said surface to the proper grade, crown, thickness and wearing surface." What is to be the proper grade, crown, thickness, and wearing surface?

What is a "proper" grade? Certainly not the lawful grade, because none had been established. It is clear, therefore, that what was to be the proper grade, thickness, crown, and wearing surface were matters left still in the breast of the council or city engineer, and not disclosed to the abutting property owners, so that they might estimate the expense they were likely to incur, and determine their course in relation to making or not making a protest.

We are of the opinion that the notice was not sufficiently definite to give the city jurisdiction to make the improvement. This exact question in its present form has not been passed upon by this court, but this opinion follows the reasoning of the decisions in *Ladd v. Spencer*, 23 Or. 193, 81 Pac. 474; *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407; *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112; *Rubin v. Salem*, 58 Or. 91, 112 Pac. 713; *Jones v. Salem*, 63 Or. 126, 123 Pac. 1096; *Dyer v. Bandon*, 68 Or. 406, 136 Pac. 652.

The decree of the circuit court is affirmed.

BEAN, JOHNS, and BENNETT, JJ.,  
concur.

(97 Or. 154)

# **BYERS et al. v. CITY OF SHERIDAN.**

(Supreme Court of Oregon. July 20, 1920.)

1. Municipal corporations §294(4)—Notice of intention to improve street, not stating material of "pavement," insufficient.

Notice of intention to improve street in city of Sheridan, simply describing improvement as a hard surface pavement 16 feet in

width, held insufficient to confer jurisdiction on city to make improvement; a "pavement" being a hard, solid surface of any of several materials, as stone, brick, concrete, or wood, while property owner is entitled to be informed of material to be used.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pavement.]

2. Municipal corporations §488, 489(5) — Uncertainty in notice of improvement jurisdictional, and not waived by failure to object.

Lack of reasonable certainty in description of improvement in notice of intention to improve street went to the jurisdiction of the city to make the improvement, and was not waived by failure of property owners to object while the improvement was in progress, so that the city's plea of estoppel against them is not well taken.

## **Department 2.**

Appeal from Circuit Court, Yamhill County; H. H. Belt, Judge.

Suit by G. W. Byers, Jr., and others, against the City of Sheridan, a municipal corporation. From a decree for defendant, plaintiffs appeal. Reversed, and decree entered for plaintiffs.

This is a suit to restrain the city of Sheridan from collecting assessments for the improvement of Mill street in that city. The provision of the charter, prescribing the manner of giving notice of such proposed improvement, is as follows:

"Such notice must be given by the recorder, by order of the council, and must specify with convenient certainty the street or part thereof proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made and the time when the council will hear and determine objections and remonstrances thereto, if any."

The notice of the intention to make the improvement is as follows:

## **"Notice of Proposed Street Improvement.**

"Notice is hereby given to all persons having or owning property adjacent to and abutting upon Mill street, from the intersection of the S. P. railroad tracks, or terminus of the hard surface pavement thereon, westerly to the city limits, all in the city of Sheridan, Oregon.

"Take notice: That the common council of the city of Sheridan, Oregon, contemplates the passage of an ordinance, requiring the improvement of Mill street from the terminus of the hard surface pavement thereon at the S. P. railroad track intersection, westerly to the city limits, at the cost and expense of the abutting and adjoining property, in the following manner, to wit:

"First. By making proper excavations and fills and grading said streets to the proper subgrades and rolling and compacting the same.

"Second. By paving the roadway of said portions of Mill street, heretofore sometimes known as the county road street, to a width of 16 feet, 8 feet on either side of the center line of said street, with hard surface pavement thereon.

"Third. By constructing proper headers.

"Fourth. By constructing proper ditches, laying drain tile, and culverts at locations where needed for the proper drainage of said streets.

"Fifth. By doing other such improvement work as will make a proper and appropriate improvement, and to assess the cost and expense thereof against the adjoining and abutting property to the said part of Mill street; and

"Said hard surface pavement being a width of 16 feet and 8 feet on either side of the center line of said street, or portion thereof, to a depth of 6".

"Therefore all persons interested in said proposed improvement on Mill street, from the terminus of the hard surface pavement, westerly to the city limits, and especially the owners of the property abutting and adjacent thereon, are hereby notified that the common council will meet in the council chambers in the city hall, in Sheridan, Oregon, on the 18th day of August, 1919, at the hour of 8 o'clock p. m. of said day, to hear and determine any and all objections, if any there be, to the making of proposed improvement, and to attend at said time and place and make known your objections, if any you have, to said proposed improvement, as herein directed.

"Done by order of the common council of the city of Sheridan, Oregon, on the 5th day of August, 1919.

"Witness my hand and the seal of the city of Sheridan, Oregon, this, the 6th day of August, 1919.

"(Signed) J. R. Sanders,  
Recorder of the city of Sheridan, Oregon."

There was no remonstrance against the improvement.

The defendant answered, setting up the proceedings in full, and also pleaded an estoppel by reason of the plaintiffs having permitted the improvement to be completed without objection. Upon the trial the court found the notice sufficient and dismissed the suit, from which order plaintiffs appeal.

W. O. Sims, of Portland, for appellants.

Otto W. Heider, of Sheridan, and Frank S. Grant, of Portland, for respondent.

McBRIDE, C. J. (after stating the facts as above). In its principal features this case is subject to the same objections as were noted in the case of Henderson et al. v. Sher-

idan, 191 Pac. 350, this day decided. The notice simply described the proposed improvement as a hard surface pavement 16 feet in width. The word "pavement" is defined as "a hard, solid surface covering of stone, brick, concrete, asphalt or wood." Standard Dict. title "Pavement." Any one of these, including wood blocks, will answer the description of a "hard surface pavement." It is well known that these differ in cost, that different kinds of concrete, bitulithic, and asphalt differ in cost, and that the base and thickness of the material to be put down are important elements in their durability, and in the expense of the improvement as a whole.

[1] While technical accuracy in detail is not required, the property holder is at least entitled to be informed, in a general way, by city officials who are proposing the improvement, whether it is in the contemplation of the city to pave with brick, stone, bitulithic, concrete, asphalt, or some other material, as, under the notice given, any one of these mentioned—and perhaps others—might be employed. Unless this is done a property holder has practically no data from which to make even a reasonable guess as to what he may be called upon to pay when the improvement is completed. These general characteristics of an improvement ought certainly to be considered by the authorities before they determine to initiate it, and it is comparatively easy to specify them, and only justice to the rate payer that he should be apprised of them before being called upon to determine whether or not he will remonstrate.

[2] The plea of estoppel is not well taken; the lack of reasonable certainty in the notice goes to the jurisdiction of the city to make the improvement, and, as demonstrated in the able opinion of the late Justice Moore, in *Strout v. City of Portland*, 28 Or. 294, 38 Pac. 126, this objection is not waived by failure to object while the improvement was in progress.

The decree of the circuit court is reversed, and a decree will be entered here, enjoining the collection of the alleged assessments; but as the plaintiffs could have proceeded earlier, and thereby have prevented the improvement, they will not be allowed costs in either court.

BEAN, JOHNS, and BENNETT, JJ., concur.

[33 Idaho, 296]

**BLACK v. BLACK. (No. 3285.)**

(Supreme Court of Idaho. July 16, 1920.)

**Appeal and error** §1001(1)—Verdict or findings based on conflicting testimony not disturbed.

Where the material evidence is not all documentary but is in part oral and conflicting, this court will not disturb either the verdict of the jury or the finding of the trial court if there is substantial evidence to support either.

**Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.**

Action by Susie M. Black against Bert Black to contest the admission to probate of the purported will of William A. Black, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Thos. E. Buckner and Stone & Jackson, all of Caldwell, for appellant.

Martin & Martin, of Boise, for respondent.

**BUDGE, J.** This is an appeal from a judgment of the district court reversing an order of the probate court of Canyon county by which the purported will of William A. Black, deceased, had been admitted to probate. The only issue before the district court was whether or not the purported will had been entirely written, dated, and signed by the deceased. The case was tried before the court and a jury; the latter returning a verdict that the deceased did not write, date, and sign the document in question.

Appellant seeks to bring the case within the rule announced by this court in *Roby v. Roby*, 10 Idaho, 139, 77 Pac. 213, and followed in the cases of *Stoneburner v. Stoneburner*, 11 Idaho, 603, 83 Pac. 938; *Van Camp v. Emery*, 13 Idaho, 202, 89 Pac. 752; *Van Camp v. Breyer*, 13 Idaho, 209, 89 Pac. 754; *Village of Sandpoint v. Doyle*, 14 Idaho, 749, 95 Pac. 945, 17 L. R. A. (N. S.) 497; *Council Imp. Co. v. Draper*, 16 Idaho, 541, 102 Pac. 7; *Spofford v. Spofford*, 18 Idaho, 115, 108 Pac. 1054; *Parsons v. Wrble*, 19 Idaho, 619, 115 Pac. 8, 13—that:

"Where a trial has been had entirely upon depositions, and the trial court has not seen and heard the witnesses, the appellate court is in as favorable position for judging of the truthfulness of the witnesses and the weight of the evidence as the trial judge, and will con-

sider the same as if originally heard in the appellate court."

The rule sought to be applied in this case is not in point for the reason that all of the material testimony offered and received was not in writing and did not consist of evidence of written documents or writings of the deceased, but was made up both of documentary evidence and much conflicting oral testimony.

This court held in *Ainslie v. Idaho World Printing Co.*, 1 Idaho, 641, that where the material evidence is not all documentary, but is in part oral, the rule contended for by the appellant does not apply. The distinction was later clearly pointed out in *Jones v. Marshall*, 24 Idaho, 678, 135 Pac. 841, in the following language:

"In the first place, it has been suggested that under the rule announced by this court in *Roby v. Roby*, 10 Idaho, 139, \* \* \* it is our duty to examine and weigh the evidence in this case as though it were being originally tried before this court. The fact that oral testimony was introduced before Judge Flynn who rendered the decree in this case is a sufficient and complete answer to the contention made in this respect. This court has never departed from the rule that it will not disturb a judgment entered upon conflicting evidence where any part of the evidence has been given by the witnesses in person before the trial court. The rule applied in the foregoing cases applies only to a case where no witnesses were produced before the trial court or where the whole case was submitted on depositions, report of referee, or documentary evidence, and no witnesses appeared and testified before the court."

It is apparent, therefore, that the case falls clearly within the rule, so frequently announced, that this court will not disturb either the verdict of a jury or the finding of the trial court where the evidence is conflicting and there is substantial evidence to support either the verdict or the finding. *Hardy v. Ward*, 31 Idaho, 1, 168 Pac. 1075; *Casady v. Stuart*, 29 Idaho, 714, 161 Pac. 1026; *Hemphill v. Moy*, 31 Idaho, 66, 169 Pac. 288; *Brown v. Hardin*, 31 Idaho, 112, 169 Pac. 293; *Fleming v. Benson*, 32 Idaho, 103, 178 Pac. 482; *Lisenby v. Intermountain State Bank*, 33 Idaho, —, 190 Pac. 855.

The judgment is affirmed. Costs awarded to respondent.

**MORGAN, O. J., and RICE, J., concur.**

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(33 Idaho, 169)

**TALBOT v. COLLINS et al.**

(Supreme Court of Idaho. June 30, 1920.)

1. Constitutional law §55—Legislature cannot prescribe time or place of hearing of causes pending in the Supreme Court.

Under the Constitution of this state, the Legislature may not prescribe the time or place of hearing and determining any cause pending on appeal in the Supreme Court.

2. Appeal and error §616(2)—Record must contain certificate identifying papers used on motions involved in appeal.

On appeal from an order of the court granting or denying a contested motion, the action of the court cannot be reviewed, unless the record contains a certificate identifying the papers presented to and used in the consideration of the motions.

3. Appeal and error §193(9) — Whether cross-complaint states cause of action considered on appeal from judgment.

The question as to whether a cross-complaint states a cause of action so as to invest the trial court with jurisdiction to consider the matters therein set forth is fundamental, and presents itself on appeal from a judgment.

4. Insane persons §89—Action to recover for services or advances to ward after restoration to competency will not lie.

A personal action cannot be maintained to recover for services rendered to or money advanced for the benefit of an incompetent ward under guardianship, against the ward after he has been restored to competency.

5. Courts §202(1)—Procedure in estate of incompetent is proceeding in rem.

The procedure in a probate court with relation to the estate of an incompetent person is in the nature of a proceeding in rem.

6. Insane persons §89—Decree adjudging amounts due from ward to guardian not basis of action against ward after restoration to competency.

A decree of a probate court, made on the settlement of the final account of a guardian, adjudging that a certain sum is due the guardian from the ward, cannot be made the basis of a personal action against his former ward after he has been restored to competency. Such sum must be recovered, if at all, out of his former ward's estate.

Appeal from District Court, Bonneville County; James G. Gwinn, Judge.

Action by Samuel Talbot against William Lindsay and Lindsay & Co. and others, to foreclose mortgages, wherein W. E. Collins and others file cross-complaint. Judgment in favor of cross-complainants and defendants named appeal. Reversed in part and modified in part.

Peterson & Coffin, of Pocatello, for appellants.

W. A. Beakley, of Blackfoot, for respondents.

RICE, J. Upon application of appellants and on good cause shown, it was ordered that this cause be transferred from the Pocatello to the Boise calendar for immediate hearing. The respondents objected to the jurisdiction of the court to hear this cause at Boise without consent of all parties to the action, and moved that it be retransferred to the Pocatello calendar.

The constitutional and statutory provisions bearing upon this question are the following:

"The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted." Const. art. 2, § 1.

"At least four terms of the Supreme Court shall be held annually; two terms at the seat of the state government, and two terms at the city of Lewiston, in Nez Perce county. In case of epidemic, pestilence, or destruction of courthouses, the justices may hold terms of Supreme Court provided by this section at other convenient places, to be fixed by a majority of said justices. After six years the Legislature may alter the provisions of this section." Article 5, § 8.

"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges, thereof. The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." Const. art. 5, § 9.

"The Legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government; but the Legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution." Const. art. 5, § 13.

"The Supreme Court, or any two of the justices thereof may, by an order, fix the times for holding the terms of the Supreme Court, which shall not be changed oftener than once in each year, except as herein provided. At least five terms shall be held annually; two terms at the seat of the state government, one term at Lewiston, in Nez Perce county, one term at Coeur d'Alene, in Kootenai county, and one term at Pocatello, in Bannock county." O. S. § 6449.

"Unless by agreement of parties, causes in which writs or appeals are taken to the Supreme Court: \* \* \*

"(3) From the counties of \* \* \* Bing-

ham, Bonneville \* \* \* shall be heard at Pocatello." C. S. § 6451.

Rule 36 (176 Pac. xx) of the rules of this court provides that causes arising in the territory comprising the counties of Bingham, Bonneville, and certain other counties of the state shall be heard either at Boise or Pocatello, as the parties may agree or the court may order.

It is apparent that rule 36 cannot be reconciled with the provisions of C. S. § 6451, above quoted.

In the case of *Mahoney v. Elliott*, 8 Idaho, 190, 67 Pac. 317, it was held that the place of hearing an appeal from an action or special proceeding is determined by the statute, and that there is no discretion with the court to require a hearing on the application of one of the parties alone at a place other than that designated by the statute.

[1] By providing that the Legislature may regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all courts below the Supreme Court, power to regulate the methods of proceeding in the Supreme Court is denied the Legislature.

The place where and the time when the Supreme Court shall hear arguments upon an appeal is purely a matter of procedure. After the Supreme Court has acquired jurisdiction of a cause on appeal, and after the record upon which the appeal is to be heard has been filed, the court has exclusive control of the case. Any other body or department of government cannot prescribe where and when the court shall proceed in the exercise of its jurisdiction without regulating the methods of proceeding in the Supreme Court.

It will be observed that article 5, § 8, of the Constitution provides only for the terms of the Supreme Court, and where they shall be held. It makes no provision as to the causes which shall be considered at the various terms, nor does it intimate that the jurisdiction of the court does not continually extend throughout the entire state. It provides that after six years the Legislature may alter the provisions of that section, which has been done in C. S. § 6451, above referred to, but the Legislature has attempted to go further and limit the place at which a cause may be heard, except upon agreement of the parties. We are satisfied the Legislature has no power to create such a limitation.

The case of *Mahoney v. Elliott*, supra, is overruled.

This is an action for the foreclosure of certain mortgages upon real estate. Respondents W. E. Collins, Lizzie S. Collins, Crowley, Dickinson, and others were made parties defendant. The complaint alleges that the respondents named above claim an interest in or lien on the property described in the mortgages. Respondents above named answered and filed cross-complaints. Judgment was entered, foreclosing the mortgages

and directing a sale of the property to pay the mortgage debts, and also giving a personal judgment for certain sums of money to respondents, W. E. Collins, Lizzie S. Collins, Crowley, and Dickinson. The appeal is from that portion of the judgment in favor of the respondents and cross-complainants above named.

The respondent Crowley in his cross-complaint sets up two causes of action. In the first it is shown that on June 3, 1918, appellant Lindsay was duly adjudged an incompetent, and a guardian of his person and estate was appointed; that the cross-complainant, in proceedings leading up to the decree declaring Lindsay an incompetent, acted as attorney and counselor for Lula K. Lindsay, wife of the incompetent, and her guardian ad litem, and assisted in said proceedings, and that the court, in the rendition of the decree, ordered that the cross-complainant be paid a reasonable fee for his services; that thereafter the cross-complainant presented his duly verified claim for the services so rendered for the sum of \$794.20, and that the claim was duly allowed by the guardian and by the probate court which had jurisdiction of the matter; that appellant Lindsay was restored to competency by order of the probate court on or about June 1, 1919.

In his second cause of action respondent Crowley alleges that prior to the adjudication of incompetency of appellant Lindsay there was due him the sum of \$210.24 for services rendered and money advanced by the cross-complainant; that claim for this sum was presented to the guardian and allowed by the guardian and the probate court.

The cause of action alleged in the cross-complaint of respondent Dickinson is similar in all respects, except as to amount, to that found in respondent Crowley's first cause of action.

In the cross-complaint of W. E. Collins and Lizzie S. Collins, husband and wife, it is alleged that appellant Lindsay became indebted to Lizzie S. Collins in the sum of \$3,023.31, for certain assigned claims of expert alienists who were employed to testify in resisting the application of the appellant to be declared competent; also assigned claims for attorney's fees, paid both in the proceeding to have Lindsay declared an incompetent and in the later proceeding in which he was declared to be competent; for money advanced for the use and benefit of Lula K. Lindsay, wife of appellant Lindsay, and for other expenses connected with the estate of the incompetent. W. E. Collins alleged that he was guardian of appellant William Lindsay while he was incompetent, and that upon the settlement of his final account as guardian the probate court ascertained and decreed that there was due him from said appellant the sum of \$4,880.47.

Appellants filed demurrers to the several

cross-complaints above mentioned, which were overruled by the trial court and 10 days allowed in which to answer. Appellants failed to file their answers within the time allowed by the court, and defaults for failure to answer were entered. Appellants afterwards, and within the statutory time, moved the district court to set aside their several defaults. The motions were denied. They have appealed from the orders of the trial court denying the motions.

[2] The record on appeal contains no certificate identifying the papers presented to and used by the trial judge in considering these motions, and therefore this court cannot review the action of the trial court in this respect. *Dudacek v. Vaught*, 28 Idaho, 442, 154 Pac. 995; *Biwer v. Van Dorn*, 32 Idaho, 213, 179 Pac. 953.

[3] The record shows that the demurrers to the various cross-complaints, above mentioned, were overruled by consent of the parties. Nevertheless, the question as to whether the cross-complaints state causes of action so as to invest the trial court with jurisdiction of the matters set forth therein is fundamental and presents itself. *Western Loan & Bldg. Co. v. Gem State Lumb. Co.*, 32 Idaho, 497, 185 Pac. 554; *Newport Water Co. v. Kellogg*, 31 Idaho, 574, 174 Pac. 602. The cross-complaints of Dickinson and Lizzie S. Collins, and the first cause of action in the cross-complaint of Crowley, all attempt to set forth causes of action against appellant Landsay as bases for a personal judgment for services rendered and moneys advanced for the benefit of the incompetent, whose estate was under guardianship at the time, and for attorney fees for services rendered in the proceeding to have him declared incompetent, and afterwards restored to competency.

[4] In no event can a personal action be maintained to recover for services rendered to or money advanced for the benefit of an incompetent ward while under guardianship. No one could render himself personally liable for such claims but the guardian himself. He may be reimbursed from the estate of the ward in the settlement of his accounts, if the court is legally satisfied that the items were necessary or properly expended by him for the benefit of the ward's estate, or for his maintenance, support, or education. An incompetent person under guardianship cannot create a personal liability, either directly or through an agent. A guardian is not the agent of his incompetent ward. Neither is one who employs an attorney to appear in a proceeding to have a person adjudged incompetent, or restored to competency, such agent. *Morse v. Hinckley*, 124 Cal. 154, 56 Pac. 896; *Fish v. McCarthy*, 96 Cal. 484, 31 Pac. 529, 31 Am. St. Rep. 237; *Andrus v. Blazzard*, 23 Utah, 233, 63 Pac. 888, 54 L. R. A. 354; *Harter v. Miller*, 67 Kan. 468, 73

Pac. 74; *Garver v. Thoman*, 15 Ariz. 38, 135 Pac. 724.

The second cause of action alleged in the cross-complaint of respondent Crowley states facts which could support a judgment. Although it is alleged that the claim was presented to the guardian and allowed by him and by the court, it is also alleged that it has not been paid. While it was irregular to prosecute to judgment such an action under a cross-complaint in a foreclosure action, since it was no lien upon the property described in the mortgages, yet the district court had jurisdiction to entertain the action, and its judgment thereon will not be disturbed.

[5] Respondent W. E. Collins based his claim upon the judgment and decree of the probate court in settlement of his final account as guardian, whereby it was found that the sum claimed was due him. Such a decree cannot be made the basis of a personal action against a former ward after he has been restored to his competency. The whole procedure in a probate court with relation to the estate of an incompetent is in the nature of a proceeding in rem; the res being the estate of the incompetent. Its action, so far as the estate of the ward is concerned, relates exclusively thereto.

In the case of *In re Kincaid's Estate*, 120 Cal. 203, 52 Pac. 492, it is said:

"When the guardian assumed his office, he contracted not only to manage the estate according to law and for the best interest of the ward, but also that at the termination of his trust he would account for the property, estate and moneys of the ward in his hands, and would pay over and deliver such as remained to the person entitled thereto. This is the account which the probate court has jurisdiction to determine. No jurisdiction is given to ascertain a balance against a former ward, except as that will tend to show what the guardian must pay or deliver to his former ward."

In the same case it is said:

"As the accounting is in the nature of a proceeding in rem, a finding that the former ward was indebted to the former guardian would have no force or effect in an independent proceeding. It could affect the estate only, and would not even be evidence to charge the former ward in another proceeding."

[6] Whatever balance may have been found due to the guardian on the final accounting can only be recovered by the guardian, if at all, out of his former ward's estate. To permit an independent personal judgment therefor in another action would amount to creating a liability against an incompetent person indirectly, which would not be permitted directly, and would subject the future estate which the former ward might accumulate to the burden of an indebtedness which he had no power to incur. See *In re Kincaid's Estate*, supra; *In re Clanton's Estate* and



Guardianship, 171 Cal. 381, 153 Pac. 459; In re Boyes' Estate, 151 Cal. 143, 90 Pac. 454; Wyatt v. Woods, 31 Mo. 851; Frost v. Winston, 32 Mo. 489.

No added force is given to the various claims of cross-complainants by reason of the orders of the probate court allowing them. Assuming that these orders were in the nature of judgments, yet they are solely against the ward's estate.

That portion of the decree in which judgment is awarded in favor of cross-complainants W. E. Collins, Lizzie S. Collins, and A. S. Dickinson is reversed. The portion thereof in which judgment is awarded in favor of cross-complainant C. E. Crowley will be modified by reducing the same to the sum of \$210.24, plus interest at 7 per cent. per annum from December 28, 1918. Costs awarded to appellants as against respondents W. E. Collins, C. E. Crowley, and A. S. Dickinson.

MORGAN, C. J., and BUDGE, J., concur.

(33 Idaho, 230)

COLLINS v. LINDSAY. (No. 3517.)

(Supreme Court of Idaho. July 22, 1920.)

1. Insane persons  $\S$  33(2)—Appeal lies to district court from ruling on application for letters of guardianship.

Under C. S.  $\S$  7173, an appeal lies from the probate court to the district court from an order granting or refusing to grant letters of guardianship.

2. Insane persons  $\S$  33(2)—Trial in district court as to guardianship is de novo; district court authorized to retry issues framed only.

Upon an appeal to the district court from the probate court in guardianship matters, upon questions of both law and fact, the trial in the district court shall be de novo. The district court has jurisdiction to retry only the issues framed in the probate court, and is authorized to enter a proper judgment upon the issues before it. Its judgment should be certified back to the probate court for execution.

3. Insane persons  $\S$  33(2)—Issuance of letters of guardianship by district court on appeal irregular.

Issuance of letters of guardianship by the district court in pursuance of its judgment ordering the appointment of a guardian, upon an appeal from the probate court from an order refusing to appoint a guardian, is an irregularity.

4. Insane persons  $\S$  33(2) — Probate court may appoint substitute guardian on resignation of guardian appointed by district court.

Upon the resignation of a guardian to whom letters of guardianship were irregularly issued out of the district court, the probate court has power to appoint a guardian in his stead upon proper proceedings taken therefor.

Appeal from District Court, Bingham County; F. J. Cowen, Judge.

Petition by W. E. Collins, as guardian of William Lindsay, an incompetent, to settle his final account, to which the incompetent filed objections. An order was entered settling the account, and the objector appealed to the district court, which rendered judgment that the guardianship proceedings were void ab initio, and the guardian appeals. Reversed and remanded.

W. A. Beakley, of Blackfoot, for appellant.  
Peterson & Coffin, of Pocatello, for respondent.

RICE, J. W. E. Collins filed his final account in the probate court of Bingham county, in which he alleged that he was appointed guardian of William Lindsay, an incompetent person, on December 28, 1918, in place of V. K. Tuggle, who had resigned as guardian. William Lindsay filed objections to the allowance of the final account, and the various items thereof, and denied that Collins was ever appointed guardian of his person or estate. From the exhibits in the case it appears that Lindsay was duly restored to competency by order of the probate court on May 28, 1919. The probate court entered an order settling the account. Lindsay appealed to the district court from the order of settlement upon questions both of law and fact. A hearing was had by the district court, and the following order was entered therein:

"Now, therefore, it is hereby ordered, adjudged, and decreed that the guardianship proceedings against William Lindsay are and were void and null and of no effect ab initio and that W. E. Collins, nor any other person was ever the legal or other guardian of William Lindsay's person or estate, and all proceedings had thereunder are void; that each and every claim filed against William Lindsay in said void proceedings, and each and every claim filed against the estate of William Lindsay in said void proceedings were and are invalid and are hereby disallowed."

Collins has appealed to this court.

The district court did not indicate in its order the grounds upon which it held the guardianship proceedings to be void. From the exhibits in the case it appears that a petition was filed in the probate court of Bonnevillie county by Lula K. Lindsay, wife of respondent, praying that respondent be adjudged insane and incompetent to manage his affairs, and that V. K. Tuggle be appointed as guardian of his person and estate. Upon the hearing on the petition the probate court found that respondent was capable of taking care of himself and managing his property, and thereupon entered the following order:

"It is therefore considered, adjudged, and decreed by the court that the petition filed herein by Lula K. Lindsay for the appointment of a guardian for the person and estate of William Lindsay, and adjudging said William Lindsay to be insane and incompetent to manage his affairs, be and the same is hereby denied and dismissed."

Lula K. Lindsay appealed to the district court from the last-mentioned order on questions of both law and fact. The district court reversed the order of the probate court, and found that respondent was of unsound mind and mentally incompetent to manage his property and affairs, and entered an order to the effect that V. K. Tuggle, of Idaho Falls, "be and he is hereby appointed guardian of the person and estate of William Lindsay, incompetent." Upon the qualification of V. K. Tuggle, letters of guardianship were issued to him by the district court, and the cause was returned to the probate court, with instructions to proceed with the administration of the estate according to law. Thereafter Tuggle resigned as guardian, and the appellant herein was by the probate court of Bingham county appointed guardian of the person and estate of Lindsay.

[1] It is contended by counsel for respondent that no appeal lies from a finding by the probate court that a person is competent. C. S. § 7173, in part is as follows:

"An appeal may be taken to the district court of the county from a judgment or order of the probate court in probate matters:

"1. Granting, refusing or revoking letters \* \* \* of guardianship."

We are referred by respondent to the cases of *In re Moss*, 120 Cal. 695, 53 Pac. 357; *In re Funkenstein's Estate*, 170 Cal. 594, 150 Pac. 987. These cases are authority for the position that an appeal lies from the order granting or refusing to grant letters of guardianship only, and not from any preliminary finding of competency or incompetency. In the case at bar the appeal was from the order of the probate court in which the petition for the appointment of a guardian was denied. The denial of the petition is tantamount to refusal to order the issuance of letters of guardianship. Under the statute, therefore, the appeal vested the district court with jurisdiction.

[2] C. S. § 7178, provides that if an appeal

to the district court from the probate court in probate matters be on questions of both law and fact, the trial in the district court shall be de novo. Under this statute the district court had jurisdiction to retry the issues presented by the petition. *In re Estate of McVay* (on rehearing) 14 Idaho, 84, 93 Pac. 31; *Fraser v. Davis*, 29 Idaho, 70, 156 Pac. 913, 158 Pac. 233. The district court, while hearing an appeal from a probate court in probate matters, does not exercise the powers conferred upon it by the Constitution as a court of general jurisdiction, but exercises the powers conferred by the Constitution upon the probate court in probate matters. Appeal of *Slattery*, 90 Conn. 48, 96 Atl. 178; *Holt v. Guerguin* (Tex. Civ. App.) 156 S. W. 581; 21 Stand. Enc. of Proc. 670.

The district court, in the exercise of its appellate jurisdiction, is authorized to enter a proper judgment upon the issues before it. There its jurisdiction ends, and whatever judgment is entered should be certified back to the probate court for execution in accordance therewith. *In re Estate of McVay*, supra; *Fraser v. Davis* (on rehearing) 29 Idaho, 81, 156 Pac. 913, 158 Pac. 233. The district court should have remanded the cause to the probate court upon the order of appointment of Tuggle as guardian, leaving it to the court to issue letters and proceed with the administration of the estate.

[3, 4] However, the issuance of the letters out of the district court was an irregularity, and upon the resignation of the guardian so appointed the probate court had power to appoint a guardian in his stead upon proper proceedings taken therefor. Respondent's denial that appellant was ever appointed guardian of his person or estate is in the nature of a collateral attack upon the order of the probate court appointing appellant as such guardian. *In re Arva and Elmer Brady*, 10 Idaho, 366, 79 Pac. 75. Since the probate court had power to make the appointment, its action in so doing was not void, and is not open to successful collateral attack.

The judgment of the district court must be reversed, and the cause remanded, with directions to the court to proceed with the settlement of the account. Costs awarded to appellant.

MORGAN, C. J., and BUDGE, J., concur.

(33 Idaho, 221)

**GRANT v. ST. JAMES MINING CO., Ltd.**

(Supreme Court of Idaho. July 13, 1920.)

1. Appeal and error  $\S$ 169, 173(1) — Questions not raised below will not be considered; defenses cannot be raised for first time on appeal.

As a general rule, a party cannot avail himself of a defense for the first time in the appellate court; nor will a question not raised in the trial court be considered on appeal.

2. Mines and minerals  $\S$ 114 — Defect in claim of laborer's lien waived by failure to object.

A defect or irregularity in the claim of lien is waived by a failure to make timely objection thereto.

3. Mines and minerals  $\S$ 117 — Evidence on foreclosure of laborer's lien held to sustain finding as to appropriation of property.

A finding that respondent had not appropriated property to his own use and benefit is sustained by evidence which shows that a sale of the property by him to a third party was ratified by the proper officers of the company owning the property.

Appeal from District Court, Shoshone County; Edgar C. Steele, Presiding Judge.

Action by Peter B. Grant against the St. James Mining Company, Limited, to foreclose a laborer's lien. Judgment for plaintiff, and defendant appeals. Affirmed.

John M. Gleeson, of Spokane, Wash., and H. J. Hull, of Wallace, for appellant.

Horning & McEvers and Charles L. Helman, all of Wallace, for appellee.

BUDGE, J. This is an action to foreclose a laborer's lien. The claim of lien upon which the action is based was for \$2,693. The action was tried by the court. Findings of fact and conclusions of law were filed and a judgment entered decreeing respondent entitled to a lien for \$525, the foreclosure of the same, and awarding him attorney's fee in the sum of \$125, and his costs. This appeal is from the judgment. Appellant contends that the court erred in not dismissing the cause and denying respondent a lien for the reason that the claim filed was greatly in excess of any possible claim against appellant. No issue was raised on this point, nor was any motion or objection made raising it upon the trial of the cause.

[1, 2] The rule is well settled that a party cannot avail himself of a defense for the first time in the appellate court, nor will a question not raised in the trial court be considered on appeal. *Smith v. Sterling*, 1 Idaho, 128; *Taylor v. Hall*, 8 Idaho, 757, 71 Pac. 116; *Miller v. Donovan*, 11 Idaho, 545, 83 Pac. 608; *Marysville Merc. Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026.

While there are certain exceptions to the foregoing rule, they are not involved in this proceeding. A particular application of this general rule has been made in cases of this character by holding that a defect or irregularity in the claim of lien is waived by a failure to make timely objection thereto. 27 Cyc. 206; *General Fire Extinguisher Co. v. Magee Carpet Works*, 199 Pa. 647, 49 Atl. 366; *Wharton v. Real Estate Investment Co.*, 180 Pa. 168, 36 Atl. 725, 57 Am. St. Rep. 629; *Klinefelter v. Baum*, 172 Pa. 652, 33 Atl. 582; *Wheeler v. Ralph*, 4 Wash. 617, 30 Pac. 708.

[3] It is next urged that the court erred in not finding that respondent was responsible for certain dynamite valued at \$330, which it is alleged he had wrongfully charged to appellant and sold to the Guelph Company. The contention upon the trial was that respondent had purchased this dynamite for appellant without authority and had converted it to his own use and had never accounted to appellant therefor. The evidence shows that the dynamite was purchased for appellant company and that the purchase was authorized by one Whelan then the secretary of the company. The court found that appellant's claim that respondent had appropriated the dynamite to his own use and benefit was not supported by the evidence. This finding is supported by the evidence, which, although conflicting, shows that the sale to the Guelph Company was ratified by the proper officers of appellant company.

Appellant also insists that the court erred in not finding that respondent had received \$214 for boarding two men from the O. & R. Mining Company and appropriated it to his own use and benefit. However, this item in the pleadings was only claimed by appellant company as an offset against other sums claimed by respondent which the court disallowed. The answer admits that appellant owes respondent \$525 for services, subject only to an offset for the \$330 item above disposed of, and a certain draft as to which appellant's claim has been upon this appeal abandoned.

Assignments 4, 5, and 6 need not be discussed, since they are in effect disposed of by what has already been said.

The seventh assignment, that the court erred in allowing an attorney fee and in making a decree in favor of plaintiff, is without merit for the reason that it depends upon the sufficiency of the first assignment touching the existence of any lien whatever; it having been stipulated upon the trial that, if the court found respondent entitled to a lien, he might award such fee as he thought reasonable.

The judgment is affirmed. Costs are awarded to respondent.

MORGAN, C. J., and RICE, J., concur.

(44 Nev. 164)

**Application of MORIARITY.  
(No. 2458.)**

(Supreme Court of Nevada. Aug. 6, 1920.)

**1. Criminal law §573—One accused of crime is entitled to a speedy trial.**

In view of Rev. Laws, § 6855, one accused of crime is entitled to a speedy trial.

**2. Criminal law §573—"Session of court" as affecting right to speedy trial defined.**

Under Criminal Practice Act, § 546, providing that if a defendant whose trial has not been postponed on his application is not brought to trial at the next session of the court at which the indictment or information is triable after the same is found or filed, the court shall order the same dismissed unless for good cause to the contrary, the term "session of court," in view of the abolition of regular terms, means a sitting when the court is organized to hear and determine criminal cases, so the continuing of a criminal case at a time when no jury was drawn, etc., is not a denial of the right to speedy trial, so as to warrant the quashing of the indictment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Session.]

**3. Constitutional law §211—Statute denouncing syndicalism not class legislation.**

St. 1919, c. 22, denouncing criminal syndicalism, is not objectionable as class legislation denying equal protection; it being applicable to any person committing the acts denounced.

**4. Habeas corpus §30(2)—Imperfections in indictment not considered.**

On habeas corpus, imperfections in the indictment because it consisted of generalities and conclusions cannot be considered, and if the indictment attempts to state an offense of a kind which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to state an offense will not be examined into.

**5. Habeas corpus §33—Excessiveness of bond not considered where petitioner is unable to furnish any.**

Even though the action of the court in raising the bail from \$2,500 to \$5,000 violated the spirit of Const. art. 1, § 6, forbidding excessive bail, the matter will not be reviewed on habeas corpus, where it appeared petitioner was unable to furnish any bail whatsoever.

In the matter of the original application of Mike Moriarity for a writ of habeas corpus to secure release from the custody of the sheriff of Nye county who was holding him under indictment. Proceedings dismissed, and petitioner remanded.

M. J. Scanlan, of Reno, for petitioner.

L. B. Fowler, Atty. Gen., and H. H. Atkinson, Dist. Atty. of Nye County, of Tonopah, for respondent.

**COLEMAN, C. J.** This is an original proceeding in habeas corpus. It appears from the return to the writ that petitioner is held by the sheriff of Nye county under an indictment returned by the grand jury of that county.

On January 14, 1920, the petitioner and one M. C. Sullivan were separately indicted by the grand jury of Nye county for similar offenses, and on February 7, 1920, the two cases were set for trial for March 29, 1920, with the understanding that the Moriarity case should follow the Sullivan case. On April 24 the court raised the bond of petitioner from \$2,500 to \$5,000. Prior to March 29 the defendant Sullivan received word of the serious illness of a brother in Butte, Mont., and the court permitted him to leave the state on his own recognizance. On March 20 counsel for Sullivan (who was at that time, and is now, attorney for this petitioner) sent from Reno the following telegram to the district judge at Tonopah:

"Sullivan advises death of brother and illness of sister and requests postponement. Any time later suitable for me unless state insists on proceeding with trial of Moriarity."

In pursuance of this telegram, it was agreed that the two cases might be postponed for trial, and on March 29, counsel appearing for both defendants, the Sullivan case was set for May 12 and the Moriarity case for May 19. It also appears that on May 3 the district court of Nye county drew a panel of jurors for the trial of criminal cases to appear May 12, and that on the following day, May 4, the presiding judge of that court received a telegram from Sullivan's attorney, reading as follows:

"Reno, Nev., May 4, 1920. Judge Averill, Tonopah, Nev. Just received wire Sullivan subpoenaed as witness in murder inquest which will probably last two or three weeks. Request postponement his case. Kindly advise me soon as convenient. M. J. Scanlan."

It also appears that on May 4 the district court of Nye county entered an order vacating the order entered the day before for the service of a panel of jurors to appear May 12, and continued the trial of the Sullivan case to September 6, 1920.

It is alleged in the petition that the petitioner has at all times since February 7 been ready and anxious for a trial of his case, has never asked for nor desired a continuance, and that he has been confined in the jail of Nye county continuously since January 14, 1920, except for the period between March 31, 1920, and April 21, 1920. It is also alleged that on May 7 counsel for petitioner was informed that the said district court had vacated the order setting petitioner's case for trial on May 19, and had indefinitely postponed the same, without informing either the

petitioner or his counsel of its intention to hear or consider an application for such an order, and that immediately upon receiving notice of such an order counsel protested against such continuance and insisted upon the trial of petitioner on May 19.

The return shows that on May 19 the petitioner was brought into court, at which time his counsel called the attention of the court to the fact that it was the time previously fixed for the trial of his case. It also appears that the matter was continued by the court until the following day, May 20, when the court heard a motion interposed by the defendant to dismiss, and also an application by the state for a continuance of the case for trial, which motion to dismiss was denied and an order entered continuing the case until the next calendar. Hence these proceedings.

[1, 2] That a person charged with a crime is entitled to a speedy trial no one will deny (Rev. Laws, § 6855; *Ex parte Stanley*, 4 Nev. 113; *Ex parte Larkin*, 11 Nev. 90), but as to what constitutes a speedy trial is frequently a question of considerable difficulty to determine. Counsel for petitioner contends that our statute settles the question, so far at least as this matter is concerned, and to sustain his position our attention is directed to section 546 of our Criminal Practice Act as amended (Stats. 1919, p. 436, § 92), which reads as follows:

"If the defendant, whose trial has not been postponed upon his application, is not brought to trial at the next session of the court at which the indictment or information is triable, after the same is found or filed, the court shall order the indictment or information to be dismissed, unless good cause to the contrary be shown."

It is asserted that there was a session of court on May 19, and, no good cause being shown as a ground for continuance, petitioner was denied a speedy trial, and hence is entitled to his discharge. As to this contention, we may say that there was no such session of court on the date mentioned as is contemplated by the section of the Practice Act quoted. In most of the states of the Union the law requires the holding of regular terms of court, and such was the law in Nevada for a while, but in view of the conditions existing in this state it was thought wise to dispense with regular terms of the district court. *State v. Jackman*, 31 Nev. 511, 104 Pac. 13.

The term "session of the court," as used in the section quoted, does not refer to every occasion when court convenes, for, as is well known, the court may convene to hear matters which require only the consideration of the presiding judge, but the term "session of the court," in the connection in which it is used in the section quoted, necessarily alludes to a "session" when the court is organized to hear and determine criminal cases.

It cannot be so organized unless a jury lawfully drawn and served is present, ready to participate and perform its function, since a trial by jury is one of the constitutional guarantees enjoyed by those charged with crime. The Supreme Court of Pennsylvania, in *Clark v. Commonwealth*, 29 Pa. 129, speaking of a similar statute, in which a kindred question to that here presented was involved, said:

"Now, the evident construction of this section is, that the 'term, session, or court' intended by the act is a legally constituted and competent term, session, or court. It meant that a prosecutor should not allow two such terms or sessions of the court, at each of which the defendant might be legally indicted or tried, to elapse without bringing on the prosecution. But to constitute a competent court, several things are necessary: The presence of the president judge and jurors, grand and petit, drawn, summoned, and impaneled according to law. \* \* \* It is only after two terms, at both of which it was possible to indict and try them according to law, that they became entitled to a discharge. The statute was made to restrain the malice and oppression of prosecutors, and to relieve wrongful imprisonment; not to embarrass the administration of the criminal law; not to relieve righteous imprisonment and to defeat public justice."

See, also, *Commonwealth v. Brown*, 11 Phila. 370.

[3] It is next contended that the act under which petitioner was indicted is unconstitutional, in that it is class legislation, and denies each person equal protection of the law. There is no merit whatever in this contention. The statute (Stats. 1919, p. 33) makes any one of certain acts a felony, and provides that "any person" who commits any of the acts mentioned shall be guilty of a felony. The statute does not aim at any class, nor does it deny to any person equal protection of the law, but it is expressly intended to reach "any person," regardless of the class to which he belongs, who commits any of the acts designated. In the very recent matter of *Ex parte McGee*, 44 Nev. —, 189 Pac. 622, we held that the test of whether or not a statute denies the equal protection of the law is whether all persons similarly situated are affected alike in respect to the privileges conferred and the liabilities imposed. The act in question does not offend against this rule.

[4] The third contention, to the effect that the indictment does not charge a crime because it consists of generalities and conclusions, cannot be considered in a habeas corpus proceeding. We think the correct rule on this point is stated by the Supreme Court of California in *Ex parte Ruef*, 150 Cal. 665, 89 Pac. 605, wherein it is said:

"It is claimed that the indictments fail to state a public offense. On habeas corpus the inquiry into the sufficiency of an indictment is

limited. We think the true rule is that where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus. Here the indictments clearly attempt to charge extortion, a crime defined by section 518 et seq. of the Penal Code, and within the jurisdiction of the superior court. Without expressing any opinion as to whether these indictments should be held to be good on demurrer or other direct attack, they are at least not, under the rule stated, so defective as to permit us to hold them void in this proceeding."

This rule is sustained by an overwhelming weight of authority, as appears from a note to *Ex parte Robinson*, L. R. A. 1918B, 1148.

[5] Counsel for petitioner seems to be of the impression that great wrong and oppression was wrought by the raising of the bond of petitioner from \$2,500 to \$5,000, and by the denial by the court on May 20 of the request to permit petitioner to go on his own recognizance. It may be that the spirit of the provision of the Constitution against excessive bail (article I, § 8) has been outraged; but this is not an application to have the bond reduced, nor does the petition or the return justify such an order, for in the petition it is said that petitioner is unable to furnish bond in any sum. Hence we decline to consider the question of ordering a reduction of the bond.

It is not contended that the district court abused its discretion or in any way violated the rights of the petitioner in entering the order of May 4, vacating the order of the previous day for the service of a panel of jurors to appear May 12.

For the reasons given, it is ordered that these proceedings be dismissed and that the petitioner be remanded to the custody of the officers.

SANDERS and DUCKER, JJ., concur.

(79 Okl. 90)

**MOUNTS v. BOARDMAN CO. et al.**  
(No. 9771.)

(Supreme Court of Oklahoma. July 20, 1920.)

*(Syllabus by the Court.)*

1. Principal and agent §145(2)—Agent dealing in his own name binds principal.

For most purposes the contract of an agent, who deals in his own name without disclosing that of his principal, is the contract of the principal, and when discovered the principal may be held liable, as a general rule, unless it clearly appears that the contracting party intended to give exclusive credit to the agent.

2. Principal and agent §23(1)—Implied agency established by words or conduct.

An implied agency may be established from words or conduct of the parties and circumstances of the particular case, and, while it is more readily inferable from a series of transactions, it may be implied from a single transaction.

3. Principal and agent §24 — Agency when resting in parol is for jury.

In law actions in this jurisdiction the question of agency, when resting in parol, is a question of fact to be determined by the jury.

4. Husband and wife §25(6)—Mere relationship does not make husband wife's agent.

The relationship of husband and wife will not, unaccompanied by other circumstances, authorize the conclusion that the husband is the agent of his wife; but such fact may be taken into consideration, and is usually entitled to considerable weight when taken in connection with other circumstances as tending to establish the facts of agency.

5. Appeal and error §1001(1)—Verdict not set aside where evidence tends to support it.

In an action at law the verdict of the jury will not be set aside on the ground of insufficiency of evidence where there is any evidence reasonably tending to support it.

6. Appeal and error §1170(7)—Statute prevents reversal for erroneous admission of evidence unless miscarriage of justice results.

This court is not authorized to reverse a case on the erroneous admission of evidence, unless, after an examination of the entire record, it appears to the court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.

Error from District Court, Tillman County; Frank Mathews, Judge.

Action by the Boardman Company against Kate L. Mounts and another. Judgment for plaintiff, and defendant named brings error. Affirmed.

Mounts, Davis & Williams, of Frederick, for plaintiff in error.

Edward Splers, of Oklahoma City, and Wilson & Roe, of Frederick, for defendants in error.

RAINEY, C. J. This action was instituted in the district court of Tillman county by the Boardman Company as plaintiff against John H. Mounts and Kate L. Mounts as defendants.

The plaintiff, the Boardman Company, sold one John H. Mounts two sites to be erected on the southeast quarter of section 12, township 3 south, range 15 west, Tillman county, Okla., evidenced by a written contract and two promissory notes for the purchase price thereof, which were signed by John H. Mounts. It was agreed in the contract that the land should stand as security for the payment of the notes. The action was on

the contract and notes against John H. Mounts and his wife, Kate L. Mounts. John H. Mounts admitted liability. The lien claimed was abandoned, and the action proceeded to trial against Kate L. Mounts, resulting in a judgment against her, from which she appealed to this court.

Plaintiff alleged in its petition that, at the time of entering into said contract, John H. Mounts was the agent and acting for his wife, Kate L. Mounts, in the management of her property, and as such agent had authority to contract for her, and that in purchasing said silos was acting as her agent, and that the silos were erected on her land. Plaintiff further alleged that at the time of entering into said contract it believed that John H. Mounts was the owner of said land, and that it did not discover the land was the property of Kate L. Mounts until some time thereafter. The petition also alleged that Kate L. Mounts had ratified and confirmed the action of her husband, John H. Mounts, by taking and accepting said silos with full knowledge of the conditions under which they were erected.

The facts, as disclosed by the evidence, are substantially as follows: In the year 1911, John H. Mounts conveyed the land upon which the silos were erected, together with other lands, to his wife, Kate L. Mounts, for a recited consideration of \$1 and love and affection. On April 5, 1913, he, claiming to be the owner of the land, entered into a contract for the purchase of the silos, which were erected in August of that year. The defendant Kate L. Mounts knew that said silos were being erected on her land and was present part of the time and asked several questions concerning them, and, in response to a question as to how they liked them, she and her husband each replied: "They are fine." She was present when the notes for the purchase price were signed. The evidence also shows that John H. Mounts had full charge of the silos and sold silage from them later in that year, and that said silos were a permanent improvement on Mrs. Mounts' land. In 1915, Mr. Mounts entered into a rental contract for the land as agent for his wife.

[1] From the foregoing it appears that the case attempted to be presented grows out of a contract with an agent dealing in his own name without disclosing the name of his principal. In such circumstances, the law is that, as a general rule, the principal, when discovered, is liable unless it clearly appears that the contracting party intended to give exclusive credit to the agent. 21 Ruling Case Law, 890 (see cases cited in footnote).

[2, 3] Agency may be established by showing either an express appointment with authority to act, or by implication from conduct for which the principal is responsible. The plaintiff does not contend, nor does the evi-

dence show, an express appointment by Kate L. Mounts of John H. Mounts as her agent to purchase the silos in question. An implied agency may be established from words or conduct of the parties and the circumstances of the particular case, and, while it is more readily inferable from a series of transactions, it may be inferred from a single transaction. 2 C. J. 435, 436. And in law actions in this jurisdiction the question of agency, when resting in parol is a question of fact to be determined by the jury. *Leasure v. Hughes*, 178 Pac. 696; *Mass. Bonding & Insurance Co. v. Vance*, 180 Pac. 693; *Emerson-Brantingham Imp. Co. v. Ritter*, 170 Pac. 482.

[4, 5] We agree with counsel for defendant that the relationship of husband and wife existing between John H. Mounts and Kate L. Mounts does not, unaccompanied by other circumstances, authorize the conclusion that John H. Mounts was the agent of his wife. *Bryan et al. v. Orient Lbr. & Coal Co.*, 55 Okl. 370, 156 Pac. 897. But such fact may be taken into consideration, and is usually entitled to considerable weight when taken in connection with other circumstances, as tending to establish the fact of agency. 2 C. J. 440. In this case the question of whether John H. Mounts was the agent of his wife, Kate L. Mounts, in purchasing the silos, was submitted to the jury under proper instructions, and we are not authorized to set aside the verdict of the jury if there is any evidence reasonably tending to support it. *Dickinson v. Perry*, 75 Okl. 25, 181 Pac. 504; *St. Paul Fire & Marine Ins. Co. v. Robison*, 180 Pac. 702; *McCoy et al. v. Wosika et al.*, 75 Okl. 3, 180 Pac. 967; *Strong v. Day et al.*, 176 Pac. 401.

The defendant Kate L. Mounts, although present, did not testify in the case, and we are not prepared to say there is not any evidence reasonably tending to support the verdict on the question of implied agency. This makes it unnecessary for us to discuss the evidence in connection with the assignment of error to the effect that the evidence is insufficient to show ratification or that she is estopped to deny the agency.

[6] Complaint is made that the court erred in admitting over defendant's objection plaintiff's Exhibit 5, which was a property statement executed and signed by John H. Mounts, and Exhibit 8, which was a written lease of the land on which the silos were constructed, executed by John H. Mounts as agent of Kate L. Mounts; the date of said lease being the 27th day of September, 1915. Counsel do not attempt to show how defendant was prejudiced by the admission of the first-named Exhibit, and we are at a loss to see how it could have prejudiced the rights of the defendant. Although an implied agency may be established from acts of a similar nature done a short time thereafter, it is doubtful

whether this lease (Exhibit 8) was not executed too long after the silos were purchased to have been admissible to establish the fact of agency. But assuming without deciding that the lease was improperly admitted in evidence, it does not follow that the judgment should be reversed by reason thereof. Under section 6005, Rev. Laws 1910, this court is not permitted to reverse a case on account of the erroneous admission of evidence, unless after an examination of the entire record it appears to the court that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. We have examined the record and are of the opinion that the evidence is sufficient to support the judgment, after laying this evidence out of the case, and that the verdict returned by the jury is just and in furtherance of justice.

The judgment is therefore affirmed.

KANE, HARRISON, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

RAMSEY, J., concurs in the conclusion.

(79 Okl. 39)

STATE ex rel. GILL v. MORRIS, Secretary of State. (No. 10702.)

(Supreme Court of Oklahoma. July 20, 1920.)

(Syllabus by the Court.)

Constitutional law §10—State referendum inapplicable to amendment of federal Constitution.

Referendum provisions of state Constitutions and statutes cannot be applied in the ratification or rejection of amendments to the federal Constitution without violating the requirement of article 5 of such Constitution that such ratification shall be by the Legislatures of the several states or by conventions therein, as Congress shall decide.

Original proceedings in mandamus by the State, on the relation of Warren P. Gill, against Joe S. Morris, as Secretary of State. Writ denied.

Stuart, Cruce & Cruce, of Oklahoma City, for complainant.

S. P. Freeling and E. L. Fulton, both of Oklahoma City, for respondent.

KANE, J. This is an original proceeding in mandamus commenced by the complainant for the purpose of securing an order commanding the respondent, as Secretary of State, to file a certain referendum petition, which seeks to submit Senate Concurrent Resolution No. 2, which ratifies the joint resolution of the Congress of the United States proposing the prohibition amendment to the federal Constitution, to a vote of the people, pursuant to the referendum clause of the state Constitution. The respondent, as

Secretary of State, refused to receive the referendum petition or to file the same in his office or to transmit the same to the Attorney General, to provide a ballot title as provided by state law, upon the following grounds which are indorsed on the petition:

"Filing within petition is hereby refused and rejected for the reason that the 1919 session of the Legislature of Oklahoma, under its constitutional powers, by Senate Concurrent Resolution No. 2, ratified the joint resolution of the Congress of the United States, proposing the prohibition amendment to the Constitution of the United States, thereby binding the state of Oklahoma; and, which action of said Legislature is final and in conformity with the Constitution of Oklahoma, and the said resolution of the Congress of the United States, and not subject to reference to the people by referendum petition."

The prohibition amendment was proposed by the Congress pursuant to that part of article 5 of the federal Constitution, which provides, in substance, that the Congress, whenever two-thirds of both Houses deem it necessary, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part of the Constitution, when ratified by the Legislatures of three-fourths of the several states; and the concurrent resolution of the Legislature which is sought to be referred was passed for the purpose of ratifying this proposed amendment.

The contentions of the Attorney General, in behalf of the respondent, are summarized by him in his brief as follows:

"First. In adopting article 5 of the federal Constitution, wherein it is provided that the Constitution might be ratified 'by the Legislatures of three-fourths of the several states, or, by conventions in three-fourths thereof,' the intention and purpose of the constitutional convention was to exclude the people of the various states from voting directly upon amendments to the Constitution and to give such right only to their representatives in the Legislature, or in a convention called for the purpose of ratifying the amendment. That is, the word 'Legislature,' as used in this article, refers to a representative legislative body and does not refer to or comprehend the legislative power or authority of a state.

"Second. The act of the Legislature of this state in ratifying the prohibition amendment to the Constitution of the United States was not an act of the Legislature as used and contemplated in section 1, art. 5, of the state Constitution, providing for the referendum."

On the other hand, it is contended: (1) That the word "Legislature," as used in the fifth article of the Constitution of the United States, is not used in its technical and restricted sense, but means the lawmaking power of the state, in existence at the time the amendment to the Constitution of the



United States was submitted to the original states by Congress. (2) That the referendum provision of the Constitution of Oklahoma applies to all legislative action by the state Legislature, except as to those particular laws enumerated in the initiative and referendum section, and applies alike to acts, bills, and resolutions.

Whatever differences of legal and judicial opinion may have existed as to the proper solution of the questions presented herein have been definitely settled favorably to the contention of the Attorney General by the Supreme Court of the United States in the opinions recently handed down in *Hawke v. Smith*, Secretary of State, 252 U. S. —, 40 Sup. Ct. 495, 64 L. Ed. —, and *Hawke v. Smith*, Secretary of State, 252 U. S. —, 40 Sup. Ct. 498, 64 L. Ed. —.

In the first of these opinions, which reversed a decree of the Supreme Court of Ohio (126 N. E. 400) affirming a decree of the lower court by which a demurrer was sustained to a petition seeking to enjoin the submission of a referendum to the electors on the question of the ratification which the General Assembly had made of the proposed eighteenth amendment to the federal Constitution, it was held that—

“Referendum provisions of state Constitutions and statutes cannot be applied in the ratification or rejection of amendments to the federal Constitution without violating the requirement of article 5 of such Constitution, that such ratification shall be by the Legislatures of the several states, or by conventions therein, as Congress shall decide.”

The second case involved the submission to a vote of the people under the referendum the proposed nineteenth amendment to the Constitution extending the right of suffrage to women. The Supreme Court held that the case presented the same question as that already decided in the first case, and reversed the judgment of the Supreme Court of Ohio (127 N. E. 924), which held that the Constitution of the state, requiring such submission by a referendum to the people, did not violate article 5 of the federal Constitution.

Upon the authority of those cases, the writ prayed for is denied.

All the Justices concur.

(183 Cal. 292)

**STURTEVANT v. JORDAN**, Secretary of State. (S. F. 9531.)

(Supreme Court of California. July 8, 1920.)

**I. Courts** ¶166 — Oral opinion by Supreme Court may be given, to be followed by written opinion.

Where a decision as to ballots in an election to be held soon necessitates prompt decision,

the Supreme Court may render an oral opinion, and later file a written opinion to place the court's views on record.

**2. Elections** ¶126(5)—Primary election ballot for associate justices of a District Court of Appeal should show office as single office for which two are to be selected.

In the first election of associate justices of a division of the District Court of Appeal under Const. art. 6, § 4, as amended in 1918, the primary election ballot should show the office of associate justice as a single office for which two or more persons are to be selected with all candidates appearing as for that office and not specially for either of the two associate justiceships to be filled at the election.

**In Bank.**

Application by George A. Sturtevant against Frank C. Jordan, Secretary of State of the State of California, for mandamus. Prayer of the petition for peremptory writ of mandate granted.

Andrew F. Burke, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondent.

**PER CURIAM.** The question involved in this proceeding for a writ of mandate was whether in the matter of the primary election to be held August 31, 1920, for the two associate justices of Division 2 of the District Court of Appeal of the First Appellate District, the ballot should be in such form as to show each associate justiceship as a separate and distinct office, each distinguished from the other by giving the name of the present incumbent by appointment, and to be voted upon separately; or in such form as to show the office of associate justice as a single office for which two persons are to be selected, with all candidates for the office appearing as candidates for “that office,” and not “specially” for either of the two positions to be filled at the election.

[1, 2] Owing to the necessity for a prompt decision, an oral decision was rendered from the bench at the close of the argument, sustaining the view last stated, viz.: That the ballot for the purposes of nomination and election should show the office of associate justice of Division 2 of the District Court of Appeal of the First Appellate District as a “single office,” for which two persons are to be selected, with all candidates for the office appearing as candidates for that “office,” and not “specially” for “either” of the two associate justiceships to be filled at the election. A peremptory writ of mandate in accord with the prayer of the petition was thereupon ordered issued. This opinion is filed in order that the views of the court on the question may be of record.

The conclusion of the court is in accord with the well-settled rule and practice in this

state with regard to the nomination and election of persons to public office where more than one person is to be selected for the same office, such as associate justice of the Supreme Court, judge of the superior court of counties having more than one such judge, etc., except in the matter of selection of some one to fill an unexpired term by reason of vacancy. The claim of respondent is that the situation here is different by reason of the language of a provision of section 4, art. 6, of the Constitution with relation to the first election for associate justices of the new divisions of the District Courts of Appeal of the first and second appellate districts created by amendment of that section in 1918 (see St. 1919, p. xxxii). By that provision it was decreed that upon the adoption of the amendment "the Governor shall appoint six persons to serve as justices of the district courts of appeal—three as justices of division two of the first appellate district, and three as justices of division two of the second appellate district—from and after their qualification and until the next general election and qualification of their successors." It was further provided therein that the justices so elected in each division shall so classify themselves by lot that one shall go out of office at the end of four years, one at the end of eight years, and one at the end of twelve years. Another provision of the section is substantially to the effect that one of these justices in each division shall be the presiding justice thereof "and as such shall be appointed or elected, as the case may be," which explains why only two persons are to be selected as associate justices. Another provision of the section is that—

"The justices of the District Courts of Appeal shall be elected by the qualified electors within their respective districts at the general state election, and the term of office of said justices shall be twelve years from and after the first day of January next succeeding their election."

Taking the section as a whole, it seems to us that fairly construed it means that at the general election of 1920 selection must be made to fill all of these new judgeships precisely as if no appointment by the Governor had been provided for or made, the term of office of the persons selected to commence as provided in the general provision quoted above, on the first day of January next succeeding the election, and to continue, as determined by lot, four, eight, and twelve years therefrom, while the appointees of the Governor are to hold until the commencement of the term of the judges so elected. If this be the proper construction, as we think is true, the general rule to which we have referred is clearly applicable.

It should be noted that there is a plain distinction between the situation presented by

this case, and the situation where a vacancy in judicial office occurs and is filled by appointment to hold until the next general election, when the vacancy must be filled by the election of a justice or judge who shall hold the office "for the remainder of the unexpired term." In such a case, for all the purposes of election, every unexpired term is a separate and distinct office, to be separately designated on the ballot.

In view of our conclusion on the question presented, the prayer of the petition for a peremptory writ of mandate was granted.

ANGELLOTTI, C. J., and SHAW, LAWLOR, and LENNON, JJ., being all the Justices who heard the argument, concur.

OLNEY and SLOANE, JJ., deeming themselves disqualified, do not participate.

(183 Cal. 304)

**TRABER et al. v. RAILROAD COMMISSION.**  
(S. F. 9280.)

(Supreme Court of California. July 9, 1920.)

**1. Public service commissions — 32—Scope of review of facts found.**

Notwithstanding the declaration of Public Utilities Act, § 67, that the Railroad Commissions determination of matters of fact are not subject to review, its determination on the question whether or not the facts existing are sufficient to bring the case within the scope of its power must be subject of review, so far as they present a question of law bearing on that subject, and the provision that "conclusions" of the commission on the facts are final does not apply to facts necessary to the existence of the jurisdiction of the commission to act; but where the evidence in proof of such facts is substantial in character, and justifies the inference or conclusion that the facts did exist, then such findings are binding and conclusive.

**2. Waters and water courses — 257 — Contracts of Fresno Canal & Irrigation Company of 1875 subject to regulation.**

The Fresno Canal & Irrigation Company, incorporated on February 16, 1871, under St. 1853, p. 87 (Garfiede & Snyder, p. 273), St. 1861, pp. 618-622, §§ 22-39, and St. 1869-70, p. 660, had the power to act as a public service corporation for the supply of water for irrigation, and, having acted as such, its contracts of 1875, entered into for furnishing water, are subject to regulation by the Railroad Commission, as provided in the Public Utilities Act.

**3. Waters and water courses — 216—Statute concerning organization of corporation not repealed by implication.**

Act April 2, 1870 (St. 1869-70, p. 660), relating to the organization of corporations, did not operate as a repeal by implication of Act May 14, 1862 (St. 1862, p. 540), relating to the organization of corporations for the construction of canals and supplying of water.

4. Statutes  $\Rightarrow$  161(f)—Repeal by implication not favored.

The repeal of statutes by implication is not favored, and where there are two laws upon the same subject they must be so construed as to maintain both, if it can be done without destroying the evident intent and meaning of the later act.

5. Corporations  $\Rightarrow$  382½, New, vol. 16 Key-  
No. Series—Property taken by condemnation necessarily dedicated to public use; "public utility administering a public service."

Of necessity, property taken under power of eminent domain is dedicated to public use, and to that extent a corporation exercising such power is a "public utility administering a public service." in view of Const. 1849, art. 1, § 8.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

6. Waters and water courses  $\Rightarrow$  254—No presumption of public use arose from diversion and sale of water.

Prior to the adoption of Const. 1879, art. 14, § 1, no presumption of a public use arose from the mere fact that a corporation diverted waters and agreed to sell it to certain persons.

7. Waters and water courses  $\Rightarrow$  254—Finding that corporation dedicated water to public use sustained by evidence.

A finding by the Railroad Commission that Fresno Canal & Irrigation Company, organized under St. 1853, p. 87 (Garfield & Snyder, p. 273), St. 1862, p. 540, St. 1861, pp. 618-622, §§ 22-39, and St. 1869-70, p. 660, dedicated certain water in 1875 to a public use and became a public utility, held supported by the evidence.

8. Waters and water courses  $\Rightarrow$  254—Contracts to supply water held not inconsistent with dedication to public use.

The fact that contracts were made by water company, declaring that the agreement to supply water should be appurtenant to respective tracts of land, is not inconsistent with the theory of a dedication, and such contracts relating to the service of water diverted to public use are subject to regulation and control by the public authorities, whether acting under laws then existing or under laws subsequently enacted.

9. Waters and water courses  $\Rightarrow$  254—Corporation had power to sell water, whether articles so declared or not.

A corporation organized under St. 1853, p. 87 (Garfield & Snyder, p. 273), St. 1862, p. 540, St. 1861, pp. 618-622, §§ 22-39, and St. 1869-70, p. 660, had the power to sell water for public use, whether its articles so declared or not.

10. Waters and water courses  $\Rightarrow$  254—Agreement of water company as to use of its canal held not a discrimination.

Where a water company, in constructing a canal, found it necessary, by reason of the construction of a ditch by other persons who had appropriated water, to enter into an agreement with such other persons to carry their water in its canal free of charge, other users of the

water could not claim that an order of the Railroad Commission fixing the rates for water to be used by them authorized an unlawful discrimination; the arrangement between the water company and the owners of the ditch, which interfered with its construction, not making the company the owner of the water diverted from the river and carried to and delivered to such persons, the effect being that the prior appropriators had a common use of the ditch, although it was under the control of the water company.

In Bank.

Proceeding in certiorari by John W. Traber and another to review an order and decision of the Railroad Commission of the State of California. Petition for writ denied.

Short & Sutherland, W. A. Sutherland, and J. O. Traber, all of Fresno, for applicants.

Milton M. Dearing, of Fresno, for certain water users.

Hugh Gordon, of Los Angeles (Douglas Brookman, of San Francisco, of counsel), for respondent.

SHAW, J. This is a proceeding in certiorari, under the Public Utilities Act, by plaintiffs, for themselves and in behalf of 22 other persons interested in like manner, to review an order and decision of the Railroad Commission made on June 8, 1919, fixing rates to be charged by the Fresno Canal & Land Corporation for water supplied from its canal for the irrigation of land. The ground for review is that the Fresno Land & Canal Corporation is not a public utility, at least so far as plaintiffs' rights to water are concerned; that the respective rights of the plaintiffs to the water are private rights appurtenant to their respective tracts of land, and consequently that the commission is without power over them, and may not fix rates different from those fixed by the respective contracts between plaintiffs and the predecessor in interest of said corporation. It is also claimed that the order is void, because it authorizes the canal corporation to make an improper discrimination in the rates charged.

The Fresno Canal & Land Corporation was incorporated on January 5, 1917. It thereupon took over the properties and functions of the Fresno Canal & Irrigation Company, and ever since that time it has been operating the large water system in Fresno county previously operated by the last-named corporation. In the year 1917 it made two applications to the Railroad Commission, under section 32 of the Public Utilities Act (Stats. 1915, p. 132), asking said commission to investigate the condition of the business carried on by said corporation and make an award regulating and fixing the rates to be charged by said corporation for the service

of water by it by means of said water system. On June 6, 1919, the commission made its award and decision in the matter of said applications, declaring that the corporation should thereafter charge for the service of water at the rate of \$200 per year for each 160 acres of land served. The plaintiffs, in connection with other persons, numbering 24 in all, had been previously receiving water from the corporation under contracts made in 1875 with its predecessor in interest, providing that they should receive water at the rate of \$25 annually for each quarter section served. The object of the present action is to annul said order, so far as these parties are concerned.

[1] Section 67 of the Public Utilities Act authorizes this proceeding in review. It provides that the review shall not be extended further than to determine whether the commission has regularly pursued its authority and whether or not it has violated any constitutional right of the petitioner. It also provides that the findings and conclusions of the commission on questions of fact shall be final and not subject to review. The first duty of the commission with respect to such applications was to inquire into and determine whether or not the facts existed that were necessary to confer upon it jurisdiction to act in the matter. Notwithstanding the declaration of section 67 that the commission's determination of matters of fact are not subject to review, it must be held that its determination upon the question whether or not the facts existing are sufficient to bring the case within the scope of its powers must be subject to review, so far as they present a question of law bearing upon that subject, and that the provision that the "conclusions" of the commission on the facts are final does not apply to facts necessary to the existence of the jurisdiction of the commission to act. *Del Mar, etc., Co. v. Eshleman*, 167 Cal. 677, 140 Pac. 591, 948. But if the evidence in proof of such facts is substantial in character, and justifies the inference or conclusion that the facts necessary to the jurisdiction of the commission did exist, then, under the general principles of law regarding the proceeding in certiorari, its decision as to the effect of such evidence is binding and conclusive on the reviewing court. *Farmers' etc., Bank v. Board*, 97 Cal. 325, 32 Pac. 312; *In re Grove Street*, 61 Cal. 453; *Ex parte Sternes*, 77 Cal. 162, 19 Pac. 275, 11 Am. St. Rep. 251; *De Pedrona v. Superior Court*, 80 Cal. 145, 22 Pac. 71; *Cahill v. Superior Court*, 145 Cal. 44, 78 Pac. 467; *Grannis v. Superior Court*, 146 Cal. 255, 79 Pac. 891, 106 Am. St. Rep. 23. Our consideration of the facts presented must therefore be governed by this principle.

The Public Utilities Act and the Constitution (section 23, art. 12) undoubtedly give the commission power to make orders prescribing the rates to be charged by corpora-

tions engaged in operating a system of water-works or canals for the distribution of water dedicated to public use. If said canal corporation was so engaged, and the water it agreed to supply, and was supplying, to the plaintiffs for their land, was a part of the water so dedicated to public use, the power of the commission to make the order is clear. The rights of these parties arise from contracts made with the Fresno Canal & Irrigation Company, and the inquiry relates exclusively to the character and business of that company and its water supply, and the nature and effect of those contracts.

[2] We think the evidence was sufficient to sustain the conclusion of the commission that the company last named was a public utility at the time these contracts were made, and that the water to be supplied by it in pursuance of said contracts was a part of the water it had dedicated to public use. The Fresno Canal & Irrigation Company was incorporated on February 16, 1871. Paragraph III of its original articles stated that it was formed for the purpose of constructing canals out of Kings river with which to supply water for irrigation to lands along and near the line of its canals and to collect rents for the use of the water it supplied. In May, 1871, said paragraph III was amended by eliminating the foregoing provisions and stating in lieu thereof that the corporation was formed to erect dams or other works in the channel of Kings river and its branches at points near and above the town of Center-ville and for the construction and enlargement of canals out of Kings river, and to continue said canals along such routes as should be found most feasible across Fresno county in every available direction. Nothing was said in the amendment about supplying water for irrigation or for any other use to any person or about charges or rates for water supplied. The articles also declared that the company was organized under the act of April 14, 1853, "and the several acts amendatory thereof and supplemental thereto."

The act of April 14, 1853, provided for the organization of corporations, but not for corporations for supplying water. Stats. 1853, p. 87 (G. & S. p. 273). The act of May 14, 1862, which was supplemental to the act of 1853, provided that corporations could be formed under the act of 1853 for "the construction of canals, for the transportation of passengers and freights, or for the purpose of irrigation or water power, or for the conveyance of water for mining or manufacturing purposes, or for all of such purposes." Stats. 1862, p. 540. It also provided that such corporations should have power "to establish, collect, and receive rates, water rents, or tolls, which shall be subject to regulation by the board of supervisors," and also the power to exercise the right of eminent domain by acquiring land or other property

necessary for its canals by condemnation in the mode prescribed by the railroad act of 1861. Stats. 1861, p. 618, §§ 22 to 39. The declaration in its articles that said corporation was formed under the act of 1853 and the several acts supplemental thereto includes the act of 1862 aforesaid as one of the acts under which it was organized. This act, in effect, gives the corporations organized under it the power to act as a public service corporation for the supply of water for irrigation. In *Price v. Riverside, etc., Co.*, 56 Cal. 431, it was decided that "every corporation deriving its being from the act above cited (the act of 1862) has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created. \* \* \* The power—in its nature a public power—and the public duty are correlative. The duty exists without any express statutory words imposing it wherever the public use appears." It is therefore clear that the company, in so far as it derives its powers from the act of 1862, was a corporation of the class now known and described as a public utility, and one which, with regard to public service it carries on, is subject to regulation by the Railroad Commission as provided in the Public Utilities Act.

Another act supplemental to the act of April 14, 1853, is the act of April 2, 1870. Stats. 1869-70, p. 660. (By an obviously clerical error it refers to the previous act as the act of April 14, 1863.) This act repeals all acts and parts of acts in conflict with its provisions. Section 13. The plaintiffs contend that the Fresno Canal & Irrigation Company must be deemed to have been formed under the later act alone. Section 1 of the act of 1870 is in substantially the same words as section 1 of the act of 1862 above quoted, and the subsequent provisions of the act are similar to those of the act of 1862, except that, instead of referring to the Railroad Act of 1861 for the mode of condemning private property for corporate purposes, the act itself (sections 4 to 11), prescribes the mode, and with the further exception that it contains nothing corresponding to section 3 of the act of 1862, the section providing that the rates established by a company formed under it shall be "subject to regulation by the board of supervisors," and authorizing such corporations to make rules regulating the distribution of its water and the like. The argument is that these omissions operate as a repeal of those parts of the act of 1862 which in *Price v. Riverside, supra*, were held to make the corporations formed under that act public utilities, and hence that the Fresno Canal & Irrigation Company had authority to act as a corporation for the private purpose of diverting, distributing, and selling water for its own profit, free from public regulation of any kind.

[3, 4] We do not think the act of 1870 operated as a repeal by implication of the act of May 14, 1862. The repeal of statutes by implication is not favored. The rule is "that where there are two laws upon the same subject, they must be so construed as to maintain both, if it can be done without destroying the evident intent and meaning of the latter act." *Merrill v. Gorham*, 6 Cal. 42; *Hilton v. Curry*, 124 Cal. 87, 56 Pac. 784. The act of 1870 expressly repeals all parts of other acts which are "in conflict" with it. The provisions of section 3 of the act of 1862 do not in any manner conflict with the act of 1870, but are entirely consistent therewith. Hence there is no express repeal thereof. Nor do the provisions of the latter act show that it was intended as a complete substitute, and so to operate as a repeal of the earlier act, under the rule applied in *Mack v. Jastro*, 126 Cal. 132, 58 Pac. 372. Both statutes were in force when said company was organized, and it must be considered as a company formed under both statutes, and as having, potentially, at least, the powers conferred by both.

[5, 6] The act of 1870 confers authority to exercise the power of eminent domain. This would be a taking of private property for public use. Const. 1849, art. 1, § 8. Of necessity, the property so taken would be dedicated to public use, and to that extent at least the corporation taking it would be a public utility administering a public service. But it does not appear that the Fresno Canal & Irrigation Company took any of its property in that manner, and it may be conceded that the act of 1870 might very reasonably be construed to authorize the formation of a corporation to appropriate, distribute, and sell water without dedicating it to public use. It is to be noted that these transactions took place prior to the adoption of the Constitution of 1879 declaring that the use of all water appropriated for sale, rental, or distribution is a public use. Article 14, § 1. At that time, therefore, no presumption of a public use arose from the mere fact that the corporation diverted water and agreed to sell it to certain persons. If there were no other evidence of a dedication of the water to such public use, it might be conceded that the proof before the commission was insufficient to show jurisdiction. But there was other evidence, consisting of acts and declarations, which were sufficient in that respect, as we will proceed to show.

[7] After the irrigation company had completed its dam, it was necessary to construct a canal through the higher banks of Kings river in order to take the water to lands susceptible of irrigation. The company was without funds wherewith to do so. It proposed to the plaintiffs and those whom they represent, 24 in number, that if they would excavate the canal through said banks the company would thereupon execute water-

right contracts to each person so assisting, for the delivery of one cubic foot of flowing water per second for each quarter section of land, at an annual rate of \$25. The proposal was accepted, and said parties excavated the canal under this agreement. Thereupon the company executed to said 24 persons the contracts now under consideration. They were all in the same form. They each recite that it was agreed that the company might sell 1,000 water rights of one cubic foot each, and that, if the water in its canals fell short of 1,000 cubic feet, the water it had should be distributed proportionally to the respective purchasers of such 1,000 water rights. At the hearing one of the plaintiffs testified that at the time the negotiations for these contracts were under way, Mr. Church, the manager of the company stated that the company had 1,000 cubic feet of water and intended to dispose of all of the 1,000 water rights; that it was not for disposition to any particular person, but that "anybody was to have it as wanted it"; and that "the water was for sale, and if any man had the money he could get it, until the 1,000 were disposed of." It also appeared that either before or after said contracts were made the company was willing to and actually did sell all said water rights to any one who would sign the form of contract prepared by the company. It is apparent that the company made no limitation upon the persons who should buy, except such as were necessary for the convenient delivery of the water from its canals to the land of such purchaser.

The contracts provided that the company was to furnish the water at its main canal or some branch thereof, and was to place a gate therein to allow the water to flow into a side ditch to be built by the purchaser from his land to said gate, which side ditch, after construction, should be under control of the company and become one of its branch ditches, with the right to use and enlarge the same, providing such act did not interfere with the delivery of water to said land. Subject to these and similar restrictions, depending upon the situation of the particular tract, the water was for sale to all who would apply. From all this evidence the commission concluded that the conduct of the company in disposing of its water in this manner amounted to a dedication thereof to public use. We think the evidence was sufficient to establish that fact. *Thayer v. Cal. Dev. Co.*, 164 Cal. 128, 128 Pac. 21. The offer of the company was a general offer to any and all persons who should apply for the water upon its terms for their lands. Whether in all cases such an offer would constitute a dedication to public use or not, it is clear that evidence of such offer and acceptance is sufficient to justify a finding of such dedication. As soon as the contracts were all sold, the persons making the purchase and the lands to which the water was to be ap-

plied would comprise the portion of the public entitled to the use, and to whose use the water was dedicated, so far as it was necessary thereto.

[8] The fact that contracts were made declaring that the agreement to supply water should be appurtenant to the respective tracts of land is not inconsistent with the theory of a dedication to public use. *Fresno C. & I. Co. v. Park*, 129 Cal. 437, 62 Pac. 87. Such contracts relating to the service of water devoted to public use are subject to regulation and control by the public authorities, whether acting under laws then existing or under laws subsequently enacted. *Southern P. Co. v. Spring Valley W. Co.*, 173 Cal. 298, 159 Pac. 865, L. R. A. 1917E, 680.

[9] In this view of the case the point made by the plaintiffs that the amendment to its articles eliminated the pre-existing declaration that the company was organized to furnish water and collect rates for its use becomes immaterial. By the acts under which the company was formed it had the power to sell water for public use whether its articles so declared or not.

[10] The objection that the order of the Railroad Commission authorized an unlawful discrimination between persons similarly situated with regard to the use of the water is not well taken. It appears that, at and before the time the company was constructing its diversion works and preparing for the construction of its canal, certain other persons owning some 1,700 acres of land had constructed a ditch and had taken water from Kings river therein to their lands for the irrigation thereof, and claimed a prior right to do so, both to the water taken and to the use of the ditch through which it was carried. As this ditch would interfere with the construction of the canal laid out by the company, it became advisable to make some arrangement with said persons for a common use. Accordingly it was arranged that the company should construct its canal as laid out, and that thereafter it should take out of the river at its headgate the quantity of water previously diverted by said persons, and should carry the same to a designated place on its canal, and there deliver it to said other persons into a canal to be constructed by them leading to their lands, and that in view of the mutual concessions of the parties the company should make no charge for such carriage of the water. This, in substance, was the arrangement made at that time, and under it the company has ever since carried the water from the river to said canal of said other persons free of charge, as it had agreed to do. The order of the Railroad Commission did not expressly authorize this to be continued, but it did not provide that it should be discontinued, and this constitutes the discrimination complained of. The arrangement made between the company and these persons was entirely lawful, and it

did not make the company the owner of the water it diverted from the river to be carried to and delivered to these persons for their lands. It was a mere arrangement whereby the ditch of the company was for that purpose to be used by the other persons to carry their water to their lands. The effect was that they had a common use of the ditch, although it was under the control of the company.

Upon the filing of the petition herein the court did not order a writ of review to issue and return to be made, but merely made an order that the respondent show cause why such writ should not issue. We are unable to perceive any reason for the issuance thereof.

The petition for a writ of review is denied.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SLOANE, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

(7 Cal. App. 788)

**CHASTEK et al. v. ALBERTSON et al.**  
(Civ. 3125.)

(District Court of Appeal, Second District, Division 1, California. May 28, 1920.)

**1. Appeal and error**  $\Leftrightarrow$  931(1)—Evidence considered most favorably toward prevailing party.

In determining whether a judgment is warranted by the evidence, the appellate court must consider the testimony in its most favorable aspect toward the prevailing party.

**2. Bailment**  $\Leftrightarrow$  14(1)—Ordinary care required of automobile dealer trying out car to be credited on purchase.

Where one, desiring to purchase an automobile, left with the dealer a car to be credited on the purchase price to determine its value, the bailment was for the mutual benefit of both, and ordinary care was required to be exercised by the dealer in protecting the car while retaining it for the purpose of ascertaining its value.

**3. Bailment**  $\Leftrightarrow$  14(1)—Automobile dealer did not exercise ordinary care to protect car left to determine value for purpose of credit on new car.

Where one, contemplating the purchase of an automobile from a dealer, left with him an old car to have its value ascertained for the purpose of crediting the amount on the purchase price, and the car was stolen, in an action by the purchaser to recover the value of the car held that the court was justified in concluding that ordinary care was not used for protection of the automobile, the defendant dealer having left it at the curb unlocked.

**4. Bailment**  $\Leftrightarrow$  30—Complaint to recover value of automobile negligently lost by bailee sufficient, though allegations were in general appropriate for action for conversion.

A complaint, alleging that plaintiff left an automobile with defendants as bailee, and sub-

sequently demanded the return thereof, and that they failed and refused to return the same, to the damage of the plaintiff in a certain sum, while in general form the allegations are appropriate to an action for conversion, warranted a recovery as against one who assumed the obligation of a depositary, who must upon demand redeliver or become liable for value of the property, in view of Civ. Code, § 1822.

**5. Pleading**  $\Leftrightarrow$  406 (5)—Special objections waived by not demurring.

Any special objections which might have been urged as to the completeness of the allegations of a complaint were waived where no demurrer was interposed.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Marion W. Chastek and the New Jersey Fire Insurance Company against Fred S. Albertson and John Hoover. Judgment for plaintiffs, and defendants appeal. Affirmed.

Overton, Lyman & Plumb, Wm. B. Himrod, and George W. Prince, Jr., all of Los Angeles, for appellants.

Edward Brody and Charles A. Bank, both of Los Angeles, for respondents.

**JAMES, J.** Appeal by defendants from a judgment entered in favor of the plaintiffs by which an award was made for the value of an automobile.

In the complaint it was alleged that appellant Albertson was engaged in business under the name of Albertson Motor Company; that plaintiff Chastek was the owner of an automobile. This allegation followed:

"That at the city of Los Angeles, state of California, and on or about the 4th day of May, 1918, the plaintiff Marion W. Chastek, at the special instance and request of the defendants, and each of them, placed the said automobile in the possession of the defendants, and each of them, as bailees, and subsequently thereto on the same day plaintiff Marion W. Chastek demanded the return of the said automobile of the said defendants, and each of them, and the defendants, and each of them, failed, neglected, and refused, and still fail, neglect, and refuse to return the said automobile to plaintiff Marion W. Chastek to the damage of the plaintiffs in the sum of \$574.00."

There was the further allegation that prior to the commencement of this action Chastek had assigned to his coplaintiff a one-half interest in the claim; and the prayer was for the recovery of \$574. Defendants, after making denial of the material allegations of the complaint, further answered, alleging that at the request of Chastek, defendants had taken possession of the automobile described in the complaint for the purpose of examining and appraising the same and determining the amount that they would allow as a credit in part payment on

a new motorcar which plaintiff Chastek contemplated buying from defendants. The defendants alleged that while the automobile was in their possession for the purposes last set forth, the same was without fault or negligence on their part, stolen and taken from their possession.

[1-3] In determining the first point as to whether the judgment is warranted by the evidence, we will consider the testimony, as we must, in its most favorable aspect toward the plaintiffs. The plaintiff testified that he went to the place of business of the defendants with the idea of purchasing an automobile of which the defendants were the vendors; that he desired to "turn in" the Ford automobile which he owned, and defendants desired to "try out" the Ford automobile before finally determining what allowance would be made as a credit on the purchase of the machine which they were seeking to sell to the plaintiff. Plaintiff testified, in part, as follows:

"When I came to Albertson's place of business I locked the car. When Mr. Hoover took the car to try it out I handed him the key. I don't think I unlocked the car for Mr. Hoover. I handed Mr. Hoover the key. Mr. Rall, the salesman, suggested that Mr. Hoover, the appraiser, try the Ford out, to see if they could allow me more than \$450. So Mr. Hoover took the Ford in order to appraise it. I saw Mr. Hoover leaving the place of business with my car, and I saw him again that day after the machine was stolen, when he came back to the Albertson Motor Company."

On the part of the defendants, Hoover, the appraiser, testified that he took Chastek's machine, ran it into the central portion of the city of Los Angeles, and left it at the curb while he entered an office building to interview a man who desired to buy a Ford automobile of similar style and equipment to that of the plaintiff; that he was gone five or six minutes; when he returned the machine had been stolen. He testified further:

"I don't know whether Mr. Chastek gave me the key to the car, either he gave me the key or else he had left the car unlocked, because it was a Rex lock, and you can't take the key out unless you locked the car; so he either left it unlocked while he was there, or else he gave me the key. I don't remember. Mr. Chastek either gave me the key to the car, or I went out and found the key in the lock of the car. I do remember that I did not lock it when I got out."

In arriving at a conclusion as to whether defendants, in view of the fact that the car was stolen, incurred any liability to Chastek, the question arises as to what degree of care was required to be exercised by them in the circumstances. Appellants contend that the bailment was gratuitous; hence that a slight degree of care only was required of

them; and that the evidence did not show that they were guilty of gross negligence. The court determined that the bailment was for the mutual benefit of Chastek and defendants, and hence ordinary care was required to be exercised by the latter in protecting Chastek's property. We agree that this conclusion was the correct one to be drawn. The defendants received the automobile of Chastek in the course of the negotiation for a machine which they desired to sell to Chastek, and that they would be benefited by the transaction was only contingent upon an amount being agreed upon as a credit to be allowed Chastek which would be satisfactory to both sides. We think that the court was justified in concluding that ordinary care was not used for the protection of Chastek's automobile while it was in possession of the defendants. The machine was equipped with a lock, as to the operation of which Hoover, one of the defendants and the man who took charge of the machine, appeared to be familiar. Chastek delivered the key of the lock to Hoover, and when he turned the machine over in front of the place of business of the defendants the lock was fastened. Hoover took the automobile into the business section of a large city, left it unattended and unlocked, and it was stolen. With very simple means at hand by which the machine could have been made more secure in the place where he left it, Hoover omitted altogether to make use of this means. It would seem to be clear beyond question that such act of his by no means satisfied the requirement of ordinary care.

[4, 5] Neither do we think there is merit in the contention of appellants that the action as framed by the complaint was not appropriate to permit a recovery by the plaintiffs. While in general form the allegations were appropriate to an action for conversion, facts are alleged which show that a bailment had been created and the refusal of the defendants to redeliver the property upon demand. Under the circumstances of this case, we feel well satisfied that in taking control of the automobile of Chastek, defendants assumed the obligation of a depository. It was their duty, upon demand, to redeliver the same to plaintiff, in default of which they would become liable for the value of the property. Civ. Code, § 1822. The case assumed no different aspect in regard to the legal relation than that of the ordinary warehouse contract, in which cases suit for the property itself or its value has been assumed to be the proper remedy. *Morse v. Imperial Grain & Warehouse Co.*, 181 Pac. 815; *Pope v. Farmers' Union Milling Co.*, 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87. The case of *Poggi v. Scott*, 167 Cal. 372, 139 Pac. 815, 51 L. R. A. (N. S.) 925, cited by appellants, is not, we think, inconsistent with the view



here expressed. No damages were claimed herein beyond the value of the automobile which was lost, and the court expressly found that value to be the sum of \$500, for which judgment was awarded. No demurrer was interposed to the complaint; hence any special objections which might have been urged as to the completeness of the allegations thereof have been waived.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(47 Cal. App. 774)

### HUNT v. GLASSELL. (Civ. 3201.)

(District Court of Appeal, Second District, Division 2, California. May 27, 1920.)

#### 1. Appeal and error $\Leftrightarrow$ 1170(1)—No reversal for error, unless prejudicial.

On appeal the question is not as to whether there is error in the record, but rather as to whether there is prejudicial error, in view of Const. art. 6, § 4½.

#### 2. Bills and notes $\Leftrightarrow$ 358—Assignee of, as collateral holder for value.

An assignment of a negotiable instrument before maturity as collateral security for a pre-existing debt constitutes an indorsement for a valuable consideration, sufficient to protect the purchaser thereof under the law merchant against defenses to the note of which he has no notice at the time of the indorsement, under Civ. Code, §§ 8123, 8124.

#### 3. Bills and notes $\Leftrightarrow$ 351—Maker may set up any defense as against indorsee after maturity.

The maker of a note, sued on by indorsee after maturity, may prove anything to destroy or satisfy the note that he might prove if it were in the hands of the person to whom originally given, anything that denies its validity, or that constitutes a bar to an action upon it, as distinguished from anything which constitutes admission or affirmance of the plaintiff's right of action, but which seeks to defeat recovery by establishing liability on his part.

#### 4. Bills and notes $\Leftrightarrow$ 351—Notes purchased from trustee in bankruptcy after maturity subject to all defenses.

Even a bankruptcy court possesses no such power that it can by a pretended sale of a purported right to a note which it never possessed, actually or constructively, and which was settled in full, surrendered, canceled, and destroyed several months before payee had been adjudged a bankrupt, deprive the maker thereof of such defenses thereto as he might interpose at the time it was delivered by the payee to a third person as collateral security.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by F. W. Hunt against A. Glassell. Judgment for defendant, and plaintiff appeals. Affirmed.

Murphey & Poplin, of Los Angeles, for appellant.

J. E. Hannon and J. Vincent Hannon, both of Los Angeles, for respondent.

THOMAS, J. This is an action brought to recover judgment against the defendant on a promissory note alleged to have been made, executed, and delivered by the defendant on the 25th day of September, 1907, to the Duquesne Brewing Company, a corporation, for the sum of \$10,000, subsequently delivered as collateral security to the Fidelity Investment Company, and by further transfers, hereinafter set forth, eventually becoming the purported property of this plaintiff.

[1] In this, as in all cases, our first query is not, "Is there error in the record?" but rather, "Is there prejudicial error?" or "Is the judgment just?" In quest for the correct answer to the latter inquiry, it will be necessary, we think, to set forth briefly a statement of the case, as disclosed by the record. It first appears that on September 25, 1907, this defendant, as the result of certain representations made to him by an agent of the Duquesne Brewing Company, a corporation—the payee named in the note hereinafter referred to—executed and delivered to said brewing company a certain subscription for 200 shares of stock in said corporation, which subscription reads as follows, to wit:

"I, the undersigned, hereby subscribe for 200 shares of the capital stock of the Duquesne Brewing Company, par value \$50, amounting to \$10,000, payable as follows, to wit: August 1, 1908. Witness my hand and seal this 25th day of September, 1907. Andrew Glassell. [Seal.]"

And at the same time and place, as a part of the same transaction, and as further evidence of the promise and agreement to pay for such shares, but not as payment therefor, the defendant also executed the note sued on here, which note is in words and figures as follows:

"\$10,000.00. September 25, 1907. Ten months after date I promise to pay to the order of Duquesne Brewing Company ten thousand dollars. This note is negotiable and payable, without any relief or benefit whatever from stay, valuations, appraisements, or homestead exemption laws. Due August 1, 1908. Andrew Glassell."

Briefly stated, the representations so made to induce defendant to execute the subscription and the note were as follows: That said brewing company was about to erect, in the city of Los Angeles, a brewery of large capacity, and engage in the business of conducting such brewery in said city; that it owned the land upon which such brewery was to be erected, and that it had money enough

on hand to erect and to put the brewery in operation; that the buildings would be completed and the brewery in operation by August 1, 1908, and that if defendant did subscribe for such 200 shares he would not be required or called upon to pay said subscription, or to accept such stock, prior to the completion of said brewery and the commencement of the operation thereof; that each and every one of said statements was false, and known by said brewery company to be false, for the reason that such company did not own the land referred to, or have sufficient funds on hand with which to complete the brewery, or to put the same in operation.

We are next met with the fact that the shares of stock so subscribed for were never issued or delivered to defendant, or to any one else for him; that before the expiration of the time within which the money was, by the terms of the subscription and note, to be paid and said stock delivered, the said brewing company had wholly abandoned the intention to erect such brewery or to engage in the business of manufacturing or selling the products thereof, and had wholly abandoned the purposes for which said subscription to its capital stock was made; and that it had been, at all times mentioned, unable to erect such brewery, or to carry out the purposes or intention for which said subscription was obtained, or to engage in the business as already set forth.

In addition to said alleged fraud, one of the defenses made by defendant here was that there was no consideration for the subscription referred to, or for the note which is the basis of this action. Some time between "some time in the year 1909 and prior to the 24th day of June, 1909," the said Duquesne Brewing Company, being indebted to the Fidelity Investment Company in the sum of about \$2,500, as evidenced by a promissory note payable to and negotiated by one Martel to the latter company, delivered the note sued on here to said investment company as collateral security to secure the payment of such indebtedness. Thereafter, and on the 24th day of June, 1909, such indebtedness being past due and unpaid, the said Fidelity Investment Company brought suit on the \$10,000 collateral security note, and while such suit was pending, and prior to the 10th day of May, 1910, the plaintiff in that action sold and transferred the said \$2,500 note—the transaction carrying with it the note here involved and so held as collateral security—to one Hugh Glassell; the latter conducting and continuing the suit so commenced in the name of his assignor, the Fidelity Investment Company. On or about May 10, 1910, this defendant, believing that said Hugh Glassell was an innocent holder of said note for value, paid to him something more

than \$2,500, in full payment and discharge of the said \$10,000 note for cancellation, and it was thereupon destroyed. On October 5, 1909, the Duquesne Brewing Company was, in accordance with the federal bankruptcy law, adjudged a bankrupt, a trustee of the estate of the bankrupt was duly appointed, and by the referee, to whom the matter was referred, authorized to sell at public auction the assets of such bankrupt. Thereupon the trustee proceeded as directed to sell the property of the bankrupt estate, which consisted of certain real estate and promissory notes, among which was included the note of defendant upon which this action is based—being designated as "Parcel 3. Andrew Glassell, promissory note for \$10,000." On December 19, 1910, 7 months and 9 days after the payment of said sum by this defendant to said Hugh Glassell, and at least 1 year, 5 months and 25 days after the note in controversy was delivered by the Duquesne Brewing Company as collateral security to said Fidelity Investment Company, the note having been so delivered at least 3 months and 11 days before the adjudication of said brewing company to be a bankrupt, as already set forth, the trustee in bankruptcy was authorized to sell all of said property, which, as we have already shown, purported to include the note in question, notwithstanding the fact—which must now be obvious—that this note was not among the assets of said bankrupt estate at the time the corporation was by the court declared a bankrupt, nor has it been at any time since; it being shown that the company had not possessed it at all since June 24, 1909. Pursuant to said purported order, the trustee in bankruptcy made a purported sale of said note to the plaintiff herein, which purported sale the referee in bankruptcy did thereafter, on January 23, 1911, pretend and purport to confirm. Accordingly, on January 23, 1911, whatever right the said Duquesne Brewing Company, a corporation, bankrupt, had in and to said note, was pretended and purported to be sold and delivered to the plaintiff herein.

Under these facts and conditions, plaintiff claims that the judgment so entered should be reversed, and the lower court directed to enter judgment in his favor "as prayed for in his second amended complaint." The trial court found, among other things, as follows:

"It is not true that at the time the defendant made said payment he knew that said note for \$10,000 made by him to Duquesne Brewing Company was held by the Fidelity Investment Company as collateral security to secure the payment of the said \$2,500 note or notes, or for no other purpose, or knew that the only interest that the Fidelity Investment Company had in said note of \$10,000 was to the extent of \$2,500, with interest; nor is it true that said note was at the time of said settlement held by the said

Fidelity Investment Company, a corporation, as collateral security or otherwise. \* \* \* The court further finds that the note herein sued on \* \* \* is the same note that was sued on in the original complaint; \* \* \* that said note had been delivered up to be canceled as fully paid and discharged, and had been canceled and destroyed, paid and discharged, prior to \* \* \* December 10, 1910."

There is evidence to support these findings. Were this action between the defendant here and the brewing company, there is no question but that on the showing made the defendant would have been entitled to judgment on both grounds; i. e., "fraud" and "no consideration." Is the plaintiff in this action in any better position than the brewing company would have been? We think not.

[2] As we have already seen, the \$10,000 note was due by its terms on August 1, 1908. The Fidelity Investment Company became the holder of the note during the year 1909, and prior to June 24th of that year, which was some time after the note had become due. It was therefore, as a matter of law, received by said investment company, as well as by the latter's successor in interest—Hugh Glassell—subject to any and all defenses which the maker thereof, defendant here, might interpose. *Risley v. Gray*, 98 Cal. 40, 32 Pac. 884; *James v. Yaeger*, 86 Cal. 184, 24 Pac. 1005; *Braly v. Henry*, 71 Cal. 481, 11 Pac. 385, 12 Pac. 623, 60 Am. Rep. 543; *Folsom v. Bartlett*, 2 Cal. 163. The rule in this state is that an assignment of a negotiable instrument before maturity as collateral security for a pre-existing debt constitutes an indorsement for a valuable consideration sufficient to protect the purchaser thereof under the law merchant against defenses to the note of which he has no notice at the time of the indorsement. Sections 3123 and 3124, Civ. Code; *Pezzoni v. Greenwell*, 178 Cal. 649, 174 Pac. 60. The record in the case at bar discloses the fact that the note in question was signed by defendant, made payable "to the order of Duquesne Brewing Company," and was negotiable in form. The court found that said brewery company did practice the fraud upon defendant and induced him to subscribe for said stock, and that no stock was ever issued or delivered by said brewery company to defendant, which findings find support in the evidence. The court further found that at the time said Fidelity Investment Company so received the said note it had no notice of any fraud in the procuring of the note in the first instance, or of any defense to its validity, except the fact that it was by its terms several months past due. It also appears that no call or assessment upon the stockholders or against the stock subscribed for was made by the board of directors of said

brewing company at any time, for any amount, nor by said bankruptcy court, or the trustee therein, nor were any proceedings had to determine what, if any, amount would be necessary to pay the debts, etc., of the bankrupt corporation, and that there are no unsatisfied creditors.

[3] Under such conditions as these, the general rule is that—

"The maker of a note sued on by an indorsee after maturity may prove anything in defense which goes to destroy or satisfy the note—anything that denies its validity, or that constitutes a bar to an action upon it, as distinguished from anything which constitutes an admission or affirmation of the plaintiff's right of action and his title to the money he seeks to recover, but which seeks to defeat the recovery by establishing liability on his part. Within this class of defenses are fraud, mistake, want or failure of consideration, release, or anything else which goes to show that he ought never be compelled to pay the note to the person to whom it was originally given, or to any person who had held it after maturity, and before it came into the hands of the plaintiff." *Note to Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank* (Ill.) 46 L. R. A. 760.

There is, therefore, no merit in appellant's contention that respondent here is liable as trustee of an involuntary trust.

[4] Appellant urges 13 points for reversal of the judgment, none of which, however, do we deem it necessary or essential to discuss, for the reason that it is now obvious that the bankruptcy court had absolutely no jurisdiction or control over the note, and that the bankrupt estate had no interest therein that could be so disposed of. Under these facts, even a bankruptcy court possesses no such power that it can, by a pretended sale of a purported right to a note which it had never possessed, actually or constructively, and which was settled in full, surrendered, canceled, and destroyed several months before the payee named therein had been adjudged a bankrupt deprive the maker thereof of such defenses thereto as he might interpose at the time it was so delivered as such collateral security.

We think, regardless of the claim that there is error in the record, finding no prejudicial error therein, that the judgment is eminently just. Particularly is this so when the entire record is viewed in the light of section 4½ of article 6 of our Constitution; for we cannot say, after an examination of the entire cause, including the evidence, that we are of the opinion that the errors complained of have resulted in a miscarriage of justice.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WELLER, J.

(47 Cal. App. 274)

**DAMAN v. HUNT (REYNOLDS, Intervener).**  
(Civ. 2072.)

(District Court of Appeal, Third District, California. April 30, 1920. On Hearing in Supreme Court, June 28, 1920.)

**1. Insolvency §14—Jurisdiction must appear on face of record in insolvency proceedings.**

The superior court in proceedings in insolvency exercises a special or limited jurisdiction, and therefore everything required by the Insolvency Act of 1880, to give the court the jurisdiction to hear and determine the same or act in the proceedings must be made affirmatively to appear in the record.

**2. Pleading §129(1)—Ultimate facts not denied admitted.**

Where vital ultimate facts alleged in a complaint are not denied by the adversary party in his pleadings, they are to be deemed as admitted.

**3. Insolvency §89—Successor to assignee needs no specific assignment of property.**

In an insolvency proceeding, where the office of assignee has become vacant and the vacancy has become regularly supplied by the appointment of another to discharge the duties of the office, property of the insolvent estate having already been assigned and conveyed to the original assignee and his "successor and successors in office," it was not necessary that there should be a specific assignment and conveyance of the property belonging to the insolvent to the person appointed to the vacancy.

**4. Insolvency §21—Consent to dismissal must appear upon face of proceedings.**

Consent of all interested parties, in an insolvency proceeding under Insolvency Act 1880, to a dismissal, must be made to appear upon the face of the proceedings to dismiss, to render an order of dismissal immune from collateral attack.

**5. Motions §59(2)—Have jurisdiction to vacate void order.**

A court making an order without jurisdiction had authority to vacate it.

**6. Insolvency §167—Unauthorized dismissal of proceedings complete nullity.**

Unauthorized dismissal of an insolvency proceeding, unauthorized because the court was without jurisdiction to dismiss, did not have the effect of nullifying the proceedings, and they were still pending in contemplation of law, and the insolvent did not thereby gain title to the property of the estate.

**7. Insolvency §82—Assignee must file bond, otherwise sale void.**

The requirement in Insolvency Act, § 15, that assignee in insolvency should file a bond, is an essential requisite for his qualification, and a sale by an assignee who had not filed a bond was absolutely void.

**8. Insolvency §82—Order for private sale void in absence of petition.**

An order requiring assignee in insolvency proceeding to make a private sale was absolutely void, where there was no petition filed

praying for the sale or disposal of the property by private sale, in view of Insolvency Act, § 25.

**9. Insolvency §81—Failure of assignee to promptly prosecute proceedings not abandonment of property.**

The fact that the administration of the estate of an insolvent remained in abeyance or was dormant because the proceeding in insolvency was not properly prosecuted to final determination did not constitute an abandonment of land forming a part of the assets of the estate; there being no presumption of abandonment from mere lapse of time.

**10. Insolvency §81—Abandonment of property by assignee question of fact.**

The question of abandonment of property by an assignee of an insolvent is one of fact to be determined by the jury, or the court if the issues of fact are tried by the court.

**11. Insolvency §81 — Party claiming abandonment of property by assignee must clearly prove it.**

In an action concerning title to land, one claiming that the land was abandoned by assignee of an insolvent had the burden of clearly showing that there was an intention in the assignee to abandon the property.

**12. Limitation of actions §19(3)—Five-year statute held to apply to action to quiet title involving land fraudulently obtained.**

The five-year statute of limitations (Code Civ. Proc. § 318) held to govern the time within which an action to quiet title might be commenced, although the purpose was to recover land fraudulently acquired, section 838 not applying, the relief prayed for being based upon the ground that plaintiff was entitled to possession of the property.

**13. Limitation of actions §44(4)—Accrual of cause of action to recover land.**

Where assignee of insolvent in insolvency proceeding failed to promptly sell land and subsequently the court dismissed the proceedings and appointed an assignee to transfer the property without the consent of the creditors, the five-year statute of limitation, Code Civ. Proc. § 318, did not commence to run until the making of the order of dismissal, or perhaps from the act of the filing of the petition for a dismissal.

**14. Limitation of actions §110—No statute runs against claim after filing of petition in insolvency.**

In view of Insolvency Act, § 58, no statute of limitation will run against a claim after the filing of a petition to be adjudged an insolvent, during the pendency of the proceeding.

**On Hearing in Supreme Court.****15. Insolvency §21—Proceeding could not be dismissed without creditors' consent.**

Dismissal of an insolvency proceeding without the consent of the creditors was absolutely void under Insolvency Act 1880.

**16. Insolvency §51—After dismissal, appointment of assignee for limited purpose not authorized.**

Court had no authority to appoint an assignee after dismissal of an insolvency proceed-

ing under Insolvency Act 1880, for the limited purpose of making a conveyance of the property to the insolvent.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by A. O. Daman against John Wesley Hunt, Jr., in which H. W. Reynolds intervened. From a judgment for part of the relief prayed for plaintiff appealed. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

A. J. Mitchell and Charles H. Brock, both of Los Angeles, for appellant.

J. H. Creighton, of Los Angeles, for respondent.

Charles Thomson, of Los Angeles, for defendant.

HART, J. Plaintiff brought the action to quiet his title to certain lots in the town site of Howard, in the county of Los Angeles. Judgment was in favor of plaintiff for a portion of said lots and in favor of the intervener as to the balance thereof. Plaintiff prosecutes this appeal from that portion of the judgment which was in favor of the intervener, no question arising herein as to the other lots.

The complaint was filed on September 23, 1915, and was in the usual form, alleging that defendant, Hunt, claimed some interest in the real property adverse to plaintiff. On February 16, 1916, H. W. Reynolds, as assignee in the matter of Jeremiah W. German, an insolvent debtor, filed a complaint in intervention.

The findings of the court present fully certain facts of the case. They are as follows: (2) That, on the 31st day of July, 1888, Jeremiah W. German was the owner in fee, and was in possession of the lots in controversy. (3) That on said day said German filed his petition in voluntary insolvency in the superior court of the county of Los Angeles, and that he was duly adjudged an insolvent. (4) That at a meeting of the creditors of said insolvent, Jacob Baruch was chosen assignee in said insolvency matter, and duly qualified as such assignee. (5) That in the schedule attached to the petition of said insolvent was the real property involved herein. (6) That verified claims were filed against said insolvent estate to the amount of \$4,907.09, which were duly allowed by the court, and are now unpaid, except that there was paid thereon the sum of 7.1046 cents on each dollar thereof received from the sale of the personal property belonging to the insolvent. (7) That, on the 8th of September, 1888, the county clerk deeded said real property to the assignee, Jacob Baruch, and to his successor or successors in office. (8) That said assignee, Jacob Baruch, died about January 1, 1909. (9) That, about the 28th of February, 1912,

the court, "without any notice to creditors or to any one else interested in said insolvency proceedings, made the following order in said proceedings, to wit: 'This cause coming on to be heard upon the application of Jeremiah W. German, the insolvent debtor, \* \* \* for an order dismissing this action for want of prosecution, and it appearing \* \* \* that no proceedings have been had therein for a period of more than 20 years, \* \* \* it is ordered that the said action be, and the same is hereby dismissed for want of prosecution.'" (10) That on or about the 7th day of June, 1912, the court, "without any notice to creditors, or to anyone else interested in said insolvency proceedings, made the following order: 'It appearing to the court' that said order dismissing the action 'was inadvertently made in this, that said order does not provide for the disposition of the undisposed property heretofore conveyed to the assignee' of the estate of said insolvent, 'it is therefore ordered that the said order of dismissal be, and the same is hereby, canceled and set aside and the court hereby assumes jurisdiction of said cause for the purpose only of taking such further action therein as may be necessary and proper in the furtherance of justice; and it further appearing to the court that there is certain real estate heretofore conveyed to Jacob Baruch as assignee in this cause, \* \* \* and that no disposition has been made of said real estate by the said assignee; \* \* \* that by reason of the death of the said Jacob Baruch \* \* \* a vacancy exists, and that there is no person qualified to act herein; \* \* \* that no successor to said Jacob Baruch as assignee has been appointed, and that by reason of the want of prosecution of said action the said assignor \* \* \* is entitled to a dismissal thereof and to a reconveyance of any undisposed of property herein; that said German has conveyed to one A. O. Daman, by deed dated March 5, 1912, \* \* \* an interest in and to the said undisposed of real estate—it is therefore ordered that James H. Blanchard be, and he is hereby, appointed as assignee in this cause, without bond, for the purpose only, and he is hereby directed to convey to A. O. Daman, as grantee of Jeremiah W. German, the undisposed of real estate heretofore conveyed to Jacob Baruch," etc. (11) That, on or about the 28th of February, 1917, said court vacated the portion of the last above quoted order which appointed said Blanchard special assignee, and appointed H. W. Reynolds as assignee with bond of \$1,000. (12) That the said German gave a quitclaim deed, dated March 5, 1912, to A. O. Daman, to the property in question. (13) That, on or about the 7th day of June, 1912, the said Blanchard, acting as special assignee, gave a deed to said property to said Daman, purporting to convey the title from

the estate of said insolvent, "but the said James H. Blanchard had not qualified as said assignee \* \* \* and never did qualify as such assignee, and no order had been obtained for the making of said transfer, save and except the order" set out in finding 10, "and no notice of sale had been given" or obtained, "and no sale had been made of said property, and no consideration for said deed passed to the said assignee, \* \* \* and the estate of said insolvent and "the creditors therein did not \* \* \* at any time receive any consideration for the said transfer of said property," and no notice to creditors was ever given of the intention to make said transfer. (14) That the creditors first obtained knowledge of the making of the orders set out in findings 9 and 10 about the 1st day of November, 1915. (15) That, about the 10th day of June, 1912, A. O. Daman gave to Frank P. Stedman a grant deed to said property, the consideration recited in said deed being \$1,000.00. (16) That, about the 7th day of September, 1915, Stedman gave to Daman a grant deed to said property, the consideration recited in said deed being \$10. (17) That in the account of the assignee, Jacob Baruch, filed July 9, 1889, said Baruch reported to the court that the real estate in question was undisposed of, for the reason "that the said assignee was unable to find purchasers therefor, and that upon the 22d day of July, 1889, this court audited and settled the account of said assignee."

The points made by the appellant for a reversal are thus specifically stated in the brief of the respondent:

"(1) That the demurrer to respondent's amended complaint should have been sustained; (2) that there is no evidence to show that Jacob Baruch was ever appointed assignee or ever qualified as such in the insolvency proceedings of Jeremiah W. German, or that the property here involved was ever assigned to him, or that respondent was ever appointed assignee in such insolvency matter or ever qualified as such, or that the property in question was ever assigned to him; (3) that the findings of fact and conclusions of law do not support the judgment; (4) that the intervener could not make a collateral attack on the orders made in the insolvency proceedings for the reason that the superior court when sitting as an insolvency court is a court of general jurisdiction; (5) that the order of dismissal made in the insolvency proceedings was a valid order, and disposed of all of the interest which the assignee or creditors might or could have had in the property here involved, and put the property back in Jeremiah German just the same as if no insolvency proceedings had been had; (6) that the order setting aside and vacating the order of dismissal did not set aside and vacate it, and that if any of the order setting aside and vacating the order of dismissal is void, it is void in toto; (7) that the property here involved was abandoned by the assignee in the insolvency proceedings; (8) that the in-

tervener is barred from bringing this action by the statute of limitation; (9) that by reason of the great lapse of time since the insolvency proceedings were instituted, all the claims, debts, liabilities, or demands against Jeremiah German on July 31, 1888, being the time when said insolvency proceedings were commenced, must be deemed to have been discharged; (10) that appellant was an innocent purchaser of said property; (11) that James H. Blanchard was the legally appointed and qualified assignee in the insolvency matter."

It is deemed proper first to examine and present herein such of the provisions of the Insolvency Act of 1880 (Stats. 1880, p. 82), under which the insolvency proceedings involved herein were instituted, as have direct pertinency to the inquiry submitted by this appeal.

The first, second, third, and fourth sections of said act pointed out the manner in which an insolvent debtor may as a voluntary insolvent petition the superior court to be discharged from his debts and liabilities, and provided that annexed to his petition there should be a schedule of his debts and liabilities, which should contain a full and true statement thereof, and an inventory containing a description of all his estate, both real and personal. The fifteenth section provided for the election by the creditors of an assignee to take charge of and administer the insolvent's estate. Said section also provided that the assignee so elected should, within five days after his election, file with the clerk of the court a bond, in an amount fixed by the court, with two or more sufficient sureties, approved by the court, and conditioned for the faithful performance of the duties devolving upon him. The court could, however, upon a proper showing, extend the time for filing such bond beyond the five days' limit specified in said section for said purpose.

Section 25 of the act provided as follows:

"The assignee shall, as speedily as possible, convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid, unless made under the order of the court upon a petition in writing, which shall set forth the facts showing the sale to be necessary. Upon filing the petition, notice of at least ten days shall be given by publication and mailing, in the same manner as is provided in section seven of this act. If it appears that a private sale is for the best interests of the estate, the court shall order it to be made."

See, also, subdivision 4, § 21, of said act.

Section 58 of the act provided:

"Pending proceedings by or against any person, copartnership, or corporation, no statute of limitation of this state shall run against a claim, which in its nature is provable against the estate of the debtor."

Section 66 of said act provided:

"The court may, upon the application of the debtor, if it be a voluntary petition, or of the petitioning creditors, if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of assignee. After the appointment of assignee, no dismissal shall be made without the consent of all parties interested in or affected thereby."

[1] It is settled that the superior court, in proceedings in insolvency, exercises a special or limited jurisdiction. It follows, therefore, that everything required by the insolvency statute to give said court the jurisdiction to hear and determine the same or to act in the proceedings must be made affirmatively to appear in the record. If any jurisdictional fact appears, upon the face of the record, to be wanting, then the court was wholly without jurisdiction to act or to make any valid order or adjudication in the proceeding.

In the case of *McDonald v. Katz*, 31 Cal. 167, the court said, referring to insolvency proceedings:

"The proceedings are special, and no intendments can be made in favor of the jurisdiction. Everything bearing upon that question must appear affirmatively"—citing *McAllister v. Strode*, 7 Cal. 430; *Judson v. Atwill*, 9 Cal. 478; *Meyer v. Kohlman*, 8 Cal. 47; *Swain v. Chase*, 12 Cal. 283.

See, also, *Keystone Driller Co. v. Superior Court*, etc., 138 Cal. 738, 742, 72 Pac. 398.

By the rules stated in the foregoing cases the points as to the jurisdiction of the court to make the several orders referred to must be considered and determined.

1. The demurrer to the amended complaint in intervention was general, and was properly overruled. That pleading states the facts as they are substantially hereinabove reproduced. It is not necessary to examine in detail herein the averments of said complaint, and we shall not attempt to do so, since the facts as they are above stated show that, as embraced in the complaint, a cause of action is stated.

[2] 2. As to the point that there was no evidence showing that Jacob Baruch was duly appointed and the qualified assignee in the insolvency proceedings, a ready and conclusive reply is found in the fact that the appellant failed to deny the allegation in the complaint of Baruch's appointment, etc., and so in legal effect admitted that fact. The complaint in intervention alleges the appointment and qualification of Baruch as assignee, and also that the clerk of the superior court, on the 8th day of September, 1888, deeded and assigned to said Baruch, as assignee, etc., and to his successor and successors in office all of the property, real and personal, belonging to the insolvent, Jeremiah W. German, except such property as was by law exempt,

said deed and assignment having been duly recorded. There was no denial of these averments, and, as above stated, the facts so averred, therefore, stand as having been admitted. Nor was there any denial in the answer of the averments of the complaint in intervention that the court set aside and vacated the order appointing James H. Blanchard as assignee, and declared the office of assignee vacant, and thereupon appointed H. W. Reynolds (intervener and respondent) as such assignee, and that said Reynolds "ever since has been, and now is, the duly appointed, qualified, and acting assignee in the said insolvency matter," etc.

[3] It requires the citation of no authorities to confirm the obvious proposition that where certain vital ultimate facts alleged in a complaint are not denied by the adversary party in his pleading, such facts are to be deemed admitted, and that in such case it is not necessary to introduce evidence extrinsic to the pleadings themselves to support such facts. But in this connection, it may be noted that counsel for appellant contend that there is neither allegation nor proof that the property was assigned to the intervener. This contention cannot be maintained. The undenied allegation of the complaint in intervention is, as we have seen, that the clerk of the court, upon the filing of the petition in insolvency and the adjudication following therefrom that German was an insolvent debtor, deeded and assigned to said Baruch, the original assignee, "and to his successor and successors in office, all of the property, real and personal, then belonging to the said Jeremiah W. German," etc. It follows, of course, that the office of assignee having become vacant and a successor to Baruch having been regularly appointed and qualified, such successor thereupon immediately became vested with the right to the possession of all the property belonging to the insolvent estate by virtue of the assignment and conveyance to Baruch. We have found no provision in the insolvency law to the effect that, where the office of assignee has become vacant and the vacancy has been regularly supplied by the appointment of another to discharge the duties of the office, and where the property of the insolvent estate had already been assigned and conveyed to the original assignee, and his "successor and successors in office," it is necessary or requisite that there should be a specific assignment and conveyance of the property belonging to the insolvent's estate to such successor or successors. We, therefore, conclude that it was not necessary to plead and prove that the clerk directly assigned and conveyed the property to Reynolds, Baruch's successor.

[4] 3. The order dismissing the insolvency proceedings showed upon its face that the court was without jurisdiction to make said order, and that the same was absolutely void.

The petition for the order of dismissal and the order constitute the entire record of the proceeding wherein the order dismissing the proceedings was made, and it appears therefrom that the petition was filed on the 28th day of February, 1912, and that the order of dismissal was made on the same day. As will be observed, section 66 of the Insolvency Act, above quoted herein, provided that after the appointment of an assignee in insolvency, no dismissal of the petition in insolvency and discontinuance of the insolvency proceedings should be made and ordered without the consent of all parties interested in or affected thereby. It was not made to appear upon the face of the petition to dismiss or in the order of dismissal or otherwise that the consent of the parties interested in or affected by the insolvency proceedings had been obtained for a dismissal and discontinuance of the proceedings in insolvency. The consent of the parties interested in the proceedings involved a jurisdictional fact. The court was absolutely powerless to make an order of dismissal and discontinuance of the proceedings in the absence of a showing of that fact, and its act in making the order under such circumstances was *coram non iudice*. Moreover, since the superior court was in insolvency proceedings vested only with a special or limited jurisdiction, no presumptions or intendments can be indulged in favor of the validity of the order. It was necessary that the consent of all interested parties should be made to appear upon the face of the proceeding to dismiss to render the order immune from collateral attack. As above intimated, there was no showing nor any attempt to show by evidence *de hors* the record of the proceeding to dismiss that the consent of the interested parties to a dismissal and a discontinuance of the insolvency proceedings actually was had, assuming that it would have been proper thus to have made such a showing.

[8, 9] 4. It was, of course, proper for the court to set aside and nullify its order dismissing the insolvency proceedings. As above shown, the court was wholly without authority or jurisdiction to make the order of dismissal and discontinuance, and there was therefore left to it no other alternative but that of vacating said order, and thus getting it out of the way and so preventing complications which would necessarily arise in the insolvency proceedings by reason of said order. The deed of conveyance of the property by German to the appellant was, of course, absolutely void. It conveyed nothing. The unauthorized dismissal of the insolvency proceedings—unauthorized because the court was without jurisdiction to dismiss the proceedings—did not have the effect of nullifying the proceedings. They still were pending in contemplation of law, and, of course, the insolvent was not legally reinvested with title to the property which had belonged to the

estate and which had been conveyed for the purposes of administration of the estate to the assignee and his successor and successors in office. And the fact that appellant, having conveyed the property to one Stedman after German, in the interval between the dismissal and the restoration of the insolvency proceedings, had made a purported conveyance of the property to the appellant, received a conveyance back of the property from said Stedman could not have the effect of vesting any greater title in the appellant than he was able to convey to Stedman. In other words, having obtained no title from German, the appellant could convey none to Stedman, and therefore the latter had no title he could convey when he made the purported reconveyance to the appellant.

[7-8] It was also proper for the court, upon vacating the order of dismissal and thus reviving the proceedings, to appoint an assignee to take charge of and administer upon the remaining undisposed assets of the insolvent's estate, since there was a vacancy in that office by reason of the death of the original assignee. The appointment of James H. Blanchard as assignee to succeed Baruch, assignee, was regular. But Blanchard failed to file a bond as assignee, and he was therefore without authority to exercise the duties of his office or to perform a valid act as assignee until he filed such bond. It follows that the conveyance by him of the land in controversy to the appellant involved a void act. It was wholly without legal force or effect. Counsel for the appellant vigorously contend, however, that the mere appointment of Blanchard vested him with all the powers of an assignee or a trustee, and that he could act or perform the duties of the office without giving or filing a bond conditioned for the faithful discharge of his duties as such assignee. We are unable to concur in that contention. As above shown, the Insolvency Act (section 15) provided that the assignee, within a certain specified time, or within any further time which the court might allow for meeting that requirement, should file a bond conditioned for the faithful performance of the duties devolving upon him. It is true that section 15 of said act does not expressly declare that the filing of the bond should be a prerequisite to his right to exercise his authority as assignee, but it certainly meant that such was to be the case. If the assignee could go on and legally administer the insolvent estate without filing the bond required, what could have been the object of the Legislature in requiring a bond at all? The assignee derived his title to the insolvent's estate from the assignment, which divested the insolvent of his property and vested it in the assignee from the time of the insolvency. Both the insolvent and the creditors are interested in the estate, and are entitled to have its assets administered according to the best interests of all concerned. The insolvent



(191 P.)

is interested in having his liabilities as far extinguished by the assets of his estate as possible and the creditors are interested in having their claims as nearly satisfied in full as the condition of the estate will permit. Hence, it was a wise provision that one having cast upon him so important a trust should be required to file a sufficient bond conditioned for the faithful performance of the trust, and we entertain no doubt that the requirement that an assignee in insolvency should file a bond for that purpose was intended by the Legislature as an essential requisite for his qualification to exercise or perform the duties of that office. At any rate, it has been so held in a number of cases, among which may be mentioned the case of *Winchester v. Union Bank of Maryland*, 2 Gill & J. (Md.) 79, 19 Am. Dec. 255. Furthermore, the order appointing Blanchard limited his authority as assignee to the performance of the act of making a conveyance of the property in dispute to the appellant. That portion of the order was absolutely void, since it does not appear therefrom or from anything in the proceeding culminating in his appointment that a petition was filed praying for the sale or disposal of the property by private sale. Section 25 of the Insolvency Act provided that "no private sale of any property of the estate of an insolvent debtor shall be valid, unless made under the order of the court upon a petition in writing, which shall set forth the facts showing the sale to be necessary." And the same section provided that upon the filing of a petition for such a sale notice of at least 10 days should be given by publication, etc. The order appointing Blanchard as assignee and the order authorizing him to convey the property to the appellant was, as we have seen, practically one order, and both were made on the same day. Thus it is manifest that there is not only not any showing that a petition was presented to the court asking for a private sale, but that it was absolutely impossible for any notice whatever, much less the required notice of 10 days, to have been given of such sale, assuming, of course, that the conveyance to the appellant involved a sale by the assignee. And this brings us to the question, raised by the appellant, that the right to subject the land in controversy to the payment of the debts of the insolvent was lost by reason of the fact that said land had been abandoned by the assignee. But there is no merit to the point. The complaint of the intervener alleges that said property was taken possession of by the original assignee, Jacob Baruch, the same having been assigned and conveyed to him by the clerk of the superior court. This allegation is not denied by the answer to the complaint in intervention, and therefore stands as admitted. The fact that the administration of the estate of the insolvent remained in abeyance or was dormant because the proceedings in insolvency were not promptly prosecuted to a final deter-

mination did not constitute an abandonment of the property as part of the assets of the insolvent estate to be subjected to the extinguishment of the liabilities of the insolvent. The rule of law as to abandonment is that there is no presumption of abandonment from mere lapse of time. *Partridge v. McKinney*, 10 Cal. 181. See, also, *Utt v. Frey*, 106 Cal. 352, 397, 398, 89 Pac. 807, as to what will and will not constitute the abandonment of property. In the present case, there could be no abandonment except by the assignee in whom the title to the property for the purposes of the insolvency proceedings had been vested. There is no evidence tending to show that Baruch abandoned, or intended to abandon, the property, save and except the fact that he failed to sell it during his incumbency as assignee and appropriate the proceeds of the sale to the payment of the debts of the insolvent. This omission may be assumed to have involved a dereliction of official duty on the part of Baruch rather than an abandonment, since it does not appear that the property was not of sufficient value to have justified the expense of selling it for the benefit of the insolvent's estate.

[10, 11] Appellant cites a number of cases which it is claimed support the view that the property herein involved was abandoned, and therefore the right to appropriate it to the payment of the debts of the insolvent lost; but we have examined the cases and do not perceive that they are in point here. The property belonged to the insolvent's estate, and it was available for disposition by the assignee in insolvency. No claim was ever made that it was abandoned or that there was an intention to abandon it as a part of the insolvent's estate until the void order was made, at the instigation of the insolvent, dismissing and discontinuing the insolvency proceedings; when the insolvent himself undertook to retake possession of it and convey it to the plaintiff. The question of abandonment is one of fact to be determined by the jury or the court, if the issues of fact are tried by the court, and the burden was upon the plaintiff clearly to show that there was an intention in the assignee to abandon the property. *Latham v. City of Los Angeles*, 87 Cal. 514, 518, 25 Pac. 673. The finding of the court in this case that there was no abandonment is conclusive upon this court.

[12] 5. The contention that the action, in so far as it is made by the complaint in intervention, is barred by the statute of limitations is without force. The complaint of the intervener is one for the quieting of title to the property in dispute as against the plaintiff and the defendant and in favor of the intervener, or, in effect, is for the recovery of real property, and the claim that the intervener's claim is barred proceeds upon the theory that the action, as to the time within which it should have been commenced, is governed by section 338 of the Code of Civil Pro-

cedure. But it is manifest that that section does not apply to the intervenor's case, but that section 318 of said Code governs as to the time within which such an action may be commenced. Section 338 provides for the commencement of actions where the relief prayed for is based upon the ground of fraud, and that is not the ground of the relief asked for by the intervenor. Section 318 provides that an action for the recovery of real property, or for the possession thereof, cannot be maintained "unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years next before the commencement of the action." The Supreme Court, in construing section 318, in *Murphy v. Crowley*, 140 Cal. 141, 146, 147, 78 Pac. 820, 821, 822, says:

"It seems to be established, therefore, by these cases that, although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the five-year limitation contained in section 318. The same rule has been followed in the states of Iowa, Kansas, Missouri, and Texas. *Williams v. Allison*, 33 Iowa, 278; *Reihl v. Likowski*, 33 Kan. 515; *Dunn v. Miller*, 96 Mo. 338; *Shepard v. Cummings*, 44 Tex. 502. There is a case to the contrary in New York. *Hoyt v. Putnam*, 39 Hun, 406.

"Unless the decisions of this court above cited are to be overruled, it must be conceded that, although the wrong complained of, and undoubtedly the principal contest in the case, arises from the undue influence exerted by the defendant Crowley on her deceased husband in his lifetime, the action in question is nevertheless an action to recover real property and for the possession thereof, and is not barred by the provisions of section 318."

See, also, *Page v. Garver*, 146 Cal. 577, 80 Pac. 860.

[13] In the present case the first act which could start the statute of limitations to running, or could in any way impart to the intervenor or the creditors of the estate of which the intervenor became the assignee, information that the appellant claimed an interest in the property was the filing for record of the deed from German to the appellant, which act of recordation occurred on the 11th day of March, 1912, or, as counsel for the respondent suggest, perhaps the act of the filing of the petition for a dismissal of the proceedings in insolvency and the making of the order of dismissal might have been the first acts indicating a claim of interest in the property by parties other than the assignee, and the order of dismissal was made on the 28th day of February, 1912. The intervenor's amended complaint, upon which the action

was tried, was filed on the 11th day of March, 1916, within the five-year limitation prescribed by section 318 of the Code of Civil Procedure. It is therefore manifest, as stated, that the intervenor's action is not barred.

[14] 6. The point that "because of the lapse of time since the filing of the petition by the said Jeremiah W. German to be adjudged an insolvent debtor, the presumption exists that all claims, debts, liabilities, and demands that were valid claims against said petitioner on July 31, 1888, have been paid and discharged" is conclusively answered by section 58 of the Insolvency Act, above quoted herein, that no statute of limitation of this state shall run against a claim which, in its nature, is provable against the estate of the debtor.

7. It is claimed that the findings of fact and conclusions of law do not support the judgment. It is not necessary to reproduce herein the findings of fact and the conclusions of law to show that this contention has no foundation. It is sufficient to say that we have carefully examined the findings and the conclusions of law, and that we have concluded from said examination that the judgment derives ample support from them.

There are numerous other points made by the appellant in impeachment of the judgment, but we have discovered no merit in them. We are satisfied that the judgment is legally impregnable, and it is accordingly affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

#### Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [16, 16] In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District we are not to be understood as approving that portion of the opinion substantially holding that the ordinary presumptions and intendments applicable to judgments of courts of record are not applicable to judgments and orders of the superior court in insolvency proceedings. We think that here the order of the superior court dismissing the insolvency proceeding, and the subsequent order appointing Blanchard as assignee for the limited purpose of making a conveyance of the property to the insolvent, were manifestly void upon their face, the order of dismissal because it sufficiently appears on the face of the record that it was made without the consent of the creditors, and the other order because no such appointment of an assignee is authorized by law. In view of this conclusion, we intimate no opinion upon the question of the effect of the failure of Blanchard to give a bond. In all other respects we are satisfied with the opinion of the District Court of Appeal.

The application for a hearing in this court is denied.

All concur.

(58 Mont. 231)

**ROBISON v. DOVER LUMBER CO.**  
(No. 4144.)

(Supreme Court of Montana. July 6, 1920.)

**1. Chattel mortgages ⇐177(3)—Testimony of mortgagee of flume suing for destruction speculative.**

In action by mortgagee of timber flume to recover for its wrongful destruction and consequent impairment of security, plaintiff's testimony that there was merchantable timber on reservation near the flume, and that he might have secured contract from the government to cut it, and could have taken possession of the flume or used it and realized a profit, held properly excluded as speculative.

**2. Chattel mortgages ⇐70(1)—Defendant destroying mortgaged flume held not entitled to deny right to maintain same.**

Defendant cannot be heard to justify against plaintiff mortgagee its wrongful act in destroying the mortgaged timber flume by invoking the provision of the mortgagor's contract with the United States government under which the flume would have become the property of the government if not removed before a given date.

**3. Chattel mortgages ⇐177(4)—Damages for impairment of security is amount remaining due.**

If a mortgagee is entitled to recover for the wrongful or negligent destruction of mortgaged property, thus impairing its security, the measure of damages is the amount remaining due on the debt secured by the mortgage, not to exceed the value of the property.

**4. Trial ⇐251(2)—Instruction assuming matter was issue for jury which was not such, misleading.**

In an action by the mortgagee of a timber flume for impairment of his security by its destruction, where complaint alleged value of flume was totally destroyed, and answer admitted it was of no value, there was no issue on such question, and an instruction assuming value of flume after it was injured was an issue for the jury was misleading.

Appeal from District Court, Sanders County; Asa L. Duncan, Judge.

Action by C. S. Robison against the Dover Lumber Company. From judgment for defendant, and order denying his motion for new trial, plaintiff appeals. Reversed and remanded.

H. O. Bond and John E. Patterson, both of Missoula, for appellant.

Herman H. Taylor, of Sand Point, Ida., and A. S. Ainsworth, of Thompson, for respondent.

**HOLLOWAY, J.** By a contract entered into with the government of the United States on December 5, 1912, J. P. McKay agreed to purchase a large amount of timber along Canyon creek in the Cabinet National Forest. The contract authorized McKay to go upon

the reservation and install the equipment necessary to remove the timber purchased, and pursuant to that authority he constructed a logging flume for the purpose of floating the logs to be cut, down Canyon creek into Vermillion creek, through which latter creek they were to be moved into Clark's fork of the Columbia, there to be delivered to the Dover Lumber Company, to which company McKay had contracted to sell them. After the flume was completed, McKay gave to this plaintiff a chattel mortgage upon it to secure an indebtedness of \$2,500 with interest. McKay's contract with the government expired on October 1, 1914, and contained a provision that any equipment not removed within 90 days thereafter should become the property of the government. His contract with the Dover Lumber Company provided, among other things, that if he should fail to carry out any of its provisions by December 1, 1913, the lumber company might, at its option, take possession of the equipment and complete the contract.

This action was brought by plaintiff, as mortgagee, to recover damages for the wrongful destruction of the flume and the consequent impairment of his security. After setting forth the execution and delivery of the note and mortgage securing its payment, it is alleged in the complaint that about January 14, 1914, defendant took possession of the flume, and between that date and August 1, following, used it, and in its use negligently, carelessly, and wantonly tore out, displaced, and destroyed it to such extent as to render it valueless; that immediately before the flume was destroyed it was of the reasonable value of \$10,000 and was ample security for the indebtedness due from McKay to plaintiff; that only \$100 has been paid upon the debt secured by the mortgage; that plaintiff has no other security; that the mortgagor is insolvent; and that by reason of the destruction of his security he has been damaged in the sum of \$2,723.15, the amount of the unpaid balance.

The answer admits the execution and delivery of the note and mortgage; denies that the flume was of any value whatever; denies any negligence, carelessness, or wantonness on defendant's part, or that by any act of defendant plaintiff's security was impaired, or that plaintiff has been damaged in any sum or at all. The answer then attempts to plead two affirmative defenses: First, that the flume was constructed by McKay with money furnished by defendant, by reason whereof defendant had a right to or interest in it prior and superior to the lien of plaintiff's mortgage; and, second, that the flume was constructed upon the national forest under a license from the government, which license expired before the commencement of this action, and that the

fume is the property of the United States. The reply admits that the fume was constructed upon the forest reservation under a permit from the government, and denies all the other affirmative allegations.

The trial of the cause resulted in a verdict for defendant, and plaintiff appealed from an order denying his motion for a new trial.

[1] Complaint is made that the court did not permit plaintiff to prove that there was a large amount of merchantable timber upon the reservation near the fume; that plaintiff might have secured a contract from the government to cut such timber; that he could have taken possession of the fume and used it to remove such timber and could have realized a profit from the operations sufficient to satisfy the indebtedness due him from McKay. The ruling was correct. Plaintiff did not offer to prove that he had a contract with the government for the purchase of timber, and whether he could have secured a contract, and, if so, whether upon such terms as to be profitable, were matters of speculation altogether. 17 Corpus Juris, 735. Plaintiff was permitted to prove that the reasonable value of the fume immediately before it was injured was greater than the amount due him from McKay and cannot complain that he was not permitted to do more.

[2] The other assignments refer to instructions given and refused. Instruction 9, given by the court, while not essentially erroneous, is altogether inapplicable. According to the undisputed evidence, the fume was destroyed long before McKay's contract with the government expired, and defendant cannot be heard to justify its wrongful act by invoking the provision of the contract under which it is contended the fume would have become the property of the government if not removed before January 1, 1915. The government might have made such modifications of its contract as it saw fit. It might or might not have availed itself of the benefit of that provision; but, whether it did or not, defendant is liable if by its wrongful or negligent act the fume was injured or its value lessened to plaintiff's prejudice. The same objection may be urged to instruction 14, given by the court. In other words, the provisions of McKay's contract with the government could not be injected into this controversy to any extent whatever, except in

so far as the provision for forfeiture of the fume to the government after January 1, 1915, might reflect upon the value of the fume at the time it was destroyed.

The court erred also in giving instruction 12, which assumed that McKay's contract with the lumber company gave to the lumber company a property interest in the fume. The contract does nothing of the kind. At most, it gave to the lumber company only the right to use the fume in a careful and prudent manner, in the event that McKay failed to carry out the contract.

[3] These three instructions emphasize the fact that the cause was tried and submitted upon an erroneous theory—a theory which transformed a very simple case into one so complicated that it is doubtful whether the jury comprehended it in any respect. The case presented by the pleadings is of the simplest character. The only issues to be submitted to a jury were: (1) Did the destruction of or injury to the fume result from defendant's wrongful or negligent act? If this inquiry was answered in the negative, a verdict for defendant would follow as of course. If answered in the affirmative, then it became necessary for the jury to determine: (2) The value of the fume immediately before it was injured, and (3) the amount remaining due to plaintiff. If plaintiff is entitled to recover, the measure of his damages is the amount remaining due upon the debt secured by the mortgage, not to exceed the value of the fume. 11 Corpus Juris, 619.

[4] The court erred also in assuming by its instruction 13 that the value of the fume after it was injured was an issue to be determined by the jury. It is alleged in the complaint that the value of the fume was totally destroyed, and the answer admits that it was of no value. There was therefore no issue upon that question, and the instruction could not fail to mislead the jury. *Sullivan v. Metropolitan Life Ins. Co.*, 35 Mont. 1, 88 Pac. 401.

Because of the particular errors herein considered and because of the fact that the case was tried upon an erroneous theory, the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and HURLY, MATTHEWS, and COOPER, JJ., concur.

(58 Mont. 287)

**POOL v. TOWN OF TOWNSEND et al.**  
(No. 4119.)

(Supreme Court of Montana. July 24, 1920.)

1. Municipal corporations  $\S$  488, 489(6) — Failure to protest against creation of improvement district did not estop protest against increased tax.

A landowner making no protest to the creation of an improvement district, which involved a tax based upon a certain area of his land, was not estopped to question the town's authority to increase the area and his tax proportionately.

2. Municipal corporations  $\S$  433—Tax for improvements on land out of city void.

A tax based upon lands without a town, which was included in an improvement district by the city officials before the land became a part of the town, was void ab initio.

3. Municipal corporations  $\S$  43—Code provision as to additions to town exclusive.

If the Codes provide the means by which an addition becomes a part of a city or town and subject to its jurisdiction, the means so provided must be held to be exclusive, in view of Rev. Codes,  $\S$  6213.

4. Municipal corporations  $\S$  43—Filing of plat alone does not operate to bring addition within town.

The filing of a plat did not operate to bring an addition within a town, it becoming a part of the town and subject to the jurisdiction of the council only when the plat was approved by the mayor and council and the approval indorsed thereon, under Rev. Codes,  $\S$  3212.

5. Municipal corporations  $\S$  433—Tax based on land within and without town only invalid as to portion of land out of town.

Where a town created an improvement district and improperly and without jurisdiction entered therein land without the boundaries of the town, a tax upon property of an owner of land both within and without the town was invalid only as to the portion of the land outside the town, and the court, on granting the landowner an injunction, should not restrain the collection of the entire tax.

Appeal from District Court, Broadwater County; R. Lee Word, Judge.

Suit by G. E. Pool against the Town of Townsend and B. Williams, Treasurer of Broadwater County, to restrain the collection of taxes. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Edward Horsky, of Helena, for appellants.  
E. H. Goodman, of Townsend, for respondent.

**HOLLOWAY, J.** This suit was instituted to secure an injunction restraining the town of Townsend and the county treasurer, as ex officio collector of taxes for the town, from enforcing the payment of a tax to defray the

expense of certain special improvements made pursuant to proceedings taken by the town council in 1913. Plaintiff alleges that he is, and at the time special improvement district No. 4 was sought to be created was, the owner of fractional lots 5, 6, 7, and 8 in block 17, original town site of Townsend, with an area of 14,069 square feet. The history of the council proceedings is then recited, and it is alleged that on September 29, 1913, the council passed a resolution, levying a tax upon the property within the district, apportioning to plaintiff the amount of tax due upon his property upon the basis of 14,069 square feet, but that thereafter, in 1914, the council wrongfully, and without notice to plaintiff, changed the apportionment, and for that year levied the tax against his property upon the basis of 28,400 square feet of area; that plaintiff tendered the amount justly due, but the tender was refused, and defendants threaten to sell his property in order to realize the larger amount demanded.

The answer admits that the tender was made and refused, and that defendants intend to proceed to sell plaintiff's property unless restrained, and generally denies all the other material allegations of the complaint. The trial resulted in a judgment in favor of plaintiff, and defendants appealed.

In so far as plaintiff's attack is directed to the procedure by the town council, it is without avail. The same questions were presented and determined adversely to the contentions made, in *Harvey v. Town of Townsend*, 57 Mont. —, 188 Pac. 897.

[1] Defendants insist that plaintiff is estopped to complain because he made no protest to the creation of the district; but there was no occasion for protest if plaintiff was satisfied, but his failure to protest against proceedings which involved a tax based upon an area of 14,069 square feet cannot be urged against his right to be heard to question the town's authority to increase the area and his tax proportionately. He might have been willing in 1913 to pay the tax based upon an area of 14,069 square feet, and altogether unwilling to pay the tax for 1914 based upon an area of 28,400 square feet, and he certainly is entitled to be heard to question the council's right to make the increase without his knowledge or consent.

[2] Upon the trial it developed that in addition to fractional lots 5, 6, 7, and 8, plaintiff owned certain fractional lots in the Potts-Harrison addition, which adjoin fractional lots 5, 6, 7, and 8, and that these two groups of fractional lots apparently make out four full-sized lots, though this does not appear definitely. It appeared, further, that the boundaries of special improvement district No. 4 were intended to include the fractional lots in the Potts-Harrison addition, as

well as the fractional lots in the original town site. The only controverted question now before this court involves the legality of the council's proceedings in attempting to include the territory in the Potts-Harrison addition. If that addition was a part of the town at the time the district was created, plaintiff cannot complain. He is called upon to pay only his just proportion of the expense. If, however, the addition was not a part of the town in 1913, and was not subject to the jurisdiction of the council for the purpose of creating the improvement district which included a portion of it, then plaintiff is entitled to be heard upon his contention that the tax based upon the area included in the fractional lots in the addition is void ab initio.

The record discloses that the plat of the Potts-Harrison addition was filed in the office of the county clerk and recorder of Broadwater county on August 4, 1908, but was not approved by the mayor and council of Townsend until April 30, 1914, several months after district No. 4 was created.

[3] Counsel for defendants insists that, even though the statute was not followed, there was a common-law dedication and acceptance of the streets and alleys within the addition, and *Kaufman v. City of Butte*, 48 Mont. 400, 138 Pac. 770, is cited in support of the contention; but it is one thing to dedicate the streets and alleys to public use as highways, and quite another thing to bring the addition within the town's limits and subject the property to the payment of town taxes. "In this state there is no common law in any case where the law is declared by the Code." Section 6213, Rev. Codes. If, then, the Codes provide the means by which an addition becomes a part of a city or town and subject to its jurisdiction, the means so provided must be held to be exclusive.

[4] Section 3212, Revised Codes, provides:

"Whenever territory adjoining any incorporated city or town is surveyed, and laid off into streets or blocks as an addition thereto, upon filing the map or plat thereof in the office of the county clerk, said territory may become a part of such city or town, upon the approval of the mayor and a majority of the council indorsed thereon."

The meaning of this language is too plain to admit of doubt or controversy. The filing of the plat did not operate to bring the addition within the town. It became a part of the town and subject to the jurisdiction of the council only when the plat was approved by the mayor and council and the approval indorsed thereon. Since this plat was not approved until long after district No. 4 was created, it follows, as of course, that the property of plaintiff within the Potts-Harrison addition was not a part of the town at the time the district was created, and was not subject to the jurisdiction of the council, and cannot be made subject to the payment of the tax sought to be imposed upon it. *Farlin v. Hill*, 27 Mont. 33, 69 Pac. 239.

[5] Counsel for defendants insists that the question just determined was not raised by the pleadings; but so far as the record discloses plaintiff did not know upon what theory defendants refused his tender of the taxes due upon his property within the original town site. Furthermore, it does appear that the question whether the Potts-Harrison addition was within the town was injected into this proceeding by defendants themselves, as is indicated by the question propounded to the witness Louis K. Pool. In any event we think the question was properly before the court, even though plaintiff's complaint might have been made more definite and certain. A great deal of evidence was introduced upon the subject, and plaintiff ought not to be subjected to a burden of taxation imposed by the council upon property not subject to its jurisdiction. The judgment entered in this instance, however, restrains the collection of the entire tax, and in this respect is too comprehensive.

The cause is remanded to the district court, with directions to modify the judgment so as to restrain the collection of the tax in so far as it is computed upon an area in excess of 14,069 square feet, and, when so modified, will stand affirmed. Each party will pay his own costs of this appeal.

Modified and affirmed.

BRANTLY, C. J., and HURLY and COOPER, JJ., concur.

MATTHEWS, J., being disqualified, takes no part in the foregoing decision.

(58 Mont. 292)

**EDWARDS v. CITY OF HELENA.**  
(No. 4661.)

(Supreme Court of Montana. July 9, 1920.)

**1. Municipal corporations — 863—Water system bonds unnecessarily issued in excess of debt limit not void.**

Though a city could not lawfully authorize a water system bond issue beyond the 3 per cent. limit of indebtedness, so long as there was sufficient margin unexhausted within the limit to secure the desired funds, because the city council purposely or through inadvertence declared it was necessary to increase the indebtedness beyond the 3 per cent. limit, bonds authorized by the vote of qualified electors are not void, unless the vote was procured or influenced by deception of voters.

**2. Pleading — 214(1)—Demurrer to complaint admits allegations.**

Demurrer to the complaint admits the truth of its allegations.

**3. Municipal corporations — 863—Water system bonds, beyond debt limit and authorized by Constitution payable from water revenues; otherwise, payable by taxation.**

If bonds for a city's water system are beyond the 3 per cent. limit of indebtedness and authorized by Const. art. 13, § 6, the revenues from the water plant are dedicated to discharge principal and interest, of the debt, and a taxpayer, not a water user, may not be called on to contribute; but if the margin unexhausted within the 3 per cent. limit of indebtedness is sufficient to admit of a bond issue in the necessary amount, the bonds become the ordinary obligations of the city, redeemable by funds raised by direct taxes, unless otherwise provided.

**4. Municipal corporations — 863 — Revenue from water system acquired only by exceeding debt limit set apart to debt only so far as necessary.**

If the 3 per cent. limit of a city's indebtedness was exceeded in purchasing a water system, the revenue from the system is set apart to the discharge of the original indebtedness only to the extent they are necessary; any excess being subject to disposition by the city council as other public revenues of the city.

**5. Constitutional law — 121(2) — Contractual ordinance cannot be repealed without consent of other party.**

A city ordinance contractual in nature, as one agreeing that, if water system bonds were authorized, the city would devote the revenues from the system to their discharge, and resort to direct taxation only to meet a deficit, cannot be repealed without the consent of the other party, unless such right was reserved, as repeal would impair the obligation of the contract.

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

Suit by Frank J. Edwards against the City of Helena. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

A. P. Heywood, of Helena, for appellant.  
E. C. Day, of Helena, for respondent.

**HOLLOWAY, J.** On February 16 of this year an ordinance was passed by the city council of Helena, and approved by the mayor, directing that a special election be held on April 5 for the purpose of submitting to the qualified electors the proposition to issue the bonds of the city in the sum of \$200,000, the money to be used to install a pipe line to convey a portion of the city's water supply from the source near Rimini to the reservoir near Helena. The preamble to the ordinance recites that the city owns its water supply and distributing system; that the portion of the supply in question has been conveyed through an open ditch; the necessity for the proposed improvement, and the probable cost of the same; that the city has almost reached the ordinary constitutional limit (3 per cent.) of indebtedness; and that to procure the funds to install the pipe line it is necessary to increase the city's indebtedness beyond the 3 per cent. limit. In the body of the ordinance is this provision:

"The revenues of said city, derived from its said water system, shall be devoted to the payment of the principal and interest on said bonds, and the city council shall hereafter provide therefor. A tax to be fixed by ordinance must be levied each year, for the purpose of paying the interest on the bonds and to create a sinking fund for their redemption."

The like provision is contained in the notice of election, which was duly given, and in the ballot provided is this recitation:

"Which said bonds and the interest thereon shall be paid from the revenues derived by the city from its said water system."

The election was held and the bonds authorized, but before they were issued this taxpayer's suit was instituted to restrain further proceedings.

The complaint recites the history somewhat more in detail, and alleges that, notwithstanding the recital in the preamble, the city had not almost reached the 3 per cent. limit of indebtedness, but, on the contrary, there was still a margin within that limit of more than \$300,000, an amount ample to secure the funds desired. To this complaint a general demurrer was interposed, and afterwards sustained. From a judgment dismissing the complaint, this appeal is prosecuted.

[1-3] It is the contention of appellant that the city could not lawfully authorize a bond issue beyond the 3 per cent. limit so long as there was a sufficient margin within that limit to secure the funds desired, and this will be conceded at once; but it does not follow that because the city council, either purpose-

ly or through inadvertence, declared that it was necessary to increase the indebtedness beyond the 3 per cent. limit, the bonds authorized by the favorable vote of the qualified electors are void. They are nevertheless the valid obligations of the city, unless the favorable vote was procured or influenced by the deception of the voters to their prejudice. Assuming the allegation of the complaint to be true, and the demurrer admits it to be true for the purpose of this case, the bonds, if valid, are the obligations of the city incurred within the ordinary limit (3 per cent.) of its indebtedness. It is a matter of vital consequence to the taxpayer whether the bonds are within or beyond the 3 per cent. limit. If they are beyond that limit, and authorized by section 6, article 18, of the Constitution, the revenues from the city-owned water plant are irrevocably set aside and dedicated to the discharge of the interest and principal, and a taxpayer who is not a water user may not be called upon to contribute anything, unless the water plant revenues are insufficient, and then only may a property tax be levied to supply the deficiency. On the other hand, if the margin within the 3 per cent. limit is sufficient to admit of a bond issue in the amount necessary, such bonds become the ordinary obligations of the city, to be redeemed by funds derived from direct taxes upon property within the city, unless other provisions are made for their payment and the payment of the interest as it becomes due. It is upon the theory that the property of this plaintiff and of others similarly situated will be charged with the payment of these bonds that this action is prosecuted; but, in this instance, the premise for the theory is erroneous, and the theory itself fails.

[4] It does not appear from this record whether the city's water system was purchased by funds derived from the sale of bonds issued in excess of the 3 per cent. limit, but it is not material here. If the 3 per cent. limit was exceeded, the revenues from the water system are set apart to the discharge of that original indebtedness only to the extent that such revenues are necessary, and any excess is subject to disposition by the city council as other public revenues of the city. *McIntock v. City of Great*

Falls, 53 Mont. 221, 163 Pac. 99. It is not claimed in this complaint that such revenues are not sufficient to meet the original indebtedness and this new bond issue; and it follows that the excess may be employed to discharge this new indebtedness, and that, if any tax levy is ever required, it will be only such as is rendered necessary to meet a deficit. In other words, plaintiff's situation is not different from what it would have been if the declaration by the city council had been correct.

[5] But it is insisted by counsel for plaintiff that, even though the revenues from the water system are available to discharge these bonds and pay the interest as it accrues, the city council cannot be compelled to make such application, even though it has declared in the ordinance that it will do so. Speaking in general terms, that contention would be available upon the theory that the same legislative body which passed this ordinance could hereafter repeal it; but to that general rule there is this exception, which is as well settled as the rule itself, viz.: An ordinance contractual in nature cannot be repealed without the consent of the other party, unless the right of repeal is reserved in the original ordinance itself, for such repeal would impair the obligation of the contract. 28 Cyc. 383. Clearly, the ordinance of February 16 is contractual in its nature and effect. By its express terms the city agreed that, if these bonds were authorized, it would devote the revenues from the water system to their discharge and resort to direct taxation only in the event such revenues were insufficient, and then only to meet the deficit. It would violate every principle of justice and fair dealing to permit the city thus to influence a favorable vote and then refuse to carry out its promise. Since the ordinance of February 16 does not reserve the right of repeal, our conclusion is that it is irrevocable until these bonds and interest thereon are fully discharged, and that plaintiff fails to disclose wherein he is, or can be, injured.

The judgment is affirmed.

Affirmed.

BRANTLY, C. J., and HURLY, MATTHEWS, and COOPER, JJ., concur.



(111 Wash. 408)

**McLAREN v. NARROWS LAND CO.**  
(No. 15817.)

(Supreme Court of Washington. July 7, 1920.)

**1. Vendor and purchaser ⇨46—Contract for deed construed as whole against seller.**

A contract for deed must be considered as a whole so that effect may be given to every part, and, if any provision is susceptible of more than one construction, that most favorable to the purchaser will be adopted.

**2. Vendor and purchaser ⇨214(5)—Assignment of contract for deed carried all rights, including that to refund.**

Grantor in a contract for deed having provided for its assignment with its consent, an assignment so made carried with it the whole contract, and all rights thereunder, including the right to a return of the purchase money under the terms of a refunding provision operative on death of the grantee.

**3. Vendor and purchaser ⇨214(2)—Grantor in contract may not be heard to say consent to assignment was conditional.**

After giving its written consent to an assignment of its contract for deed, and accepting payment thereunder from the assignee, the grantor may not be heard to say that its consent was but partial or conditional.

**4. Vendor and purchaser ⇨84—Under agreement to refund on death of purchaser, payments made during grace period recoverable.**

Executor of assignee of contract for deed providing for refund of payments on death of grantee held entitled to refund, assignment having been with written consent of grantor, though all payments on the contract were not made on or before due date, having been made before expiration of grace period.

**5. Evidence ⇨461(1) — Parol testimony to show construction of contract for deed by officers of vendor company held inadmissible.**

In action by executor of deceased assignee of contract for deed to recover from vendor payments made thereunder on account of death of assignee, contract giving such right, parol testimony to show construction of contract by officers of vendor company when they adopted and prepared the printed form held inadmissible.

**Department 2.****Appeal for Superior Court, Pierce County.**

Action by William E. McLaren, executor of the estate of Edith O. McLaren, deceased, against the Narrows Land Company. From judgment for plaintiff, defendant appeals. **Affirmed.**

E. R. York, of Tacoma, for appellant.

Flick & Paul, of Seattle, for respondent.

**TOLMAN, J.** Respondent as executor of the estate of Edith O. McLaren, deceased, brought this action in the court below to recover back the moneys paid on the purchase

price of certain lots in Regent's Park, adjacent to the city of Tacoma, under a contract of purchase in writing, dated December 1, 1908, made by appellant, Narrows Land Company, a corporation, to and with Edith O. Wright and Orinda A. Lucas. The case was tried upon a stipulation as to the facts duly entered into between the parties, and from a judgment against it in the full amount prayed for, appellant prosecutes this appeal.

The facts being stipulated, the main question now to be determined is the proper construction to be placed upon certain terms of the written contract. The contract, among other things, provided that the purchase price of the property therein described should be the sum of \$2,000, payable \$100 in cash, on the execution thereof, "and the sum of fifteen (15) dollars on or before the 1st day of each and every month thereafter until the entire sum of two thousand (2,000) dollars is paid." It further provides:

"No assignment of this contract or the premises herein described shall be valid unless the same be made with the written consent of the first party. \* \* \*

"In the event that said parties of the second part shall make default in any of the payments hereinbefore provided for at the time the same become due and such default continues for sixty (60) days thereafter, then, and in that event, the party of the first part shall be relieved from all obligations under this agreement, and shall be under no obligation or liability to convey said real property, or any part thereof, and the money theretofore paid by said parties of the second part shall be retained by said party of the first part as a consideration for the execution of this agreement, and as a consideration for the right to the possession of said real property which right of possession is hereby granted to said parties of the second part, to continue so long as the payments are made as provided in this contract.

"Time is hereby expressly declared to be of the essence of all the provisions of this agreement, and said agreement and all terms, conditions and covenants thereof, shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto. \* \* \*

"In event of the death of the second parties while this agreement is in force and unassigned, the legal representatives of said second parties may continue payments thereon; or the first party will on request and on surrender of this agreement, provided payment of all installments herein agreed to be paid and then due, have been made promptly on or before the date thereof, pay to the legal representatives of the said second parties an amount equal to the sum of all monthly installments paid hereon, with interest at 6 per cent. per annum, from date of payment on the amounts therefor paid from time to time."

Attached to the contract is an assignment by Orinda A. Lucas of her interest therein to her copurchaser, Edith O. Wright, dated

July 20, 1909, and countersigned by the Narrows Land Company, and the written stipulation of Edith O. Wright that she will make all payments and be bound by all of the terms of the contract.

In addition to the initial payment of \$100, the purchasers named in the contract made various payments of installments from time to time until July 20, 1909, when the assignment was executed and accepted by the land company, and thereafter Edith O. Wright, then having married, under the name of Edith O. McLaren, continued to make the payments until her death on December 1, 1917. At the time of the death of Mrs. McLaren all payments then due under the terms of the contract had been paid, but of the 108 monthly installments which had matured prior to her death, only 17 were paid promptly on or before the due date described in the contract, and the remaining 91 installments were, according to the schedule attached to the contract, and stipulated to be correct, paid at various intervals after the date on which each matured, but always within the 60-day period and before a default might have been claimed, and were accepted and receipted for by the land company as and when made. After the death of Mrs. McLaren, the respondent duly qualified as executor of her estate, and made demand for the payment to him of the amounts paid upon the contract, plus interest, according to the refunding condition above quoted.

Appellant strenuously contends that no recovery should have been permitted because (1) the death of both of the purchasers named in the contract did not occur; (2) the agreement was to pay only to the legal representatives of "said second parties," and not to one of them; (3) the contract was not "unassigned" within the meaning of the refunding provision; and (4) respondent's testatrix had not complied with the condition precedent, in that all of the installments which matured prior to her death had not been paid promptly on or before the due dates fixed by the contract.

[1] It is a familiar rule that such a contract as this must be considered as a whole, so that effect may be given to every part and if any provision is susceptible of more than one construction, that construction will be adopted which is most favorable to the purchaser. In other words, it will be construed against the grantor.

[2, 3] Considering together the first three points raised by appellant, and bearing in mind this elementary rule of construction, it would seem obvious that when the grantor provided for the assignment of the contract with its consent, an assignment so made would carry with it the whole contract and all rights thereunder, including the right to a return of the purchase money under the terms of the refunding provision. And after

giving its written consent to such an assignment and accepting payments thereunder from the assignee the land company may not now be heard to say that its consent was but partial or conditional. It had an opportunity, both in the drafting of the contract and in consenting to the assignment, to make clear and plain that the refunding provision should in no event be assignable, and that no assignment of the contract, even though assented to, should extend the refunding privilege to any but the original purchaser. Not having done so before the assignee parted with her money in reliance upon its consent to the assignment, it is now estopped.

[4] We think that the contention that recovery may not be had because all payments were not made on or before the due date is equally without merit. Admitting that the purpose of the refunding provision was in part to secure prompt payment of the installments, still the contract itself provides 60 days of grace before default can be claimed, and a payment within that period is a prompt payment within the meaning of the contract. As was said by Judge Rudkin in construing a similar contract in *Livieratos v. Commonwealth Security Co.*, 57 Wash. 376, 106 Pac. 1125:

"On the second question presented we are of opinion that the court was fully warranted in finding or concluding that payments made within the 60 days allowed by the contract of sale were promptly made within the agreement to refund. The two contracts related to the same subject-matter, were a part of the same transaction, and if the purchaser was not in default under the one he was not in default under the other. The appellant accepted the respondent's money without objection, and the objection now interposed to its return does not strongly appeal to us."

It is true that there is some language used in the case of *Boyle v. Narrows Land Co.*, 70 Wash. 59, 126 Pac. 78, which seems inconsistent with that just quoted, but the decision in the Boyle Case does not rest upon such inconsistency, and we are not bound thereby. The Boyle Case does hold, in construing a contract identical with this:

"The contract, in effect, stipulated that payment should be made only on condition that 'payment of all installments herein to be paid and then due have been made promptly on or before the date thereof.' The expressions 'then due' and 'the date thereof' relate to the date of the death of the vendee. The plain reading of this provision of the contract is that the right to repayment should exist at the date of the vendee's death, on the sole condition that all payments then due had been promptly made"

—a holding with which we are now content.

[8] Appellant further contends that the trial court erred in not admitting parol testimony to show the construction placed upon the written contract by the officers of the

land company when they adopted and had prepared the printed form. Clearly their interpretation of its meaning would not be binding upon the courts, and therefore the offered evidence was immaterial and inadmissible for any purpose.

Finding no error, the judgment appealed from is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(111 Wash. 699)

HEBDEN v. HEBDEN. (No. 15721.)

(Supreme Court of Washington. July 9, 1920.)

Divorce  $\S$  298(3)—Welfare of children best served by awarding them to mother.

The welfare of children is best served by awarding them to the care of their mother, granted divorce on account of the cruelty of her husband, of morose and sullen disposition.

Department 1.

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

Suit for divorce by Ella Dorothy Hebdén against Bernard Sydney Hebdén. From decree for plaintiff, defendant appeals. Affirmed.

Del Cary Smith and A. O. Colburn, both of Spokane, for appellant.

Roy A. Redfield, of Spokane, for respondent.

MACKINTOSH, J. A divorce was granted respondent upon her complaint charging the appellant with cruelty. She was awarded the custody of their three children of tender years, and a division was made of the community property. From all of this decree the appellant has come to this court, alleging many errors in the trial.

As we view the testimony taken in the course of a long and acrimonious hearing, we feel that a summary of it in this opinion would neither add anything to the body of our law or assist in making smooth the rough

places in the future lives of those most intimately concerned in this unhappy domestic catastrophe. The record affords ample material for the critical analysis of a modern novelist; but, aside from that, we can see no reason for perpetuating the sordid story in the already congested annals of the law. Suffice it to say that a careful review of the testimony and a consideration of the many objections thereto convinces us that the cruelty alleged was satisfactorily proven; that the appellant unremittently heaped Ossa upon Pellon, until the foundations of conjugal felicity crumbled; or, perhaps, better, it might be said that the dark waters of his morose and sullen disposition, dropping unceasingly, had at last worn away the rock of marital tolerance.

There is nothing in the record to justify interference with the decree as to the custody of the children, whose welfare is unquestionably best served by awarding them to the care of their mother; nor does the distribution of the property of the parties appear to be otherwise than fair and just. This opinion may be well closed by quoting from the case of Quilent v. Quilent, 105 Wash. 315, 177 Pac. 779:

"It is first contended that the evidence does not sustain the findings of the trial court. It is probably true that the evidence fails to disclose any one act of shortcoming on the part of the husband which in itself would be sufficient to justify the divorce. But when the record is read in its entirety it discloses a course of conduct on the part of the husband, beginning early in the married life of the parties, which was humiliating and distressing to the wife, and which was prompted by his imperious and domineering disposition and utter lack of affectionate regard for his wife and her rights as a party to the union. It is unnecessary here to set out this distressing story, but it is sufficient to say that a careful consideration of the evidence leads us to the conclusion that the trial court properly entered a judgment dissolving the bonds between the parties."

Judgment affirmed.

HOLCOMB, C. J., and MAIN and PARKER, JJ., concur.

$\S$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(111 Wash. 487)

**CARMAN DISTRIBUTING CO. v. CASCADE LAUNDRY CO. (No. 15859.)**

(Supreme Court of Washington. July 12, 1920.)

**Sales  $\Rightarrow$  178(3)—Buyer accepted goods not up to sample by delay in inspection.**

Where sale of canvas was made on 30 days' credit, duty was on buyer before expiration of credit period to inspect to see whether roll corresponded with sample, and, buyer having kept canvas in possession from November 8th to January 25th before inspecting, meanwhile asking for an extension of time for payment, it accepted canvas by its delay, though canvas was not up to sample.

**Department 1.****Appeal from Superior Court, King County.**

Action by the Carman Distributing Company against the Cascade Laundry Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

**Hamblen & Gilbert, of Spokane, for appellant.**

**E. H. Belden, of Spokane, for respondent.**

**MACKINTOSH, J.** The respondent is suing for the value of a roll of canvas sold on October 22, 1918. In defense to the action the appellant says that the canvas was sold by sample, which was sent from the respondent's place of business in Omaha to the appellant in Spokane, and that the appellant made the sale by telegraphed acceptance, based upon the sample, and that the canvas shipped was not in accordance with the sample. In reply, respondent denied that the canvas was not according to sample and alleged that the appellant had accepted the canvas by waiting an unreasonable time after its receipt before making objection. The trial court found that the canvas was not according to sample, but permitted a recovery upon the finding that appellant did not refuse the canvas within a reasonable time after its receipt, and its conduct thereby amounted to an acceptance.

The evidence shows that on October 17, 1918, the respondent wrote to the appellant and inclosed a sample of the canvas, which it then offered for sale. On October 22 the appellant wired an acceptance of the offer and ordered the canvas shipped. On October 23 the respondent shipped the canvas, which arrived in Spokane on November 8. According to the offer of October 17, the canvas was sold "strictly thirty days net." Instead of making payment when due, the appellant asked for an extension of time. The respondent demanded payment of appellant from time to time, and on December 16 the appellant asked for an extension of time to January 20, 1919, which request was granted. On January 20 no payment was made, and on

January 23 the appellant wrote to the respondent that the canvas was not according to sample; that it had just made an examination for the first time and discovered this situation. The price of canvas had declined between October 22 and January 23. There is considerable testimony in the case upon the question of whether, as a matter of fact, the canvas shipped was the same as the sample; but it is unnecessary for us to determine this phase of the case, and we will accept the trial court's finding for the appellant that the sample of canvas was of different quality from that purchased.

The respondent, however, is entitled to recovery on the ground that an unreasonable delay in rejecting the canvas after its receipt amounted to an acceptance. The sale was made on 30 days' credit, and the duty was upon the appellant, before the expiration of that credit period, to perform the simple act of uncovering the canvas roll and making an inspection to see whether the goods corresponded to the sample. Instead of that, the appellant kept the canvas in its possession from November 8 until January 23 before making an examination, and in the meantime merely asked for an extension of time for payment. It must be held to have accepted the canvas by reason of its unreasonably delayed examination and decision.

The rule is well recognized, as stated in 35 Cyc. pp. 227, 229, 239, 243, and 260, that—

"The inspection of the goods regarded as either a duty imposed on the buyer or as a right to be exercised by him should be made within a reasonable time."

"\* \* \* The option to reject must be exercised and notice thereof given within a reasonable time. \* \* \*"

"The buyer is estopped to complain of defects in the goods when he had knowledge or notice thereof at the time of sale, or retains the goods after a reasonable time in which to make inspection has elapsed. \* \* \*"

"\* \* \* So a failure to reject or return goods within a reasonable time will be construed as an acceptance waiving defects."

"An acceptance of the goods will be implied if the buyer fails within a reasonable time to reject them, or to return them to the seller."

24 R. C. L. p. 357, states:

"And since a sale is voidable only at the option of the buyer, to entitle him to rescind he must act promptly on the discovery of the fraud and if after discovering the fraud he acquiesces in the sale \* \* \* by an \* \* \* unreasonable delay he will be deemed to have affirmed the sale and he cannot afterwards rescind. \* \* \*"

Pence v. Langdon, 99 U. S. 578 (25 L. Ed. 420), states the rule to be:

"Acquiescence and waiver are always questions of fact. There can be neither without knowledge. \* \* \* But he may not willfully

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(111 Wash. 464)

GREENWOOD v. PUGET MILL CO.  
(No. 15840.)

(Supreme Court of Washington. July 9, 1920.)

shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He cannot rest until the rights of third persons are involved and the situation of the wrongdoer is materially changed. Under such circumstances he loses the right to rescind, and must seek compensation in damages. \* \* \*

In the case at bar the situation of the respondent had been materially changed by the fall in price. *Grabfelder v. Vosburgh*, 90 App. Div. 307, 85 N. Y. Supp. 633, discussing this question, contains the following:

"If the term of credit had expired before the defendant notified the plaintiff of his declination to accept the goods, probably that would have been, as matter of law, an unreasonable delay in arriving at the decision. Where a specific term of credit is extended upon a sale of goods, accompanied by the representation that they are of a superior quality or of a certain grade, the opportunity of examination should be taken advantage of before the bill becomes due. The credit implies that the conditional sale is to become absolute, at least by the time of the maturity of the account."

This court, in the case of *Kleeb v. Long-Bell Lumber Co.*, 27 Wash. 648, 68 Pac. 202, held that the first notification by the plaintiff of any objection to the quality of lumber sold, which occurred two months after the sale, was such an unreasonable delay as to amount to an acceptance; the court saying:

"\* \* \* The rule is, where a purchaser keeps goods for an unreasonable time or treats them as his own, he will ordinarily be considered as having ratified the sale. His conduct establishes a presumption that the goods are satisfactory, and, by reason of his negligence in seasonably notifying his vendor of his refusal to accept, he cannot deny such acceptance. \* \* \*

And, referring to the delay in the case of 64 days before the notice of rejection was given, the court farther says:

"A reasonable consideration of the distance between plaintiff and defendant, the complete opportunities for examination, and the comparatively small stock of lumber received, certainly impresses reasonable persons that the delay was unreasonable. \* \* \* Plaintiff had shipped the lumber a great distance."

Under these authorities, which but express what seems to be the universal rule, the trial court was correct in determining that the appellant's conduct had amounted to an acceptance of the canvas.

The judgment is affirmed.

HOLCOMB, C. J., and PARKER, MITCHELL, and MAIN, JJ., concur.

Army and navy  $\Leftarrow$  34—Dismissal of action for failure to prosecute proper, though plaintiff was transporting troops and ammunition.

Plaintiff having made no effort during the 10 years action was pending to bring it on for trial, its dismissal was not an abuse of discretion, his engagement, from the beginning of the war, as captain of a vessel carrying troops and munitions to Europe, shown by affidavit, not being a service covered by, nor shown in the manner provided in, *Soldiers' and Sailors' Civil Relief Act* (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ ss).

## Department 1.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Benjamin H. Greenwood against the Puget Mill Company. From a judgment of dismissal for want of prosecution, plaintiff appeals. Affirmed.

R. B. Brown and Cole & Dolby, all of Seattle, for appellant.

Chadwick, McMicken, Ramsey & Rupp and John P. Garvin, all of Seattle, for respondent.

MAIN, J. This is an appeal by the plaintiff from a judgment of the superior court dismissing an action for want of prosecution. On December 17, 1904, the appellant, while in the employ of the respondent, sustained a personal injury which he claimed was due to the negligence of the respondent. On October 2, 1908, he brought an action by his guardian ad litem to recover for the injury. In the complaint it was alleged that the appellant would be 20 years of age on the 18th day of November, 1908. The steps in the action prior to April 30, 1909, when the appellant demurred to the affirmative defense in the answer, need not be detailed.

The appellant became 21 years of age on the 18th day of November, 1909, and some time thereafter was substituted as a party to the action. Subsequent to this time there were no steps taken in the action prior to March 8, 1913, when the demurrer was heard and overruled. On September 29, 1915, the reply was served. On January 26, 1917, the respondent caused the case to be placed upon the trial calendar of the superior court. The appellant, a few days thereafter, filed a motion for continuance not to exceed six months. Thereafter and during the month of May of the same year the respondent again caused the case to be placed upon the trial calendar, and on the 2d of June, 1917, it was again stricken therefrom upon application of the appellant. Certain matters occurring in

the action from this time to June 28, 1919, when the court entered the order directing that the cause be tried not later than September 30 of that year, need not be detailed. On September 22, 1919, the case was regularly called for trial. The appellant declined to introduce any testimony and urged a motion for continuance supported by the affidavit of one of his counsel. The motion for continuance was denied, and, the appellant declining to offer any evidence, upon motion of the respondent the cause was dismissed. The record is barren of any showing that the appellant from the time he became 21 years of age until the cause was dismissed had made any effort to bring it on for trial. This was a period of approximately 10 years.

In the affidavit for continuance made by counsel for the appellant it is stated that the appellant was a seafaring man, being captain of the steamship Edgecomb, which was engaged in carrying munitions of war and transporting soldiers from the United States to ports in France and elsewhere in Europe, and in carrying home returning soldiers. It is stated in the affidavit that the appellant was engaged in this service since the beginning of the war with Germany and up to the time of the filing of the affidavit, which was made at or shortly before the time when the judgment dismissing the cause was entered. The action of the court in dismissing the cause was not an abuse of discretion under the holdings of this court in similar cases. *Langford v. Murphey*, 30 Wash. 499, 70 Pac. 1112; *Hoffmeister v. Renton Co-op. Coal Co.*, 40 Wash. 48, 82 Pac. 127; *First National Bank v. Hunt*, 40 Wash. 190, 82 Pac. 285; *Rehmke v. Fogarty*, 57 Wash. 412, 107 Pac. 184. As pointed out in *Arthur v. Washington Water Power Co.*, 42 Wash. 431, 85 Pac. 28, the appellant having brought the action, the "duty was particularly upon him to see that diligence was exercised." Every effort that was made to bring the cause on for hearing was on the part of the respondent. It is claimed, however, that since the appellant was engaged in the performance of war duties as above indicated, under the act of Congress of March 8, 1918, tit. 16, 1918 Statutes, commonly known as the Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, §§ 3078¼a-3078¼ss), the cause should not have been dismissed. To this contention there are two answers: First, the appellant was not engaged in a service covered by the act; and, second, assuming that he was engaged in such service, the showing of this fact was not made in the manner provided for in the federal statute.

The judgment will be affirmed.

PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

(111 Wash. 504)

MOORE, State Bank Examiner, v. KILDALL.  
(No. 15772.)

(Supreme Court of Washington. July 12, 1920.)

1. Evidence ¶441(11)—One signing as principal cannot set up independent collateral agreement.

In the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability.

2. Bills and notes ¶92(5)—Corporate indebtedness consideration for note of president.

Where a president of a corporation executed a note in his own name in settlement of an indebtedness of the corporation, and was to receive therefor any balance left after the securities of the corporation had been sold, the note was supported by a sufficient consideration.

3. Bills and notes ¶98—One signing note to deceive bank examiner estopped to allege want of consideration.

One giving a note as "live paper" to make an appearance of assets so as to deceive the bank examiner is estopped, on the insolvency of the bank, to allege want of consideration.

Department 2.

Appeal from Superior Court, King County; Wm. A. Grimshaw, Judge.

Action by Louis H. Moore, as State Bank Examiner of the State of Washington, in charge of the business, assets, and affairs of the German-American Mercantile Bank, against Joseph Kildall. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with instructions.

C. H. Winders, of Seattle, for appellant.

E. M. Farmer, of Seattle, for respondent.

MOUNT, J. This action was brought by the state bank examiner in charge of and liquidating the German-American Mercantile Bank, an insolvent state banking corporation, to recover a balance due upon a demand promissory note in the sum of \$3,240.45, executed by the defendant to the German-American Mercantile Bank on September 25, 1916, and for the foreclosure of certain collateral securities. The defense was in substance that there was no consideration for the note and that at the time the note was executed an oral agreement was entered into between the maker of the note and the president and cashier of the bank; that the maker should not be required to pay the note, but that the bank would foreclose certain described collateral security and, after deducting the amount of the note, turn the balance of the proceeds over to the maker of the note. On these issues the case was tried to the court, without a

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jury, and resulted in a judgment in favor of the defendant. The plaintiff has appealed.

Upon the trial of the case, over the objection of the appellant, the respondent testified, among other things, as follows:

"Mr. Carstens and Mr. Riley called me up to the bank, and they wanted to discuss this Kildall Fishing & Packing Company business, and they would like to have me put it in some kind of shape so that they could handle it and carry it along without being past-due paper, and I says, 'Well,' I says, 'I don't owe the indebtedness; I don't see how I can fix it up.' \* \* \*

"Then Mr. Carstens says, 'Well,' he says, 'you can handle these matters, these securities, better, and get something easier out of it than we can.' 'Well,' I says, 'Mr. Carstens, the securities are all right; they are worth a great deal more than the indebtedness to the bank.' \* \* \*

"Well, then Mr. Carstens and Mr. Riley were both present, and he said, 'Well, now, you better give your note for this and let us carry that on on this security, in order to have live paper, and we will carry it on an indefinite period for you and you pay the interest and you get the security.' So I stated, 'I don't want to give my note and obligate myself in a way where it is going to work a hardship on me,' I said, 'I consider the securities is worth considerable, and will be,' and we discussed it pro and con, and finally I said: 'Now, I will tell you what I will do; if you will agree to foreclose on this stock and on the tide land lease and take care of the Buckley bank's in addition to it, so that I can get all this property back, I will give my note, if you carry it so that it won't bother me to pay it eventually, but you are to foreclose on all that security and get it back to me.' And Mr. Carsten says, 'That will be all right, Kildall,' he says, 'that will be much better for us to carry it that way, and of course we have been doing business with you and depend upon you in these matters, and I would like to have it in that shape.' 'Well,' I says, 'with that understanding, I will give you my note.'"

Based upon this testimony, the trial court was of the opinion that the respondent did not owe the note and apparently for that reason made findings and entered judgment in favor of the respondents.

[1] The Mr. Carstens and Mr. Riley referred to in this evidence were president and cashier, respectively, of the German-American Mercantile Bank at that time. The appellant argues that the court erred in admitting this testimony. This contention must be sustained. This court in a number of cases has stated the rule to be in cases of this kind that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability. He is bound by the terms of his obligation. *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751. A number of cases are there cited to that effect.

In the case of *Bank of California v. Starrett*, 188 Pac. 410, in discussing this question, we said:

"By the terms of the negotiable instruments act an accommodation party to a note is primarily liable thereon. His engagement is to pay the note according to its tenor, and is so holden to the payee, even if, at the time of taking it, the payee knew he was but an accommodation party. Rem. Code, §§ 3420, 3551, 3582. While the rule is not uniform, even in those states which have adopted the negotiable instruments act, it is generally held that a contemporaneous parol agreement limiting the liability of such a maker, or fixing a collateral source of payment, is not available as a defense. Such was our holding in *Van Tassel v. McGrail*, 93 Wash. 380, 160 Pac. 1053, where a number of our cases to the same effect will be found collected. See, also, *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127. To permit the agreement pleaded to be shown would therefore be a violation of the parol evidence rule as we have heretofore announced it."

The defense pleaded was therefore insufficient, and the evidence offered in support of that defense was erroneously admitted.

[2, 3] The record shows that there was sufficient consideration for the note. The respondent executed the note in question in place of an indebtedness owing by the Kildall Fishing & Packing Company to the bank. The security referred to had been deposited by the Kildall Fishing & Packing Company with the bank as security for the payment of its indebtedness to the bank. The respondent here was the president of the Kildall Fishing & Packing Company, and we think the record shows was an indorser upon its notes. But whether he was an indorser or not, according to his own evidence he executed this note to the bank in settlement of the indebtedness of the Kildall Fishing & Packing Company and was to receive therefor the balance due after the securities of the Kildall Fishing & Packing Company had been sold. This of itself was a sufficient consideration for the note. If the note was given as "live paper" to make an appearance of assets so as to deceive the bank examiner, as is intimated by the testimony of the respondent above quoted, "it has been held that the receiver, representing the creditors, could maintain the action, and the makers were estopped upon the insolvency of the bank to allege want of consideration." *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273. It follows, therefore, that since there was sufficient consideration and an estoppel to deny consideration, and since the oral agreement could not be taken into consideration, the trial court should have entered judgment upon the note.

The judgment appealed from is therefore reversed, and the cause remanded, with in-

structions to enter judgment as prayed for in the complaint.

HOLCOMB, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

(111 Wash. 707)

**HORNER v. PIERCE COUNTY.**  
(No. 15834.)

(Supreme Court of Washington. July 7, 1920.)

**1. Statutes**  $\Leftrightarrow$  263—Retroactive statutes regarded with disfavor.

Retroactive statutes are generally regarded with disfavor, and, where it does not clearly appear that such was the legislative intent, the courts will not give a statute a retroactive effect, where to do so would impair existing rights.

**2. Highways**  $\Leftrightarrow$  203 — Statute as to filing claim inapplicable to injuries arising prior thereto.

Act effective June 11, 1919 (Laws 1919, p. 414), relating to the filing of claims for damages against a county, is not retroactive, and a claim filed after such act went into effect for damages arising out of alleged negligence in repair of a highway prior to its passage was not required to comply with its provisions; Rem. Code 1915, § 3909, controlling.

**3. Counties**  $\Leftrightarrow$  200—Claim for death "accrued" at time of injury and not death.

A cause of action for death of a pedestrian through negligence of county in failing to maintain a sidewalk in reasonable repair "accrued," within the meaning of Rem. Code 1915, § 3909, relating to time for filing claims, at the time of the alleged negligence or injury, and not at time of death as a result thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accrue.]

**4. Highways**  $\Leftrightarrow$  203 — Purpose of proviso in statute as to filing notice of claim for torts stated.

The proviso in Act June 11, 1919 (Laws 1919, p. 414), relating to filing of claims against county (in view of the history of Rem. & Bal. Code, § 7998, relating to cities), was intended to preserve action based on claims which, for the reasons given in the proviso, could not be personally verified and presented by the claimant.

Department 2.

Appeal from Superior Court, Pierce County; John D. Fletcher, Judge.

Action by Alfred Horner against the County of Pierce. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

George P. Fishburne, of Tacoma, for appellant.

Wm. D. Askren, J. A. Sorley, and Frank D. Nash, all of Tacoma, for respondent.

BRIDGES, J. On November 15, 1916, Catherine Horner, the wife of the appellant, was injured through the alleged negligence of the respondent in failing to maintain a certain sidewalk in reasonable repair. On the 5th day of June, 1919, the appellant and his wife filed and presented to the board of county commissioners of respondent their claim for damages to Mrs. Horner, in excess of \$10,000. Thereafter, and on June 16, 1919, Catherine Horner died, it is alleged, as the result of her injury. After her death, and on July 9, 1919, the appellant presented to the board of commissioners of the respondent his claim on account of the injury to his wife, in the sum of \$3,415.40. These claims were disallowed. Thereafter, and in September, 1919, the appellant brought suit against respondent to recover damages; the suit being based on his claim filed with and presented to the county commissioners, in the sum of \$3,415.40. At the trial of the case the appellant sought to introduce in evidence the claim filed by him with the county commissioners. The respondent objected to the introduction of this claim for the reason that it did not comply with the statute of 1919, with reference to the presentation of claims to the county commissioners, and, particularly, because it failed to state the actual residence of the claimant at the time of presenting and filing the claim, and for a period of six months immediately prior to the time the claim for damages accrued, as required by the 1919 statute (Laws, 1919, p. 414). The trial court held the claim insufficient and entered a nonsuit against the plaintiff. From such judgment the plaintiff has appealed. The chief question to be decided is whether the legislative act of 1919 concerning filing of claims controls.

Prior to June 11, 1919, the only statute with reference to the presentation of claims to county commissioners in cases of this character was section 3909, Rem. Code, which provided as follows:

" \* \* \* Nothing herein contained shall be so construed as to prevent a party having a claim against any county in this state from enforcing the collection thereof by civil action in any court of competent jurisdiction, after the same may have been presented and disallowed in whole or in part by the board of county commissioners of the proper county; provided, that such action be brought within three months after such claim has been acted upon by such board."

The 1919 Legislature passed an entirely new act concerning the presentation of claims to county commissioners, as follows:

" \* \* \* All claims for damages against any county must be presented before the county commissioners of such county and filed with the clerk thereof within sixty days after the time when such claim for damages accrued.



All such claims for damages must locate and describe the defect which caused the injury, describe the injury, and contain the amount of damages claimed, together with a statement of the actual residence of such claimant at the time of presenting and filing such claim and for a period of six months immediately prior to the time such claim for damages accrued, and be sworn to by the claimant. No action shall be maintained for any claim for damages until the same has been presented to the board of county commissioners and sixty days have elapsed after such presentation: Provided, that if the claimant shall be incapacitated from verifying and filing his claim for damages within the time prescribed, or if the claimant be a minor, or in case the claim is for damages to real or personal property, and if the owner of such property is a nonresident of such county or is absent therefrom during the time within which a claim for damages to said property is required to be filed, then the claim may be verified and presented on behalf of said claimant by any relative or attorney or agent representing the injured person, or in case of damages to property, representing the owner thereof, and no action for damages now pending or hereafter brought shall be defeated by the failure of the person to verify or file the claim in person if action be brought within three years after the taking effect of this act where a claim has heretofore been verified and filed within the time and in compliance with the terms of this act if said claim has been rejected."

This new enactment went into effect June 11, 1919. The appellant claims that, inasmuch as the injury for which the suit is brought occurred long prior to the going into effect of the 1919 statute, the statute in effect at the time of the injury controlled; but the respondent contends that the claimant must have complied with the 1919 statute. The claim as presented to the board of county commissioners was amply sufficient under the old act, but failed in some respects to comply with the provisions of the new act.

[1] "Retroactive statutes are generally regarded with disfavor, and, where it does not clearly appear that such was the legislative intent, the court will not give a statute a retroactive effect where to do so would impair existing rights." *Bruehn v. North Yak. School Dist.*, 101 Wash. 374, 172 Pac. 569.

[2, 3] It is clear to us that the Legislature did not intend the 1919 act should be retroactive. It requires the claim to be filed within 60 days after the time the "claim for damages accrued." To have complied in this instance with its provisions, it would have been necessary to file the claim within 60 days after November 15, 1916, the date of the injury, or more than 2½ years prior to the passage and going into effect of the act, under which it is contended the claim should have been filed. Manifestly, the Legislature did not mean to destroy entirely the appellant's right of action by imposing impossible conditions.

But respondent contends that appellant's claim of damages did not "accrue" till the death of Mrs. Horner, and, since she died after the new statute went into effect, that statute must control. We cannot subscribe to this argument. The appellant did not have a cause of action against respondent because of the death of his wife, but because of its alleged negligence. The negligence was the cause; the death was the result. Under the statute, the "claim for damages accrued," if at all, at the time of the injury to Mrs. Horner.

The first part of the proviso of the 1919 act was for the purpose of preserving causes of action to those who, for the reasons given, could not personally swear to their claims, as was required by the earlier provisions of the act. The proviso meant to preserve rather than destroy, to excuse rather than to compel, the performance of certain acts. The only portion of the act which tends to indicate that the Legislature intended it should be retroactive is the last few words of the proviso reading as follows:

" \* \* \* No action for damages now pending or hereafter brought shall be defeated by the failure of the person to verify or file the claim in person if action be brought within three years after the taking effect of this act, where a claim has heretofore been verified and filed within the time and in compliance with the terms of this act, after such claim has been rejected."

If the words just quoted are literally construed, they destroy the manifest purpose of the first portion of the proviso and are inconsistent therewith.

[4] A history of the enactment as shown by our various statutes, however, will clearly show what the Legislature had in mind. The 1909 legislative act with reference to filing claims with cities of the second, third, and fourth classes, provided that such claims should be filed with town councils within a certain period, and that the same should describe the defect causing the injury, give the residence of the claimant, and be sworn to personally by the claimant. 2 Rem. & Bal. § 7998. This act was amended in 1915 by adding thereto a proviso in almost the identical words found in the proviso of the 1919 act, under consideration. Rem. 1915 Code, § 7998. In other words, the proviso of the 1919 act, with reference to claims against counties, was taken almost verbatim from the proviso of the 1915 law, which amended an existing act with reference to the presentation of claims to cities other than those of the first class. This proviso, as an amendment to the existing act with reference to cities other than those of the first class, makes the act entirely intelligible, and shows that its purpose was to preserve certain rights which, but for the proviso, might have been

defeated. When that proviso, however, is brought into a new act with reference to presenting claims to county commissioners, it is manifest that certain portions thereof do not fit with exactness into the act. In the light of this history, it seems plain to us that the Legislature, by the proviso in the 1919 act, intended to preserve actions based upon claims which, for the reasons given in the proviso, could not be personally verified and presented by the claimant.

We are satisfied that the 1919 act was not intended to be, and is not, retroactive, and that the appellant was not required to comply with its provisions in filing his claim with the county commissioners. In holding to the contrary the learned trial court was in error.

The judgment is reversed, and the cause remanded for trial.

HOLCOMB, C. J., and FULLERTON, MOUNT, and TOLMAN, JJ., concur.

(111 Wash. 438)

**McELRATH v. FALL et al.** (No. 15759.)

(Supreme Court of Washington. July 8, 1920.)

**Appeal and error** ¶883—Plaintiff cannot urge that verdict is correct after consenting to remission.

Plaintiff, having voluntarily agreed to the remission fixed by trial court, cannot urge on defendant's appeal that the amount of the original verdict be taken as the amount of the final judgment.

Department 1.

Appeal from Superior Court, Walla Walla County; Edward C. Mills, Judge.

Action by Jessie McElrath against Emma Fall and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Evans & Watson, of Walla Walla, for appellants.

Sharpstein, Smith & Sharpstein, of Walla Walla, for respondent.

**PER CURIAM.** Respondent recovered a verdict for \$5,134.25, as compensation for personal injuries received by her when she was struck by an automobile owned by appellant. On motion for a new trial, the court reduced this verdict to \$3,000, giving the respondent the alternative of remitting to that amount or submitting to a new trial. Respondent filed the remission.

The appellant's only point upon this appeal is that the verdict as it now stands is still excessive, being arrived at through passion and prejudice. An examination of the record does not justify this court in interfer-

ing with the verdict as finally approved by the trial judge.

The respondent suggests that she should be allowed the amount awarded by the jury. Having voluntarily agreed to the remission fixed by the trial court, she is now in no position to urge that the amount of the original verdict be taken as the amount of the final judgment.

Judgment affirmed.

(111 Wash. 433)

**MINNICK v. KITT et al.** (No. 15748.)

(Supreme Court of Washington. July 8, 1920.)

**Appeal and error** ¶1012(1)—Findings not against evidence conclusive.

The evidence not preponderating against the findings of the trial court, they will not be disturbed on appeal.

Department 1.

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

Action by F. L. Minnick against Arthur Kitt and others. Judgment for defendants and plaintiff appeals. Affirmed.

Cordiner & Cordiner, of Spokane, for appellant.

Carl Ultes, Jr., and Dodds & Dodds, all of Spokane, for respondents.

**MACKINTOSH, J.** This is an action to recover on three promissory notes executed by the respondent and payable to appellant. The answer admits the execution of the notes and that they are unpaid, but excuses the nonpayment by two affirmative defenses; the first being that the notes were executed in payment for a gold separating machine owned by the appellant, which he sold to respondents upon representations as to its value and efficiency, which representations were false, and, second, that subsequent to the sale the appellant and respondents entered into an agreement whereby the notes were to be canceled and the machine was to be delivered to a corporation which was then being organized which was to take and pay for the machine.

The trial court, hearing the evidence, determined that it sustained the allegations of the affirmative defenses, and rendered judgment for the respondent.

A reading of the 125 pages of statement of facts discloses that the evidence does not preponderate against the findings of the trial court, and, in truth, the evidence convinces us that no other decision could reasonably have been arrived at. The testimony shows that the representations as to the value of the machine were false; that the

representations as to the amount of work it was capable of accomplishing were also false; and, upon the second point, the testimony is convincing that after the sale of the machine to the respondents a readjustment of the transaction was made, whereby the appellant agreed to cancel the notes upon which the suit is brought and to deliver the machine to the mining company, and accept payment therefrom from the company.

Being satisfied that the trial court arrived at the proper conclusion upon the evidence, its judgment will be affirmed.

HOLCOMB, C. J., and MITCHELL, PARKER, and MAIN, JJ., concur.

(111 Wash. 419)

**KNECHT v. SIMS. (No. 15723.)**

(Supreme Court of Washington. July 8, 1920.)

**Animals** §100(4)—Verdict for damages to crop caused by hogs held not contrary to evidence.

In action for damage to plaintiff's 160-acre wheat crop caused by defendant's hogs running at large, in which defendant interposed counterclaim, verdict of \$75 for plaintiff held not contrary to the evidence as against contention that verdict should either have been for a much larger amount or for defendant.

Department 2.

Appeal from Superior Court, Adams County; John Truax, Judge.

Action by Samuel Knecht against Walter Sims. Judgment for plaintiff, and defendant appeals Affirmed.

G. E. Lovell, of Ritzville, for appellant.  
W. O. Miller, of Ritzville, for respondent.

**TOLMAN, J.** This action was commenced by respondent, as plaintiff below, to recover from appellant, as defendant, for damages caused to his crop of wheat by stock belonging to appellant. The complaint alleges that the respondent was the owner of a crop of wheat grown on a certain 160-acres of land; that appellant was the owner of about 100 head of swine, which he wrongfully permitted to run at large; and that these animals ate and destroyed plaintiff's entire 160-acre crop, to his damage in the sum of \$1,500. The answer admits that a small number of appellant's swine ran upon and destroyed respondent's grain, and pleads affirmatively that the loss of the wheat crop was settled and fully paid for by the payment of the sum of \$20, which was accepted as such settlement by the respondent, and a counterclaim is pleaded to the effect that respondent took up and converted to his own use eight head of appellant's hogs of the value of \$30 each,

or a total of \$240. The reply admits the payment of \$20, but pleads that it was paid in settlement of the damages done to the same crop on another occasion by appellant's horses, and that it had no relation whatever to the damage caused by the hogs.

The case was tried to a jury which rendered its verdict in favor of respondent for \$75, and from a judgment on the verdict this appeal was taken.

The only error assigned is that the trial court erred in refusing to grant a new trial on the ground that the verdict was contrary to the evidence.

Respondent has favored us with no brief, but we have read the entire record and find evidence which would sustain a larger verdict. Indeed, appellant's whole argument here is that respondent's evidence, if believed by the jury, would have warranted a larger verdict, while appellant's evidence was to the effect that the crop was of no value whatever, and no verdict could have been rendered against him had the jury believed it. Hence his conclusion that there was no evidence to support the verdict that was rendered.

In speaking of a like contention in a case where it was argued that the verdict was in an impossible sum under the issues there presented, Mr. Justice Chadwick, speaking for this court, said:

"But we do not understand that a verdict will be set aside as within the rule of mistake or compromise or that it is impossible under the theory of either party, unless it shows upon its face that the jury has given way to passion or prejudice or has acted in willful disregard of its duty to consider the testimony, and a true verdict render." *Haefele v. Brackett*, 95 Wash. 625, 164 Pac. 244.

So here, there is nothing to indicate that the jury willfully disregarded its duty in any respect. The evidence of respondent and his witnesses as modified by cross-examination, and interpreted in the light of the condition of the crop as shown by all of the evidence, presented a case peculiarly for the jury, and, whatever the verdict, we should be disinclined to disturb it. But with the counterclaim a factor, as it was under the evidence, and our inability to say whether the jury allowed anything thereon or, if so, how much; the \$20, admittedly paid, to be considered as found not to have been paid in settlement of the damage caused by the hogs; the uncertainty as to the amount harvested by the respondent; the wide range of testimony as to the probable yield, running from nothing to some seven bushels per acre; and the testimony drawn from one of appellant's witnesses that the crop, while worthless for harvesting, was worth \$200 for pasturage—it is clearly evident that the verdict as rendered might be the only verdict which the jury could render from the evidence as be-

lieved by it. In any event, we cannot say that appellant has any cause for complaint.

The judgment appealed from is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(111 Wash. 422)

**STATE v. BERG. (No. 15796.)**

(Supreme Court of Washington. July 8, 1920.)

**Criminal law §260(7)—Appeal to superior court dismissed for want of diligent prosecution on delaying record.**

Where a justice of the peace on an appeal to the superior court failed to send transcript to clerk of superior court until nearly six months after notice of appeal was given, the appeal will be dismissed for want of diligent prosecution, under Rem. Code 1915, §§ 1919-1921, though delivery was the result of an oversight on the part of the justice, in absence of showing that appellant made an effort to get the record filed within a reasonable time.

**Department 2.**

Appeal from Superior Court, Pierce County; John D. Fletcher, Judge.

J. Berg was convicted of a crime by a justice of the peace, and he appealed to the superior court. From order and judgment dismissing the appeal, he appeals. Affirmed.

J. W. A. Nichols and Browder Brown, both of Tacoma, for appellant.

Wm. D. Askren, Thos. F. Ray, and J. W. Selden, all of Tacoma, for the State.

BRIDGES, J. On July 23, 1919, the appellant was found guilty of a criminal charge made against him before a justice of the peace in Tacoma, Wash. On the same day he gave oral notice of appeal to the superior court of Pierce county, and at the same time gave a bond conditioned that he would duly prosecute his appeal and abide by and perform the judgment of the superior court. The transcript on appeal was filed in the superior court January, 13, 1920. On the next day the state made and served its motion for dismissal on the ground that the appeal had not been prosecuted within a reasonable time. Thereafter the superior court made an order dismissing the appeal. From that order and judgment the defendant has appealed here.

Section 1919, Rem. 1915 Code, provides that an appeal to the superior court in a case such as this may be taken within 10 days after the judgment or sentence, and the appellant shall be committed to the county jail unless he shall give bond to be approved by the justice of the peace, conditioned that he will appear in the court appealed to and

prosecute his appeal and abide the sentence of the court. Section 1920 provides that an appellant in a criminal action shall not be required to advance any fees in claiming his appeal or in prosecuting the same, and that if the defendant shall fail to enter and prosecute the appeal he shall be defaulted on his bond. Section 1921 makes it the duty of the justice of the peace on notice of appeal being given, to make and certify a copy of the conviction and other proceedings in the case, and transmit the same to the clerk of the court appealed to. In this case the notice of appeal was given July 23, 1919, and the transcript was not filed with the clerk of the superior court till January 13, 1920, nearly six months after notice of appeal was given.

The statute manifestly contemplates that an appeal and the prosecution thereof from a criminal conviction shall be taken and had with reasonable dispatch. The appeal is initiated by the defendant and for his own benefit. It is his duty to make a reasonable effort, not only to get his appeal perfected, but to prosecute it after it is once fully in the superior court. In this case the delay was caused by the justice of the peace failing, for a period of about six months, to send to the superior court a transcript of his records. Doubtless the delay was the result of an oversight on the part of the justice, but the record fails to show any effort on the part of the appellant to get the record filed. While it is true that under the statute he is not required to pay to the justice any fees for the transcript, that alone will not excuse him from such a long delay. If he had looked after his appeal as the spirit of the statute contemplates, he would have known that the transcript had not been filed within a reasonable time. Having such knowledge, he was bound to take some action—he was, at least, bound to call the matter to the attention of the justice of the peace, and request that officer to send in the transcript. He will not be permitted to initiate the appeal and then complacently wait until some one else acts.

In the case of the State of Washington v. Parmeter, 49 Wash. 435, 95 Pac. 1012, this court, speaking of the duty of the defendant in prosecuting his appeal from the justice's court, said:

"He was entitled to trial in the superior court only by reason of his appeal if diligently prosecuted. Failure upon his part to so prosecute the same would authorize the superior court to award sentence against him without further trial, in like manner as if he had been there convicted."

In the case of the State of Washington v. Jones, 80 Wash. 335, 141 Pac. 700, this court, speaking with reference to a similar appeal, said:

"It must be remembered that the appellant himself was obligated to prosecute the appeal. If he failed to do so with reasonable diligence, the appeal was subject to dismissal on the part of the state, leaving him subject to punishment under the judgment of conviction, pronounced against him by the justice's court."

In the case of the State of Washington v. Buffum, 94 Wash. 25, 161 Pac. 832, this court said:

"Since the burden of prosecuting the appeal is on the defendant and not the state, it must follow that the state is entitled to a dismissal when a reasonable time elapses after the appeal is taken and no effort is made on the part of appellant to prosecute it to a final conclusion."

It is true that in the cases from which we have quoted the delay occurred after the transcript had been filed in the superior court; but there is no greater duty devolving upon the defendant to diligently prosecute his appeal after it has reached the superior court than that imposed upon him in the perfecting of his appeal. We think the superior court was entirely justified in dismissing the appeal for want of diligent prosecution.

The appellant further argues that the criminal complaint did not state any crime under the statute. This question is not before this court. The appeal is here from the order of the lower court dismissing the appeal from the justice's court, and the correctness of that decision is the only matter before us.

The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and TOLMAN, JJ., concur.

(111 Wash. 457)

McVEETY v. HAYES et al. (No. 15679.)

(Supreme Court of Washington. July 9, 1920.)

1. Sales  $\S$  89—Runways held to pass as "appertaining" to sawmill.

A sale of a sawmill and buildings, donkey engines, and all equipment and other articles appertaining to the sawmill and logging outfit, carries with it runways connecting with platforms on which lumber was piled, for the word "appertaining" means something used in connection with; and this is so, though ties used as a foundation for the runways were carried on the books of the seller as assets.

[Ed. Note.—For other definitions, see Words and Phrases, Appertain.]

2. Sales  $\S$  87(3)—Direction by seller of sawmill held not to show that runways did not pass.

Written direction that the buyer of a sawmill should be allowed to remove everything, except the lumber platform or lumber trucks

on which were piled merchantable timber, does not establish that runways connecting with the platforms did not pass; the reservation obviously being made to prevent the buyer's removal of manufactured lumber piled on the platform.

3. Pleading  $\S$  384—To be available, counterclaim must be pleaded.

In an action by buyer of a sawmill and appurtenances for damages against the sellers, who removed ties constituting foundation of runways connecting with lumber platforms, the seller cannot, where he did not plead as counterclaim the expense of dismantling the same, offset such expenditure.

4. Sales  $\S$  418(1)—Damages properly fixed at amount obtained for timber improperly removed by seller.

In an action to recover the value of timber in certain ways which the seller of a sawmill improperly removed and sold, the court was justified in adopting as measure of value the amount obtained by the seller, and an award of damages on such amount cannot be questioned on the ground there was no evidence of value.

5. Appeal and error  $\S$  1054(1)—Admission of improper evidence not reversible error, where judgment supported.

The admission of improper evidence is not reversible error, as the action tried by the court sitting without a jury was triable on appeal de novo; there being competent evidence to support the judgment.

#### Department 2.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by H. A. McVeety, sole trader under the name and style of the Machinery Supply Company, against S. E. Hayes and Margaret H. Hayes, husband and wife, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Israel Nelson, Robert O. Saunders, and Arthur H. Hutchinson, all of Seattle, for appellants.

Earl G. Rice and Gates & Helsell, all of Seattle, for respondent.

FULLERTON, J. On March 25, 1918, and for some two years prior thereto, the appellants Hayes owned a sawmill located near Dent's Spur, a station or siding on the Chicago, Milwaukee & Puget Sound Railway Company's railroad in King county. The mill proper was some half of a mile back from the siding, and to connect it therewith a water flume was constructed, reaching from the mill to the siding. At the end of the flume at the siding a platform some 16 feet wide and 32 feet long was constructed, parallel with a spur track at that place. The purpose of the flume was to carry the products of the mill to the siding. These, as

they came from the saws of the mill, were thrown into the flume, whence they were carried by the water flowing therein to the platform mentioned. To increase the storage room at the platform, two runways were constructed. One of these was connected immediately with the platform, and extended back therefrom about 150 feet in the direction of the mill. It was constructed by piling the ties in the form of cribs, after the manner of a log house, to the height of the platform, and covering the same with planks laid lengthwise with the runway; the cribs being about 6 feet apart. The planks were held in place by nails driven through the outer tier of planks into the ties; the intermediate planks having no other fastenings. The other runway was of practically the same dimensions and was constructed in the same way. It, however, did not connect directly with the platform mentioned. An extension of the platform was made by piling ties in crib form, but solidly outwardly from one of its ends for a distance of 40 feet, and with this the runway connected. The runways were constructed shortly after the appellants purchased the mill, and were used in connection with the operations of the mill, as long as it was operated by them. The ties used therein were in part hewn ties found on the premises at the time the appellants purchased the property and in part by second-class ties cut in the mill. The first of these had practically no commercial value, and the second very little, at the time the runways were constructed.

[1] On the date first mentioned the appellants sold the mill property to the respondent. At that time the timber adjacent to the mill had become exhausted, and it was no longer profitable to operate it at that place. The respondent is a dealer in secondhand machinery, and the mill property was purchased by him for the purpose of being dismantled and sold as secondhand material. The sale was evidenced by a written bill of sale, the material parts of which follow:

"This agreement, made this 25th day of March, 1918, by S. E. and M. O. Hayes, doing business under the firm name and style of the S. E. Hayes Lumber Company, of Seattle, Wash., first party, and Machinery Supply Company, second party, of same place, witnesseth: That for and in consideration of the sum of sixty-five hundred dollars (\$6,500.00) in hand paid by second party to first party, receipt whereof by first party is hereby admitted, first party does hereby sell, assign, transfer, and set over to second party all of the following described personal property, lying, being, and situated at Dent's Spur, King county, Washington: One sawmill and buildings, donkey engines and all equipment, including lines, blocks, tackles, etc., saws, boilers, and all other articles of every nature whatsoever now on said premises and appertaining to said sawmill and logging outfit, hereby warranting title to said above-described property."

Prior to the execution of the bill of sale the appellants had taken up and had removed the ties forming the extension to the platform, but the runways, save as one of them was affected by the removal of the ties forming the extension, remained intact in the form in which they were originally constructed. After the sale, and after the payment of the purchase price of the property, the appellants dismantled the runways and appropriated to their own use the planking forming the tops of the same and such of ties forming the supports as they found had a commercial value. This action was brought to recover the value of the property so appropriated. It was tried to the court sitting without a jury, and resulted in a judgment in favor of the respondent.

The ultimate question is whether these ways passed under the bill of sale. Turning to that instrument, it will be observed that its terms are comprehensive. After enumerating specifically certain of the properties sold, it concludes with a general designation:

"And all other articles of every nature whatsoever now on said premises and appertaining to said sawmill and logging outfit."

This clause of the contract, except as it is limited by the qualifying phrase, "appertaining to said sawmill and logging outfit," is broad enough to include all of the personal property on the mill premises, and these ways, since they are, under the conditions shown in the record, personal property, are included in the bill of sale, unless they are exempted by the qualifying phrase. The question then is: Are they so exempted? It seems to us clear that they are not. Without attempting a general definition of the term "appertaining," it can be said that a thing appertains to another thing when it is constructed to be used in connection with that other thing, and is used in connection therewith. It can hardly be doubted, we think, that these ways were so constructed and so used. Their purpose was to provide a means by which the products of the mill could be stored and cared for while awaiting shipment, and that they were so used for practically the entire time the mill was operated by the appellants the evidence is clear. When it is remembered that the ties were in part those on the premises when the appellants purchased the mill property, that the remainder were second-class ties, having then but little salable value, and that all were piled in the form of cribs "after the manner of a log house," and not solidly as merchantable ties are usually piled for storage, and that no more were used than was necessary to furnish a foundation for the planking placed upon them, it is difficult to follow the appellants in their argument to the effect that temporary storage only was intended. Plainly, it seems to us, these ways

as much appertained to the mill property as did the platform constructed on posts, the flume, and other like structures, which concededly passed by the bill of sale.

We have not overlooked the testimony of the appellants to the effect that the materials out of which the ways were constructed were inventoried in the account books of the appellant as merchantable materials, and were so regarded by them at all times as assets when taking accounts of the mill property. But this is hardly conclusive. Undoubtedly they had some value, and any correct system of bookkeeping would show them as having value. But the same thing can be said of the property which concededly passed to the respondent. This property was or should have been upon the books in the same manner, and if the fact argues in favor of exempting these ways from the operation of the bill of sale, it argues in favor of exempting everything not specifically enumerated. At the time the bill of sale was delivered and the purchase price paid, the respondent asked the appellants for a writing, directed to the watchman or keeper at the mill premises, showing his right to the mill property. In compliance with the request, the appellant in charge of the negotiations wrote and gave the appellant the following.

"Steve: It is O. K. to let the bearer remove anything they wish to, except the lumber platform or lumber trucks. S. E. Hayes."

[2] It is contended by the appellants that this is a contemporaneous construction of the terms of the bill of sale, and shows that it was not the intention of the parties that the lumber platform and ways were to be included therein. But it will be observed that it is the lumber platform only, not the ways, that are mentioned in the writing, and to construe it as explanatory of the bill of sale rather supports the respondent's construction of the instrument than it does the construction of the appellants. But the evidence makes clear the purpose of the writing. The appellants had in stacks by the side of the ways a considerable quantity of merchantable material, which was not included in the bill of sale, and which the ways and platform furnished a convenient, if not a necessary, means of carrying to the railroad for

shipment. This fact furnished the reason for the reservation in the order; the appellants desired, and the respondent consented, that these instrumentalities should remain in place until the lumber was removed.

[3] A further contention is that the recovery is too large, since no deduction was made for the cost of removing the ways and transporting the materials of which they were composed to market. The evidence shows that the purchaser of the property to whom it was sold by appellants paid the freight thereon from Dent's Spur, the location of the ways, to the place of sale, and that the amount of the recovery was for the value of the materials less this freight. There was, however, no allowance for the expense of dismantling the ways and loading the materials on the cars. But no counterclaim was pleaded for this service, and no evidence was offered tending to show the value of such services. Overlooking the fact that the appellants were wrongdoers in removing the materials, and possibly could make no claim for the service for that reason, the absence of pleading and proof precludes the consideration of the question.

[4] It is also said there was no proof of value. On the question the record shows that the purchaser of the materials paid into the court the sum it was agreed between the purchaser and the appellants that the appellants should receive for the materials, and that the court adopted this sum as the measure of the value of the materials. We think clearly that it was justified in so doing.

[5] Finally, it is contended that the appellants are entitled to a reversal and a new trial because of the admission of irrelevant and incompetent evidence. But the cause was tried by the court sitting without a jury, and is triable in this court de novo. In such cases, as we have repeatedly held, the admission of improper testimony is not reversible error. The question in such cases is whether the competent evidence supports the judgment. In this instance we find that it does, ignoring all that the appellants deem inadmissible.

The judgment is affirmed.

HOLCOMB, O. J., and MOUNT, TOLMAN, and BRIDGES, JJ., concur.

(111 Wash. 426)

**KELLY et al. v. MERRITT et ux.**  
(No. 15654.)

(Supreme Court of Washington. July 8, 1920.)

**1. Appeal and error §930(1) — Appellate court must assume truth of facts for prevailing party.**

Where the case was tried by a jury, and verdict returned for plaintiffs, the Supreme Court must assume for purposes of defendants' appeal, that the facts as testified to by plaintiffs are true.

**2. Fraud §22(1)—Brokers liable for misrepresentation that purchaser at sheriff's sale was owner of premises.**

When brokers negotiating sale of an apartment house, through their employé, represented to their customers that a purchaser of the apartment house on sheriff's sale was the owner of the premises, and that he would consent to renewal of an assigned lease, the customers were not under obligation to make further inquiry as to the alleged owner's right to consent to renewal, and, the brokers' representation being false, they were liable.

**3. Evidence §57(7)—Evidence of expert as to value of lease on apartment house admissible on question of damages.**

In an action for damages against brokers for alleged false representations in the sale of an apartment house to plaintiffs, who took assignment of lease thereon and consented to its renewal from the represented owner, really without authority, evidence of an experienced real estate man engaged for many years in buying and selling leases on apartment houses in the city, that a lease on such a house is worth 15 months' profit, held entitled to consideration on the question of damages.

**4. Fraud §59(2)—Difference between value of apartment house as sold and as represented measure of damages.**

In action against brokers who procured plaintiffs to buy an apartment house by false representation that a purchaser at sheriff's sale, who consented to assignment of lease thereon and to renewal, was the owner and could so consent, the measure of plaintiffs' damages, when ousted by the owner of the equity of redemption, was the difference between the value of the apartment as it was and what it would have been if renewal lease could have been procured for three years at \$500 a month as represented.

Department 2.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Violet M. Kelly and M. Cora Thompson against Will H. Merritt and Emma M. Merritt, his wife. From judgment for plaintiffs, defendants appeal. Affirmed.

Winter S. Martin, of Seattle, and A. C. Hough, of Grants Pass, Or., for appellants.

Ballinger & Hutson, of Seattle, for respondents.

**MOUNT, J.** This action was brought to recover damages against the defendants on account of alleged false and fraudulent representations in the sale of an apartment house. Upon issues joined the case was tried to the court and a jury and resulted in a verdict and judgment in favor of the plaintiffs for \$1,500. The defendants have appealed.

A large number of errors are assigned, but the principal points argued by the appellants are that the court erred in refusing to grant a nonsuit at the close of the plaintiffs' evidence and in refusing to grant a judgment notwithstanding the verdict at the close of all the evidence. The appellants vigorously contend in this court that the rule of caveat emptor should apply, and because it was within the power of the plaintiffs to learn all of the facts, and because they did not do so, they cannot now recover for false representations even if made.

[1] Since the case was tried to a jury and a verdict returned in favor of the plaintiffs, we must assume for the purpose of this appeal that the facts as stated by the plaintiffs are true. These facts are in substance as follows: In March, 1918, the respondents were desirous of purchasing a lease running from three to five years on an apartment house. They applied to the appellants, who were acting as real estate brokers in the city of Seattle, and were introduced to a Mr. Arnold, who was then in the employ of the appellants. Mr. Arnold showed the respondents several apartment houses which were not suitable. He also showed to the respondents an apartment house known as the "Oleta." He stated to the respondents that this apartment house had a short-time lease, but that the owner of the house would make a new lease of from three to five years at an advanced rental. The lease in effect at that time expired in September, 1918, and carried a monthly rental of \$350. Mr. Arnold stated that the owner had been seen and that a three to five year lease could be procured upon this apartment at about \$500 per month after the expiration of the short-term lease. He advised respondents to take an assignment of the short-term lease and in that way save \$150 per month for the time of the short-term lease and thus saving about \$900. This was satisfactory, and the respondents thereupon agreed to pay \$5,500 for the furniture and the lease upon this apartment house, which was to be extended for a period of from three to five years after the expiration of the lease then in effect. The lease then upon this apartment house was owned by one Bellingham, who had possession of the house. He had listed this lease and furniture for sale at \$5,500. There was a mortgage upon the furniture for \$2,500. It was agreed that the respondents should assume



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that mortgage and pay the balance, \$3,000, in money and notes. A mortgage upon the apartment house which had been given by the owner of the fee had been foreclosed and the apartment house had been purchased by Ivan L. Hyland. The time for redemption had not yet expired. Respondents did not know these facts and were not informed thereof.

At the time the respondents agreed to purchase the lease, Mr. Arnold, who represented the appellants, stated to them that he had seen the owner of the property and the owner had agreed to extend the lease from three to five years at an additional rental after the expiration of the lease then in force. When requested by the respondents to see the owner and interview him, Mr. Arnold stated that they could see the owner when the final papers were prepared. Thereafter Mr. Merritt, one of the appellants, stated to the respondents in substance that he was an attorney at law and that he would see that their interests were protected if they desired him to do so. On March 20 respondents were told that Mr. Hyland was the owner of the premises and that he had consented to a renewal of the original lease from three to five years and that they would go to his office and the papers would there be made out. Thereupon Mr. Bellingham, who held the short term lease, and the respondents, with an attorney selected by appellants, and Mr. Arnold went to the office of Mr. Hyland. Mr. Bellingham, Mr. Arnold, and the attorney who represented the respondents, went into Mr. Hyland's private office. The respondents waited in the outer office. After a conference of a few minutes, Mr. Arnold returned to the outer office and informed the respondents that the owner had agreed to extend the lease for a period of three to five years at a "little less" than \$500 per month. Thereupon Mr. Hyland dictated an assignment of the short-time lease from Bellingham to the respondents. Mr. Hyland consented to the assignment in writing, and the respondents agreed to accept the assignment of the lease. The consent by Mr. Hyland reads as follows:

"The undersigned, Ivan L. Hyland, purchaser at sheriff's sale of the above-described premises under mortgage foreclosure against Huldia E. Johnston, do hereby consent to the foregoing assignment.

"Dated this 23d day of March, 1918.

"Ivan L. Hyland."

The respondents went into possession of the building, and at the expiration of the short-term lease in October, 1918, were ousted by Mrs. Johnston, who had redeemed from the foreclosure and refused to extend the lease.

[2] Under the facts testified to by the respondents, as stated above, we are satisfied there was no duty on the part of the respondents to inquire further whether Mr. Hyland was actually owner of the property or whether

he would consent to a renewal of the lease. According to the respondents' testimony, the appellants had sent an attorney along with the respondents, and this attorney was supposed to look out for the interests of the respondents on the assignment of the short-term lease. When Mr. Arnold had stated that Mr. Hyland was the owner of the property and that he consented to an assignment of the short-term lease and to an extension thereafter of three to five years at less than \$500 per month, it stands to reason, we think, that they had a right to rely upon that representation. It is argued here that the consent to the assignment signed by Mr. Hyland was itself notice of the fact that he was not the owner of the premises. It may be that one versed in the law might conclude that a purchaser at sheriff's sale was not the absolute owner of property so purchased; but it is plain, we think, that an ordinary person, not knowing perhaps of the right of redemption in another person would conclude that Mr. Hyland, the purchaser, was the actual owner. The attorney selected by the appellants to represent respondents upon that occasion did not advise respondents that Hyland was not the lawful owner of the premises at that time. In any event, we are satisfied that the respondents were entitled to rely upon the statements made by Mr. Arnold to them upon that occasion, and that the rule of caveat emptor should not apply under those facts. When the appellants, through their employé Mr. Arnold, represented to the respondents that Mr. Hyland was the owner of the premises and that he would consent to a renewal of the short-term lease from three to five years, we think the respondents were under no obligation to make further inquiry. *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183. In *Christensen v. Koch*, 85 Wash. 472, 148 Pac. 585, in discussing the question of whether the vendee may rely upon the representations of his vendor, it is said:

"Ordinary prudence does not require a person to test the truthfulness of representations made to him by another as of his own knowledge with the intent that they shall be believed and acted upon, even though the party to whom such representations are made may have an opportunity to ascertain the truth for himself."

See, also, *Eyers v. Burbank Co.*, 97 Wash. 220, 166 Pac. 656.

When these respondents were taken into the office of Mr. Hyland, they were informed that he was the owner of the apartment house. They clearly had a right to rely upon that information. According to their testimony, an attorney to represent them was sent along by the appellants. There was no statement and nothing said to lead the respondents to understand that Mr. Hyland was not the absolute owner, authorized not only to consent to the assignment of the short-term lease but authorized also to make a renewal lease at the expiration of the

short-term lease. The respondents were told in Mr. Hyland's office that he had consented to make a renewal lease. Mr. Hyland had made no such promise. We are of the opinion that the respondents had a right to rely upon representations made with reference to the renewal of the lease and, when they were dispossessed at the expiration of the short-term lease, had a right to recover damages against the appellants who were responsible for the false representations. The trial court, therefore, did not err in refusing to grant the nonsuit or in refusing to grant a judgment notwithstanding the verdict.

Appellants assign error upon the refusal of the court to give certain requested instructions. This refusal is assigned as error. No argument is made thereon except to say that their refusal was error and that the same points are not covered by the court in his instructions. We have examined the instructions given by the court. They are full and clearly present the questions submitted to the jury and, we think, cover the whole case. It is therefore unnecessary to review these requested instructions.

[3, 4] Appellants also argue that the court erred in refusing to strike the testimony of a witness who testified in substance that a lease upon an apartment house is worth fifteen months' profit. The witness, if we understand him correctly, was attempting to testify that it would take 15 months' profit of the business of an apartment house to pay for the lease. This witness was an experienced real estate man engaged for many years in buying and selling leases on apartment houses in Seattle. We are of the opinion that his evidence was entitled to consideration upon the question of damages recoverable in a case of this kind. At any rate, it was evidence that the jury might reasonably consider in determining the amount of damages. The court very properly instructed the jury that the measure of the damage was the difference between the value of the apartment as it actually was and what it would have been if the lease could have been procured for three years at \$500 per month.

We find no merit in any assignments of error.

The judgment is therefore affirmed.

HOLCOMB, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

(111 Wash. 496)

GEORGE v. PIERCE COUNTY et al.  
(No. 15726.)

(Supreme Court of Washington. July 12, 1920.)

1. Appeal and error  $\S$  1009(3)—Findings on conflicting evidence not disturbed.

A finding of the trial court upon conflicting evidence must be accepted on appeal in an

equity case, where it cannot be said that the evidence preponderates against it.

2. Navigable waters  $\S$  37(4) — Lands under navigable waters pass to riparian proprietors by force of state law.

When land under navigable water passes to a riparian proprietor along with the grant of the shore land by the United States, it does not pass by force of the grant alone, because the United States does not own it, but passes by force of the declaration of the state which does own it that it is attached to the shore.

3. Navigable waters  $\S$  36(1)—Title to closed channel resulting from avulsion prior to entry of state into Union does not pass to the state.

Where prior to entry of a state into the Union, a navigable river by avulsion made a new channel across an ox-bow bend over public land, and the old channel was permanently closed up, the title to the new channel was in the federal government, and became impressed with a trust for the future state, and the trust character of the government's title to the old channel necessarily ceased, and upon entry of the state into the Union, it acquired no title to the old channel.

4. Navigable waters  $\S$  36(2)—Person occupying closed channel without patent had prior right over state subsequently admitted.

Where prior to the admission of a state into the Union, a navigable stream changed its channel over public lands, and the old channel filled up and was platted and divided into lots and improved, the state did not acquire title when admitted into the Union to such old channel, and the position of the persons thereon cannot be questioned by the state, but only by the government.

Department 2.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by S. P. George against Pierce County and others. Judgment for defendants, and plaintiff appeals. Reversed, with directions.

J. H. Easterday, M. J. Gordon, J. F. Fitch, and Carroll A. Gordon, all of Tacoma, for appellant.

Wm. D. Askren, J. A. Sorley, and Frank D. Nash, all of Tacoma, and Fred C. Brown and Howard A. Hanson, both of Seattle, for respondents.

TOLMAN, J. In the year 1883 or prior thereto, the Puyallup river at or near the city of Puyallup, by avulsion made a new channel across the neck of a horseshoe or ox-bow bend in the stream as it had theretofore flowed, and thereafter perhaps for four or five years flowed through both the old and the new channel, but with the passing of time the old channel was closed up, and the river was confined to the new channel, and long prior to the admission of this state in 1889, the old channel had become more or less filled with silt and

alluvial deposits, had grown up to brush and timber, and in part was being farmed and otherwise occupied and put to use. In the year 1880, prior to the admission of the state, the land included in the old channel of the river was platted into lots and blocks and streets and alleys laid out across the same. Since that time it has been further improved, is now occupied by residences and small farms, and the addition of which it forms a part has been carried on the assessment rolls of Pierce county for 30 years, and general taxes have been levied and paid thereon. Appellant, who was plaintiff below, came into possession of his lands lying in such abandoned river bed in 1915, under color of title deraigned by mesne conveyances from the patentee of the surrounding lands above the meander line. His lots are improved with a dwelling house, small factory, fruit trees, shrubbery, etc., and its level is about the same as the neighboring lands outside of the former river bed. Respondents King and Pierce, counties, acting under authority of chapter 54 of the Laws of 1913, jointly adopted a plan, and proceeded to act thereunder for the purpose of widening and straightening the channel of the Puyallup, Stuck, and White rivers, so as to permanently confine the waters of such rivers to their respective channels, and prevent inundation of adjoining lands, and have proceeded to deepen and widen the Puyallup river at points contiguous and adjacent to the land occupied and claimed by appellant, and claim to have so deepened and improved the channel of the Puyallup river as to have prevented it from resuming at some future time the abandoned channel heretofore spoken of, and claim that title to such abandoned channel vested in the state of Washington upon its admission, and was conveyed jointly to King and Pierce counties by virtue of chapter 140 of the Laws of 1915, and the work which the counties have done thereon. In carrying out this theory that they had title to the abandoned channel of the stream, respondents proceeded to appraise the various parcels of lands lying therein, and gave notice that the same would be sold at public auction on a day certain. Thereupon the appellant brought this action upon behalf of himself and others similarly situated, for the purpose of enjoining such threatened sale. A temporary restraining order was entered, but upon the trial of the cause the same was vacated, and the action dismissed at appellant's costs, and a decree entered, quieting title to the premises in question in respondents. From such judgment and decree appellant has brought the case here for review on appeal.

[1] The trial court found that the Puyallup river is a navigable stream. The evidence upon this point is very conflicting and far from satisfactory, but we cannot say that

it preponderates against the findings of the trial court, and must therefore accept that finding as made.

The Puyallup river, being navigable, the general rule is not in doubt. It is thus stated by the Supreme Court of the United States:

"The conclusions from the considerations and authorities above stated may be summed up as follows:

"Lands under tidewaters are incapable of cultivation or improvement in the manner of lands above high-water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and control of them are vested in the sovereign for the benefit of the whole people.

"At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.

"Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.

"The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

"The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below the high-water mark of tidewaters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of the uplands to the

sovereign control of each state, subject only to the rights vested by the Constitution in the United States." *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331.

This doctrine we have recognized and followed. *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811; *Hill v. Newell*, 86 Wash. 227, 149 Pac. 951.

[2] This state, acting upon the rule as thus stated by its Constitution at once asserted its title to the beds and shores of navigable waters except as to rights which had become vested, as follows:

"Section 1. *Declaration of State Ownership.*—The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in courts of this state.

"Sec. 2. *Disclaimer of Certain Lands.*—The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, the same is not impeached for fraud."

Constitution, article 17.

This declaration by the state must be borne in mind throughout the discussion which follows, for "when land under navigable water passes to the riparian proprietor, along with the grant of the shore land by the United States, it does not pass by force of the grant alone, because the United States does not own it, but passes by force of the declaration of the state which does own it that it is attached to the shore." *Hardin v. Shedd*, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. Ed. 1156.

It has frequently been held, where avulsion or sudden change in the channel of a stream has taken place after the admission of the state or states abutting upon the water course, that such avulsion or sudden change does not change the boundary between the states or divest the title which had theretofore vested in the channel thus abandoned. *Nebraska v. Iowa*, 143 U. S. 359; *Gill v. Lydick*, 40 Neb. 506, 59 N. W. 104; *Angell on Water Courses*, § 57; *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913; *Codley v. Golden*, 117 Mo. 83, 23 S. W. 100, 21 L. R. A. 300.

But it is strenuously contended here that these cases do not apply because at the time the Puyallup river abandoned its old channel, which the trial court found was in 1883, or prior thereto, the state had not come into existence, and had no title to such abandoned channel, and that when the state was admitted in 1889 the river was flowing in its present channel, had permanently and completely abandoned the old channel, and there passed from the national government to the state

title only to its bed and shores as it then flowed.

[3] So far as appears the new channel when formed was cut from the public lands, and there is therefore no question but that title to such new channel was in the Federal government, and no reason is suggested or perceived why, the change of the channel being permanent, the government's title to such new channel should not thereupon become impressed with the trust for the future state to the same extent and effect as though the change had occurred in prehistoric ages, and, if so, the trust character of the government's title to the old channel must necessarily have ceased when the trust title in the new channel arose. There could be no reason in fact or in law for both titles to persist for the benefit of the future state. The evidences on every hand in this state of changes in and cessations of water courses and bodies of water which must have been navigable at some time in the past are such as to call for such a rule as a matter of reason, otherwise, as the statute of limitations does not run against the state, the title to only the mountain peaks would be unassailable. Although there are numerous authorities which hold that if the change of channels had occurred after the state's title had become vested then the state's title to the old channel would not have been thereby divested, and we have so held in *Newell v. Loeb*, supra, and *Hill v. Newell*, supra, yet no authorities bearing on the particular point we are now considering are presented by either side, and our search has revealed none. We therefore rest our opinion purely upon what seems to us to be the logic of the situation.

If, then, we are right in our conclusion that the trust title for the future state in the old channel ceased when the trust title in the new channel arose, what became of the title to the old channel? As the title of the government had been freed from the trust for the future state long prior to its admission, the full and unrestricted title must therefore have vested in the government as a part of the public domain which it could retain or grant or permit to pass to the owner by patent of the abutting uplands under the rule as to accretions, without any further consent from the state than that contained in the constitutional provision which has been set forth.

[4] Respondents contend that the title of the patentees of the lands abutting upon the old channel did not extend below high-water mark, and that as no grant has since been made by the government they and their successors can have no title to the land now embraced in such old channel. It would seem that if the state never had the title to the old channel, and appellant is in possession, as admitted, his possessory rights are sufficient as against respondent's, and can

be questioned, if at all, only by the government. One of the witnesses, who was brought up on the banks of the Puyallup river at the point in question, testified as follows:

"A. I would say as near as I can guess, it would be about 1876 when it broke through, or possibly—

"Q. Since it first broke through has it continued to run in the same channel? A. There were several years, as I recall, until the volume of the water had cut through the new channel. It might have been five years. It kept washing all the time, and still running in both channels for a number of years until it filled up the old channel."

On cross-examination:

"Q. You say the water continued to run in both channels? A. It did for a number of years, until the new channel got wiped out.

"Q. For about how many years? A. I would say, just guessing, 4 or 5.

"Q. Then it continued to run in both channels until along in 1893 or 1894? A. Oh no, not that long.

"Q. About what time? A. It came through, possibly, that is guesswork, about 1876, and it possible might be up until 1880, although at extreme high water it would be backed up in there some.

"Q. How old are you? A. 52.

"Q. Would you have any recollection of whether or not it cut through in 1876? A. As near as I can get to it. I recollect the river when it had not broke through and I recollect being on the bank of the river and following along at the bank, and then it broke through. I was simply estimating the time by how old I was at that time."

While this testimony is somewhat vague, as it necessarily must be, considering the lapse of time, we find nothing in the record which directly or indirectly contradicts it, or tends in any way to lessen its force.

The evidence just quoted tends to support the theory of title by accretion and if the Puyallup river were a nonnavigable stream, would undoubtedly support such a title. *Denes v. Morrison*, 95 Wash. 76, 163 Pac. 382, and cases there cited. We apprehend, however, that as the government is not a party here it is beyond our power now to settle that question, and that it is wholly unnecessary to attempt to settle it in this case.

Respondents further contend that the work which they have performed tends to confine the river to its new channel and lessen the danger of its resuming its flow through the old channel, and, while this may be true in a sense, yet from a careful reading of the whole record we are not satisfied that the river before the performance of respondents' work was any more likely to break out at this point than at any other, and the history of the river for some 40 years, as given by the witnesses, convinces us that no such

resumption of the old channel was a probability, but in any event, if the state had no title, it could pass none to respondents, however necessary and advantageous their work might have been.

In view of the conclusions reached we find no necessity for a discussion of the other points raised by appellant.

For the reasons given the judgment is reversed, with directions to enter judgment permanently enjoining respondents from interfering with appellant's possession of the property described in his complaint.

HOLCOMB, C. J., and MOUNT, FULLERTON, and BRIDGES JJ., concur.

(111 Wash. 467)

LASMAN et al. v. CALHOUN, DENNY & EWING et al. (No. 15689.)

(Supreme Court of Washington. July 9, 1920.)

1. Principal and agent  $\S$  158—That principal is liable does not relieve agent from liability for his fraud.

A party, whether acting for himself or another, is liable in damages for his own fraud, and the fact that the principal is also liable does not relieve an agent from liability for fraud.

2. Principal and agent  $\S$  156—Where agent is guilty of fraud, his liability is to be measured by the law of torts.

Where a sales agent is guilty of fraud in disposing of land, thus becoming liable to the purchaser for damages suffered by the purchaser, his liability must be measured by the law of the torts; but he is not liable on the contract negotiated for his principal, so if fraud is charged it must appear that he made representations knowing them to be false, etc.

3. Fraud  $\S$  58(2)—Evidence held to warrant finding that misrepresentations of agent were knowingly false.

In an action against sellers of land and their agents, evidence held to warrant a finding that the agents made misrepresentations knowingly or without any reason to believe that they were true.

4. Fraud  $\S$  11(1) — Misrepresentations by sales agent not statement of opinion.

Misrepresentations by sales agents as to the quality of land, which they could easily have ascertained was alkali land and not fit for crops as stated, etc., combined with false statement that an irrigation system was already in operation, are not mere statements of opinion.

5. Trial  $\S$  143—Conflicting evidence for jury.

Where the evidence on an issue is conflicting, it is for the jury.

Department 2.

Appeal from Superior Court, King County; Clay Allen, Judge.

Action by Celia Lasman and Marks Lasman, her husband, against Joseph Connell and another, trustees, and Calhoun, Denny & Ewing, a corporation. After verdict for plaintiffs against all the defendants, judgment was rendered for the corporate defendant on motion non obstante veredicto, and plaintiffs appeal. Judgment reversed, with instructions to enter judgment on verdict.

Burkheimer & Burkheimer, of Seattle, for appellants.

Hartman & Hartman, of Seattle, for respondent.

**TOLMAN, J.** This action was commenced in Grant county, upon a complaint alleging fraud in consummating a sale of real estate and praying for a rescission of the sale and a recovery of the purchase price. A change of venue was had to King county, and there, and before any of the defendants had answered, appellants, who were plaintiffs below, filed an amended complaint, alleging fraud and misrepresentation in the negotiations leading up to the purchase of the land by them, upon which they relied in making the purchase; that they expended considerable sums of money in buying lumber and materials for buildings, fences, and improvements; that they also purchased farm implements, work horses, feed, and supplies, and expended their own labor and that of hired help over a considerable period of time, relying upon the representations made as to the character of the land and before they could discover the falsity of such representations; that the land proved to be worthless for agricultural purposes for which it was purchased, or for any purpose; and alleged that they had been damaged in the sum of \$8,894.85, for which amount, together with interest and costs, they demanded judgment. After moving to strike the amended complaint, respondents answered by making general denials, and pleading affirmatively:

"That the said plaintiffs at all times knew and were advised that this answering defendant was agent only of the defendants Connell and Patten, trustees; \* \* \* that the said plaintiffs never assumed to hold the answering defendant responsible for any statement, representation, act or deed save as agent acting for its principal, and the principals \* \* \* were and are known to the said plaintiffs."

A demurrer to this affirmative defense having been overruled and the remaining defendants having answered, the cause proceeded to trial, resulting in a verdict in favor of appellants and against all of the defendants in the sum of \$6,632. This verdict was set aside and a new trial granted. Upon the second trial a verdict against all of the defendants in the sum of \$8,000 was rendered. A motion for judgment non obstante veredicto was made, which was denied as to the

defendants Joseph Connell and Alfred Patten, trustees (against whom judgment was rendered on the verdict, from which they have not appealed), and granted as to respondent, and judgment rendered in its favor dismissing the action as to it and awarding it costs. The plaintiffs have appealed from such judgment of dismissal. We are therefore confronted by the single question: Was the respondent Calhoun, Denny & Ewing entitled to a judgment notwithstanding the verdict of the jury?

[1, 2] It appears that title to the land sold was in the defendants Joseph Connell and Alfred Patten, trustees, who resided in Chicago, and who appeared in the transaction with appellants only through their agent Calhoun, Denny & Ewing, and perhaps other agents located in the vicinity of the land sold. It is not claimed that Connell and Patten were guilty of any active fraud or misrepresentation. Their liability having arisen solely by reason of the acts of their agent, Calhoun, Denny & Ewing, appellants, in addition, seek to hold Calhoun, Denny & Ewing for its own alleged fraud under authority of *Garrett v. Sparks Brothers*, 61 Wash. 397, 112 Pac. 501, where it is said:

"It is fundamental that a party, whether acting for himself or another, is liable in damages for his own fraud. The fact that the principal is also liable does not relieve from responsibility the party who actually commits the wrong. In such cases, the liability of the principal can only rest upon the delict of its agent. The party who has been wronged may elect to sue either or both."

Respondent does not dispute the correctness of this rule, but argues that since the agent is one who is employed by and authorized to act for his principal, third parties knowing him to be such agent are bound to take notice of the fact that he is so acting for his principal, and, if the agent speaks honestly and in good faith from information furnished to him by his principal with a belief in the truth of his statements, there can be no liability upon the part of the agent, though, if the information furnished by the principal be false and untrue, the principal may be liable. In support of this position, respondent cites the following cases, which, so far as the facts there involved appear to go so hold: *Hillis v. Mescher*, 69 Wash. 454, 125 Pac. 768; *Lipscomb v. Kitrell*, 11 Humphr. (Tenn.) 256; *Barton v. Cox* (Tex. Civ. App.) 176 S. W. 793; *Vertress v. Head & Matthews*, 138 Ky. 83, 127 S. W. 523; *Wimple v. Patterson*, (Tex. Civ. App.) 117 S. W. 1034.

In the case last cited what we conceive to be the true rule is stated in the following language:

"If, under the circumstances stated, the agent becomes liable to the purchaser for damages suffered by him, it is by force of other

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principles of law than those which measure and fix the rights of the parties to a contract. His liability, under such circumstances, must be measured by the law of torts. For his fraudulent acts he is responsible to the buyer. He is not liable on the contract negotiated by him for his principal, but he is liable for his own fraud and deceit practiced on the purchaser to induce him to enter into the contract. If the fraud or deceit charged consists of false representations as to material facts made to the purchaser, to show a liability on the part of the agent it must be made to appear that he made such representations knowing them to be false, or, as stated by a writer in 20 Cyc. 24, that he made them 'as a positive assertion calculated to convey the impression that he had actual knowledge of their truth, when in fact he was conscious that he had no such knowledge.' It follows, from the principles stated, that when the agent, so acting within the scope of his employment as to bind his principal, honestly believes representations made by him to induce the purchaser to contract with his principal to be true, he is not liable either on the contract or as for a tort."

We must therefore turn to the record to determine whether or not there was any evidence sufficient to go to the jury upon the question of statements and representations having been made by Calhoun, Denny & Ewing to appellants to induce them to purchase the land in question with the knowledge that such statements were false, or, if not actually known to be false, were they made as a positive assertion calculated to convey the impression that respondent had actual knowledge of their truth, when in fact it was conscious of the fact that it had no such knowledge, and was by it intended that appellants should rely thereon in making the contemplated purchase?

[3-5] The witness Elwell, who was employed by Calhoun, Denny & Ewing, at the time of the sale, testified that he was an experienced land salesman; that before his employer accepted the agency of the land he went over and examined it, reported favorably upon it, and his report, coupled with a like favorable report from the immigration agent of the Chicago, Milwaukee & St. Paul Railway Company, induced his firm to accept the agency; that thereafter they were furnished with a technical report made by an engineer from Chicago; and that Calhoun, Denny & Ewing made up the advertising circular from this report. The circular, which seems to have been the first thing to interest appellants, is as follows:

#### "Alfalfa Land.

"With water!—\$99 an acre on small payment plan, in state of Washington.

#### "Public Notice.

"Notice is hereby given that our immigration department is about to throw open the first block in a total area of 20,000 acres of choice alfalfa, farm and fruit land at first prices.

"The tract is located near Corfu, on the main line of the Chicago, Milwaukee & St. Paul Railway, in Grant county, a short distance east from Ellensburg, state of Washington.

"A modern irrigation system has been built and is now in successful operation. Instead of pumping water, the system is an all gravity flow. The source of the water is Moses Lake, Lynn coulee, the Goose Lake reservoir system which is in reality a chain of smaller lakes, and the canal system of which is Crab creek forms a part. The maximum water supply developed will cover approximately 20,000 acres, the first block of which is now open to sale.

"The price is \$99 an acre for land and water is less than half the usual price on many other projects for land and water; and an important feature of this property is that instead of water simply being in prospect, it is already there. The special price is, of course, temporary, and is subject to change without notice. This offer is made to call the attention of the public to the opening of a new era in irrigated land. No stumps or timber to clear.

"The water right provides practically three acre-feet of water for each acre of land, more water than can be used for most crops. On the first block of land, ground water is found at a depth of 10 to 15 feet.

"The surface drainage area directly tributary to Moses Lake, Lynn coulee and Crab creek is about 1,000 square miles; while the underground drainage indirectly tributary to the same water channels is 2,124 square miles.

"The chain of reservoir lakes alone, between Moses Lake and this property, will store in reserve approximately 10,000 acre feet; this in addition to practically 10,000 to 15,000 second feet flow from the other water way sources, and accounts for the ample water supply for the property.

"Corfu is a small village and depot located on the 'Milwaukee' main line, on the edge of the property. It has a fine brick school building, shipping station, general store, postoffice and grain warehouse, in addition to other buildings and concerns. The distance to Seattle is 178 miles and to Spokane about 200 miles. The altitude of the town is about 800 feet above sea level. Some of the drainage area is nearly 2,000 feet above sea level.

"The annual rainfall at Corfu averages about 11 inches. On some of the uplands it runs as high as 20 inches. This accounts for the abundant range nearby for stock, much of it free. The length of the growing season averages 180 days.

"The climate is fairly on a par with that of the Puget Sound country, less the rainfall. The temperature ranges from an average of 50 degrees in the winter to a summer average of 75. A few cold days in midwinter and a few days of higher temperature in midsummer do not alter the average. The valley is largely sheltered from winds usual in some other sections by a range of hills stretching east and west through the south end of the valley, across the path of the prevailing winds.

"The first block of land resembles a 'meadow,' level and covered mainly by coarse grass and black sagebrush. In the main, the soil is a deep, black loam, much like the truck gardens near Seattle and other large cities. This valley is traversed east to west by two channels of

Crab creek. The slope down the valley averages 12 feet to the mile.

"Crops that thrive under irrigation here are alfalfa, wheat, rye, flax, potatoes, grasses and all kinds of vegetables. Cows, hogs and poultry bid fair to prove a specialty; while apples are well adapted to the slopes. The conditions are considered ideal for grape vineyards.

"Alfalfa growing is demonstrated on identical land nearby, where last year 86 acres ran over seven tons to the acre. Six tons per acre is a reasonable average per year. Plans are being considered for an alfalfa mill at Corfu to cost \$7,000.

"The opening of this property to farming will result in great development during the next few years. Early arrivals can secure small productive farms, at original prices. Opening prices for land and water run \$99 an acre. One-fourth cash payment, balance on easy time at 6 per cent. The company will co-operate with settlers in every possible way. Ask for special excursion rates to the property.

"Apply to Calhoun, Denny & Ewing, Alaska Building, Seattle, U. S. A., Sole Agents."

According to appellant's testimony the oral representations of Elwell, and White, another salesman in the employ of respondent, went considerable further than the circular, but passing that we think the jury, having before it the circular, the engineer's report from which it was said to have been made, and the testimony of the various witnesses as to the land, its character, soil, productivity, and suitability for agricultural purposes, and the existence or nonexistence of an adequate irrigation system appurtenant thereto, might have found that respondents by this circular made statements which they knew to be false, or which they had no reason to believe to be true, in the following particulars: (a) As to the completion of a modern irrigation system and water being already on the land; (b) as to the soil being deep black loam, much like the truck gardens near Seattle and other large cities; and (c) as to the crops which would thrive thereon, and especially as to the seven tons of alfalfa being grown per acre on identical land nearby. The engineer's report shows that the irrigation system was a contemplated one and uncompleted when that report was made, and appellants testified that after they went upon the land there was no water available. The engineer's report fails to say that the land is deep black loam or to tell what the soil consists of, nor does it intimate any similarity between this soil and that of the truck gardens near Seattle, with which appellants, as they resided in Seattle, might be deemed to have some familiarity, and there was testimony that it was flooded every winter and spring until well into the summer, could not be cultivated at all until after the floods receded, too late in the summer for crop growing, and when dry enough to cultivate it immediately hardened

like cement, and was so impregnated with black alkali that it would produce nothing but grease wood and salt grass; neither being of any value. And lastly, while speaking generally of oats, wheat, rye, flax, potatoes, and all kinds of vegetables thriving under irrigation, alfalfa and grasses doing exceptionally well, and the sloping hillsides being adapted to apple raising, the report further on refers to the bottom lands being suitable for alfalfa in such a way as to somewhat modify the prior general statement, and nowhere bears out in full the glowing terms of the circular as to productivity.

Mr. Elwell's testimony shows him to have been engaged in selling Washington lands for 15 years, and the abstract shows his opportunity for knowing the real character of this particular land, as follows:

"I prepared that circular. I have been at the town of Corfu. Was first there in the spring of 1915. I would not be sure about that date, whether it was 1914 or 1915. I cannot tell the date for sure, but it was before I wrote this circular. I think I was at Corfu twice up to this time. I had been out over the land. Possibly 60 days elapsed between my two visits just referred to. I examined the land at that time for the purpose of drafting this circular. I will correct that to some extent. I was examining the land with a view to the firm accepting the agency for the land. I wouldn't know whether I was going to prepare a circular or not unless we took the agency. I was there at least twice before this circular was prepared. I might possibly have been there more times. It is quite a little while ago. It is pretty certain that I was there a number of times after that before this was published and before Mr. Lasman bought it."

From this testimony, coupled with other testimony in the record to the effect that one familiar with alkali lands could readily detect the presence of alkali, black or white, from the appearance of the land and the vegetation growing thereon, the jury might very well have drawn its conclusion that the representations contained in the circular were falsely made, or at least so recklessly made, in view of Mr. Elwell's capacity and opportunity to have learned the truth, as to be equivalent to deliberate falsity.

We think the representations made were something more than mere opinion. Whether appellants were qualified to and did make an independent investigation, the evidence being very conflicting with regard thereto, was a question for the jury, and the affirmative answer, even though it had been so amended as to allege that the representations were based solely upon information furnished by the principal to the agent, presented an issue which, under the evidence, the jury could and did resolve against respondent.

We therefore conclude that the judgment appealed from must be reversed, with in-



struction to the trial court to enter judgment on the verdict of the jury.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(111 Wash. 542)

**STATE v. SUPERIOR COURT FOR ADAMS COUNTY et al. (No. 15930.)**

(Supreme Court of Washington. July 14, 1920.)

1. Eminent domain  $\Leftrightarrow$  166—Condemnation for state road is by procedure provided for condemnation of county road rights.

In view of Rem. Code 1915, § 5623 et seq., the condemnation procedure for a state road right of way must be the procedure provided for acquiring by condemnation county road rights of way, which is in the manner provided for condemnation of rights of way by corporations.

2. Eminent domain  $\Leftrightarrow$  166—State board, before proceeding to condemn way for state road, need not comply with county act.

Despite Rem. Code 1915, § 5872, it is not necessary for the state board, before proceeding to condemn rights of way for a state road, to hold meetings and give notices, determine damages, and make tender thereof, and otherwise comply with the County Road Act; the statute simply meaning that the actual condemnation proceedings shall be those required for acquiring county roads.

3. Eminent domain  $\Leftrightarrow$  196—Evidence held to show reasonable necessity for right of way for state highway.

Evidence in state's proceedings to condemn right of way for state highway held to show reasonable necessity for acquiring way, though it would considerably damage farming lands through which it passed, and though section was already traversed by section line highways, while landowners affected had offered to provide land to flatten curves necessitated by other location.

**Department 2.**

**Certiorari to Superior Court, Adams County.**

Condemnation proceedings by the State of Washington against certain landowners. To review orders of the Superior Court of Adams County dismissing the suit, plaintiff brings certiorari. Judgment reversed, and cause remanded, with directions to enter order of necessity.

Lindsay L. Thompson and John A. Hemer, both of Olympia, for the State.

Chas. P. Lund, of Spokane, for defendants.

BRIDGES, J. This is a suit to acquire by condemnation right of way for a state road. The Legislature of 1915 created the

Central Washington Highway in the following words:

"A primary state highway is established as follows: A highway connecting with the Inland Empire Highway at Pasco, Washington; thence by the most feasible route through Connell, Ritzville, Sprague and Cheney, to Spokane, Washington, to be known as the Central Washington Highway." Section 5878-2 (d), Rem. Code.

The state authorities are now procuring right of way for this highway. It has already acquired most of the right of way between the town of Connell and the town of Lind, a distance of several miles. Being unable to acquire by purchase the right of way through part of three contiguous sections, it instituted five condemnation suits—one to secure the right of way through a part of the northeast quarter of section 4, township 14, range 33 E. W. M.; another for the right of way through a part of the southeast quarter of section 33; a third for right of way through a part of the southwest quarter of section 34; a fourth to acquire the right of way through a part of the northwest quarter of section 34; and the fifth for right of way through a part of the northeast quarter of section 34, all in township 15, range 33 E. W. M. By stipulation, all these cases were consolidated for the purpose of the hearing on the question of necessity. At the termination of the hearing the trial court entered an order in each case to the effect that the testimony failed to show a necessity to acquire the right of way through the lands described, and ordered the suits dismissed with costs. Later it was stipulated between the parties that the various cases might be consolidated in one application to this court for a writ of certiorari. Upon such application the writ was issued, and the complete record is now before us.

There are two chief questions presented for our determination: First, has the state proceeded to acquire the right of way in the manner provided by the statutes of the state of Washington? and, second, does the testimony establish a necessity for the taking of the particular lands involved? Section 5872, Rem. Code, provides as follows:

"The state highway commissioner is hereby authorized to acquire right of way on behalf of the state for state roads by gift, purchase or condemnation in the manner prescribed by law for the acquirement or condemnation of lands for county roads. The cost of such right of way shall be paid for from the fund apportioned to the state road for which such right of way is acquired. \* \* \*

Section 5623 and subsequent sections of Rem. Code provide a complete program for the laying out and establishment of county

roads and acquiring rights of way therefor. These sections provide that county roads may be established either by resolution of the board of county commissioners or upon petition of householders. They provide for various hearings before the board of county commissioners, of which hearings the persons interested must be given notice. Section 5634 provides that the commissioners shall determine the amount of damages to which each landowner is entitled, and by section 5636 such amount must be tendered to the landowner. Section 5635 provides that, if such award of damages is not accepted, the board shall direct that the right of way be procured by condemnation, "in the manner provided by law for the taking of private property for public use, and to that end are hereby authorized to institute and maintain in the name of the county the proceedings provided in sections 921 to 936 of this Code. \* \* \* " The sections last referred to provide the manner and way whereby corporations may acquire right of way by condemnation.

[1] We find, therefore, that the condemnation procedure for a state road right of way must be the procedure provided for acquiring by condemnation county road rights of way, and that county road rights of way must be condemned in the manner provided for condemnation of rights of way by corporations. The state, in the cases under discussion, has proceeded in the manner provided for acquiring rights of way by corporations. The defendant, however contends that, since the statute (section 5872, Rem. Code) authorizes the state to condemn "in the manner prescribed by law for the acquirement or condemnation of lands for county roads," it is necessary that the state follow and comply with the complete preliminary provisions with reference to acquiring rights of way for county roads. In other words, it is contended that it is necessary that the state highway board hold meetings and give notices, determine the amount of damages, and make tender thereof, and otherwise comply with the County Road Act, before it could authorize the commencement of a condemnation suit.

[2] We do not so construe the statute under discussion. It does not mean that the state highway commissioner or the state highway board shall carry out all the details preliminary to a condemnation provided for acquiring rights of way for county roads. It simply means that the actual condemnation proceedings shall be those provided for acquiring county roads. Reading the various statutes together, we find that condemnation for state roads shall be the same procedure provided for condemning for county roads, and that condemnation for the latter shall follow the procedure provided for acquiring rights of way by corporations.

The state road statute means the same as if it had provided that state road rights of way must be acquired in the manner provided by law for acquiring rights of way by corporations. To give the state highway statute the construction contended for by defendant would be to impose upon the state duties which it could not perform, and which would have the effect of making it impossible for the state to acquire by condemnation rights of way for state roads. If the Legislature had intended that the state should carry out the various preliminary details imposed upon counties it would certainly have expressly so said. We have no doubt, therefore, that the state is proceeding in the manner provided by law.

The next question is whether the testimony is sufficient to authorize the state to acquire the particular right of way sought. Section 925, Rem. Code, provides that if, at a proper hearing on the question of necessity, the court be satisfied "that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise," then it may make the preliminary order of necessity. The duty resting on the courts under this statute is stated in *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, 64 Wash. 189, 116 Pac. 855, where we said:

"We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views, is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection. Plainly, the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary it conclusively established the necessity. It is sufficient to make a strong prima facie case, but when convincing evidence is adduced by the owner that the land sought is not reasonably necessary, and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained, would amount to oppression and be an abuse of the power."

The testimony tends to show that the lands through which the proposed right of way runs form a part of a valuable wheat-raising section of the state; that such lands and those in the immediate vicinity are practically level; that they are worth about \$75 per acre; that they are farmed and cul-

tivated by means of large tractors, and that tractors can be used successfully only on large tracts of land; that if these lands are cut up by the proposed right of way they will be reduced in value from 25 to 50 per cent.; that there are county roads already established and open for travel, around nearly all of the sections of land involved, as well as those sections in the immediate vicinity, which county roads follow the section lines; and that the state road could follow some one or more of these section line roads, and thereby do a great deal less damage and injury to the lands sought to be condemned. On the contrary, the state's testimony tends to show that the road, which it is seeking to build will be a main highway, and that it is as necessary to make it as short and straight as possible; that if the section line roads should be followed the road would be lengthened in this immediate locality about one mile over the proposed road; that it would have sharp turns and bends, which would be dangerous to travelers; that the expense of constructing and maintaining the additional mile of road would be great; and that it has already acquired its right of way on each side of the tracts of land here in suit.

At the trial it was orally agreed that, if the state would follow the section line roads, the landowners would procure for the state, without cost to it, reasonable quantities of land at the various section corner turns, so that at such corners the road curves could be flattened out in such a manner as to make reasonably safe turns. If the testimony of the owners is to be accepted, it must be admitted that the lands through which it is sought to acquire the right of way will be materially damaged. On the other hand, the court must take knowledge that this road, when completed, will be extensively traveled by fast-moving automobiles and motor trucks, and that the roads of bygone days are wholly inadequate for present-day purposes. While section line roads may be sufficient for the accommodation of an immediate vicinity, they are wholly inadequate for a main line road. The advent of the automobile and the auto truck, and the consequent extensive and ever-growing use to which roads are put, makes it necessary that main thoroughfares be built upon the best route obtainable. If the landowners in this locality may compel a main state road to be lengthened, and to contain many, and perhaps more or less, dangerous curves, in order to avoid cutting up and damaging

their lands, so may landholders elsewhere, for equally good reasons, compel state roads to be lengthened and the cost of construction and maintenance thereof greatly increased. Such a doctrine, carried to its legitimate end, would make main and heavily traveled state roads little better than the common community roads. The desire of the landowners here to maintain their lands as they are, so that they can better use them for farming purposes, is a laudable one; but that desire must give way to the greater and more important necessities of the general public, particularly where, as here, under the law, the state must compensate them for such damage as they will suffer.

Nor can we very seriously consider the offer of the landowners to provide land to flatten the curves, should the road follow the section lines. In the first place, there is no agreement as to how much land would be necessary for these purposes, or as to what degree the curves should have. There is no certainty that the parties can agree on these things, nor, for that matter, that the landowners can acquire the land for these purposes. But if it be conceded that these things could be agreed upon and done, yet but little good will have been accomplished, because the road would still be about a mile longer and would contain many additional objectionable curves. The testimony shows that it would cost about \$25,000 to put the original pavement on this extra mile, to say nothing of the additional cost of maintenance. Every additional mile on a main road adds greatly to the cost of construction and maintenance—adds expense to every auto, every motor truck, every vehicle, which travels it. Every curve makes additional dangers to the traveler. The reasons which induce railroad companies to spend large sums in flattening or altogether cutting out curves, and in so building or rebuilding the road as to get the shortest possible distance between given points, are in a very great measure applicable to the building of main highways.

[3] We are satisfied that the testimony shows a reasonable necessity for acquiring this right of way and that the learned trial court was in error in holding to the contrary.

The judgment is reversed, and the cause remanded, with directions to the lower court to enter an order of necessity and permit the state to proceed to the assessment of damages as provided by law.

HOLCOMB, C. J., and MOUNT, TOLMAN, and FULLERTON, JJ., concur.

(112 Wash. 34)

**STATE ex rel. URQUHART et ex. v. SUPERIOR COURT IN AND FOR GRANT COUNTY et al. (No. 15944.)**

(Supreme Court of Washington. July 28, 1920.)

1. Eminent domain  $\Leftrightarrow$  196—Reasonable necessity for acquiring right of way for primary state highway shown.

Evidence held to show reasonable necessity for acquiring right of way for the North Central Highway of the state through objecting landowners' property, and not to show abuse of the statutory power of the state highway authorities to locate primary state highways.

2. Highways  $\Leftrightarrow$  99 1/4, New, vol. 14 Key-No. Series—Application of item in appropriation act to route through particular lands proper.

Application of item in state highway appropriation act of 1919 (Laws 1919, c. 92), held proper in use for a route through objecting landowners' lands; the evidence showing there was no feasible route for a stretch of highway to which the act related that would reach nearer the corporate limits of a town mentioned in the act than the route adopted.

3. Highways  $\Leftrightarrow$  19—Law relative to survey and mapping by commissioner modified by appropriation act.

Rem. Code 1915, § 5870, passed in 1907, before it became the practice of the Legislature to define primary highways from one end to the other, and providing that, when money is appropriated for a state road, the highway commissioner shall cause survey to be made of the entire length, cause it to be mapped, etc., held modified by Laws 1919, c. 92, in making appropriation to meet the cost of only specified portions of state highways.

**Department 1.**

Certiorari to Superior Court, Grant County.

Condemnation actions by the State of Washington against Donald Urquhart and Abby Urquhart, his wife, against Louis C. Williams and others, and against P. O. Lorentzen and others. To review orders of the Superior Court in and for the County of Grant, Joseph Sessions, Judge, granting the petitions, and adjudicating public use and necessity, defendants bring certiorari. Orders affirmed.

E. J. Cannon, of Spokane, T. B. Southard, of Wilson Creek, and C. G. Jeffers, of Ephrata, for relators.

Lindsay L. Thompson, Atty. Gen., and John A. Homer, Asst. Atty. Gen., for respondents.

MITCHELL, J. This action, and that of State v. Louis C. Williams et al., and another, State v. P. O. Lorentzen et al., were instituted in the superior court of Grant county for the purpose of condemning property through farm lands upon which to construct a portion of the North Central Highway. A hearing was had upon all the

petitions, under stipulation of consolidation, resulting in an order in each case granting the petition therein and adjudicating public use and necessity, as prayed for. Thereafter, upon application, this court issued its writ of certiorari, pursuant to which the proceedings leading up to and resulting in the entry of the orders complained of are here for review, and for which purpose the three cases have again been consolidated by agreement of counsel.

The Legislature of 1919 (chapter 110) declared:

"Sec. 1 1/2. That section 15 of chapter 164 of the Laws of 1915 be amended to read as follows:

"Sec. 15. A primary state highway is established as follows: A highway starting from a connection with the Sunset Highway at Ellensburg; thence by the most feasible route (heretofore the Sunset Highway) to the Columbia river near Vantage; crossing the same and continuing thence northeasterly by the most feasible route (heretofore the Sunset Highway) to Quincy; thence by the most feasible route (heretofore the North Central Highway) through Ephrata, Krupp, Odessa, and Harrington to a junction with the Sunset Highway at Davenport, to be known as the North Central Highway."

The present county road running easterly from Ephrata reaches a point some 360 feet from the southwest corner of the corporate limits, and about 1,400 feet from the business section, of the town of Wilson Creek; thence it makes a northerly turn, crosses the Great Northern Railway tracks, and still further north enters Main street, in the town of Wilson Creek, and follows that street easterly through the town; thence on to a point about one mile east of the town; thence runs to the south, again crosses the Great Northern Railway tracks, and runs about one-half mile further south, to what is spoken of as the Lorentzen corner. Here the county road makes a right-angle turn to the left and continues in an easterly direction about 6 miles to the town of Krupp. There is a stream, Crab creek, which flows from the east to Wilson Creek. Within several miles of the town on the east the creek penetrates a large swampy section, and then runs on in low land through the city and to the south of main street and the business and residence portion of the city and on the north side of the railway tracks. The swampy area is drained by a large ditch, which runs on through the town. The ditch is ample to carry the water, except during high-water season, when the swamp is covered with water. There is a stream called Wilson creek, which runs from the north through the easterly part of the town and empties into Crab creek.

Immediately south of and within a few hundred feet of the town a bench or hill rises

precipitously from the low lands. It commences to rise from the west near the point at which the county road turns northerly to pass over the railway tracks into the city. After reaching the top of the hill the surface is nearly level for some distance and then slopes downward to the east. At a point where the present road turns northerly to cross the railroad into the city from the west, about 360 feet from the corporate limits, the proposed state highway leaves the county road and runs southeasterly and easterly, passes over the bench or hill, and thence down to the Lorentzen corner, where it connects with the present county road. From the west it runs across the lands of Mr. Urquhart, Mr. Williams, Mrs. Mitchell, and Mr. Lorentzen. The territory through which it passes is used for farming, cattle and sheep raising, and grazing purposes, and, except portions of the Mitchell and Lorentzen places, it is sage brush land. The proposed route is shown to be a good one, and is a half mile shorter than the way through the city. The state has already obtained the deed for a right of way across Mrs. Mitchell's place. Wilson Creek has a population of 400 to 500. The proposed way was selected by the state highway commissioner, and the plans and specifications for construction of the highway were prepared by him, and together with the route were approved by the state highway board, which directed the institution of these condemnation suits.

Relator contends: (1) That the evidence fails to sustain the court's order of necessity for the following reasons: (a) That the lands sought to be condemned are not necessary, nor is any part of them necessary, for the construction of the highway named; (b) that public enterprise does not require the highway on the location described; (c) that to construct such highway at such location is an abuse of power; (d) that to take such property is oppressive. (2) That the state highway board lacks any power to condemn the property, because the Legislature has established it through the town of Wilson Creek and directed that its appropriations sought herein to be expended be expended only between Harrington and Wilson Creek.

Calling attention to the provisions of section 925, Rem. Code, that in granting an order of necessity the court shall be further satisfied "that the public interest requires the prosecution of such enterprise, \* \* \* and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purpose of such enterprise," relators quote from the case of *State ex rel. v. Superior Court*, 64 Wash. 189, 116 Pac. 855, as follows:

"We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land which, accord-

ing to their own views, is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection."

The quotation should be continued, for immediately it was said:

"Plainly, the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of clear and convincing evidence to the contrary, it conclusively established the necessity."

However, the court further said in that connection:

"It is sufficient to make a strong prima facie case, but when convincing evidence is adduced by the owner that the land sought is not reasonably necessary, and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained would amount to oppression and be an abuse of the power."

While there is no claim or offer that other land of the relators may be taken, it is contended the principle is involved for the reason that the county road through the town or city of Wilson Creek will meet the necessity, thus doing away with the need of taking any private property, and that therefore the plan proposed by the state manifests bad faith, oppression, and abuse of power.

Much of the proof of relators was in support of a route heretofore surveyed for a county road from Wilson Creek easterly to Krupp, considerably north of the present county road between those points; but as we understand relators practically abandon that plan (at least, we think it indefensible), and rely upon the present county roadway as a substitute for the state's proposed route to justify their claim of bad faith and oppression at the hands of the state authorities.

It is shown there is a county road from Hartline south to Wilson Creek; that most of the settlers around Wilson Creek live to the north and west of the town. It is admitted the present crossing of the railway tracks and waterway near the southwest corner of the town is undesirable and dangerous, so that the county and city authorities and the Great Northern Railway Company are already interested in a proceeding before the Public Service Commission looking to the building at that point of an overhead crossing largely of wooden material, which has been estimated to cost \$22,000, and that the roadway along Main street in the town

would have to be slightly raised and strengthened to put it beyond the possibility of harm from exceedingly rare high water.

Relators' evidence shows the improvement of the bridge over the stream named Wilson creek and a substantial culvert east of town for carrying the waters of Crab creek would be comparatively inexpensive. They estimate the total cost of all such improvements would be approximately \$30,000, which is \$16,000 less than the estimated cost of construction of the highway as proposed through relators' property. It is shown, also, by relators that a portion of the through travel east on the Sunset Highway detours at Hartline by way of Wilson Creek, and it is plausibly argued that to accommodate that travel the settlers living north of Wilson Creek and the residents of the city itself, as well as the public generally in reaching the highway as proposed by the state or going from it to those localities will still require the building and maintenance of the overhead crossing and other improvements along the county road, and that to build and maintain in addition thereto the highway as now proposed would be unwarranted as a matter of public expense and oppressive upon relators in the taking of their property.

On the contrary, the state, by way of explanation and meeting the charge of bad faith made upon it, shows by its proof that its route is the only feasible and practicable route; that it has a maximum grade of only 5 per cent. and is free from curves of any consequence; that it is about one-half mile shorter to the Lorentzen corner than the road through the city; and that the soil is well adapted for road building. It is shown to be the policy of the state highway authorities in constructing such roads to avoid railway crossings at grade, and that its proposed plan avoids two such crossings, one on each side of the town. It was also proven that according to the material used and construction adopted by the state in building state highways a viaduct over the railway and stream at the west of the town would cost \$120,000, a bridge over the stream called Wilson creek \$8,000, about \$3,000 for a crossing over Crab Creek ditch, and still there would be left a railroad grade crossing to the east, if the county road route were adopted. The evidence shows that a viaduct along the county road to cross over the swampy land and railroad to the east of the city would cost approximately \$150,000.

An appropriation of over \$1,000,000 by the federal government is available for assisting this state in the building of its permanent highways, provided the plans and specifications, etc., meet with the approval of its engineers. In this particular case the state highway commissioner, upon learning of the plan of overhead crossing proposed by the county and railway company at a cost of \$22-

000, submitted the same to the engineers of the national government, and was advised no federal aid would be supplied if it, or anything other than that kind of construction which according to the testimony in this case is being generally used by the state in such work, were adopted. While it is true the federal appropriation is still available, if none of it is used on this project near Wilson Creek, yet it is also true that the state has by necessity arranged its plans so as to use a part of the federal appropriation at this point, where  $3\frac{1}{2}$  miles are under contract to be built at a cost of \$46,000. The incident of the rejection by the United States engineers of the plans proposed and considered by the county and railway company for going through the town is of importance as a testimonial in favor of the judgment of the state authorities, when we come to consider the charge of bad faith made against them by the relators. In this case it was testified to by the state's witnesses that in locating primary or permanent state highways consideration was always taken of local interests, provided they did not result in making the highway dangerous or cause an unwarranted demand upon the appropriation. In 1913 the Legislature, in section 2 of an act (chapter 30, Rem. Code, § 8733-2) relating to road and highway crossings, provided:

"All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by passing either over or under the same, when practicable," etc.

This is the policy the testimony shows the state highway authorities are observing generally and are seeking to apply in the present case. In the recent case of *State v. Superior Court of Adams County*, 191 Pac. 413, in discussing the matter of condemning rights of way for a primary state highway, this court said:

"The advent of the automobile and the auto truck and the consequent extensive and ever-growing use to which roads are put, makes it necessary that main thoroughfares be built upon the best route obtainable."

It is the contention of the state that the present road through the town of Wilson Creek presents many difficult engineering problems, the solution of which would run into figures that make the construction of the North Central Highway over that route absolutely prohibited; and certain it is that the present appropriation is wholly inadequate for any such plan.

[1] The duty and power of locating these primary state highways is reposed by the statute upon the state highway authorities, subject, of course, to the right of appeal to the courts in case of bad faith or an abuse of that power. In this case the record satis-

fies us there has been no abuse of that power, and that there is a reasonable necessity for acquiring the right of way through relators' property.

Secondly, it is claimed that the state lacks power to condemn relators' property, because the Legislature has established the route through the town of Wilson Creek. This contention is made because of the provisions of chapter 92, Laws of 1919, which is the Public Highway Appropriations Act, and which reads:

"For the engineering, construction and improvement, and paving of the primary and secondary highways of the state hereinafter enumerated there is hereby appropriated out of the public highway fund and the motor vehicle fund, the respective sums as follows: \* \* \* Sunset Highway \* \* \* between Harrington and Wilson Creek (North Central Highway), public highway fund \$50,000, motor vehicle fund \$50,000."

[2] In effect it is argued that it definitely locates this highway through Wilson Creek, and further that the proposed route is not "between", Wilson Creek and Harrington, and consequently, as this fund could not be used for constructing the highway as proposed by the state, there is no necessity for acquiring relators' lands. What may be termed the locating act (chapter 110, Session Laws of 1919), hereinbefore quoted from, in establishing the North Central Highway, omits any mention of Wilson Creek, which is situated between the towns of Ephrata and Krupp, and which two towns are named in the act; it simply provides for the most feasible route. An examination of the statutes of this state discloses there have been established or created a large number of state highways in the last several years, and that it has been the policy of the Legislature to make appropriations from time to time to meet the expenses of engineering, construction, improvement, etc., of specified portions of the different highways. The terms of such act, in this respect, are intended to designate or identify the particular link or stretch of the whole highway to which a given appropriation shall apply. In this case we are satisfied there has been a proper application of that item in the Appropriation Act of 1919, in undertaking to use it for a route through relators' lands, since the evidence shows there is no feasible route for the stretch of highway to which the appropriation act relates that will reach nearer the corporate limits of the town of Wilson Creek than the route adopted.

[3] Further, without its being specifically enumerated in the assignment of errors, it is contended the appropriation in this case cannot be used, and hence there can be no taking of relators' property, because the evidence shows that the provisions of section

5870, Rem. Code, have not been complied with. That section reads:

"Whenever any money is appropriated for the construction of a state road, the state highway commissioner shall, unless such road has been theretofore surveyed, cause survey to be made of the entire length of such highway, and cause the same to be mapped both in outline and profile, and shall also cause plans and specifications for the construction of such highway to be prepared. Such maps, plans and specifications shall be thereupon submitted to the state highway board, and no portion of any appropriation shall be expended upon such road until the state highway board shall have declared such road feasible and shall have approved said outline and profile maps and said plans and specifications."

That law was passed in 1907, before it became the practice of the Legislature to define primary highways from one end to the other, and must be held to be modified by the act of 1919 in making an appropriation for the declared purpose of meeting the cost of engineering, construction, etc., of only specified portions of the state's highways.

The orders complained of are affirmed.

HOLCOMB, C. J., and MAIN, PARKER, and MACKINTOSH, JJ., concur.

(111 Wash. 529)

**NOYES v. SCHOICHIRO KATSUNO.**  
(No. 15897.)

(Supreme Court of Washington. July 18, 1920.)

1. Municipal corporations  $\S$ 706(5) — Evidence held to warrant belief plaintiff taxicab driver was on right side of street.

In action against a motor truck owner and driver for injuries to plaintiff's taxicab in collision, evidence held to warrant trial court in believing that plaintiff was well to the right side of the roadway, where he had a right to be, that he was moving at low speed, etc.

2. Municipal corporations  $\S$ 705(10)—Truck driver, who forced taxi driver to turn to left, cannot claim he was negligent.

The owner and driver of a motor truck, who acted so that plaintiff taxicab driver was forced to go to the left to avoid collision, cannot be heard to say that plaintiff was negligent in turning to left side of street.

Department 1.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by Archie B. Noyes against Schoichiro Katsuno. From judgment for plaintiff, defendant appeals. Affirmed.

William U. Park and Paul S. Dubuar, both of Seattle, for appellant.

Totten & Totten, of Seattle, for respondent.

PARKER, J. Plaintiff, Noyes, seeks recovery of damages which he claims to have suffered from injuries to his taxicab automobile, caused by the negligence of Katsuno, in that the latter negligently drove his auto truck, so as to cause it to come into collision with the plaintiff's automobile at the intersection of Brintnall Place and Fifteenth Avenue Northeast in the city of Seattle. A trial in the superior court for King county, sitting without a jury, resulted in findings and judgment in favor of the plaintiff, awarding him recovery against the defendant in the sum of \$300, from which the defendant has appealed to this court.

Brintnall Place is a street running in a westerly and easterly direction. Fifteenth avenue comes into it from the north. These two streets, in so far as the general course of travel thereon is concerned, are much like one continuous street, with a bend at the place in question, forming an angle of about 100 degrees. The paved roadway of Brintnall Place, at and just east of the intersection, is 38 feet wide. The paved roadway of Fifteenth avenue is 25 feet wide. At the time in question respondent Noyes was driving his automobile westerly along Brintnall Place, approaching Fifteenth avenue with a view to turning north in that avenue. He was returning from a funeral, and had several passengers in his automobile. His automobile and the truck of appellant, being driven by himself, came into collision in the intersection of the two streets.

Respondent claims that he was driving at the rate of 7 or 8 miles per hour close to the curb of Brintnall Place, and well within the north half of the paved roadway, when he approached the northeasterly corner of the street intersection; that when he arrived within a few feet of the corner he saw appellant's truck coming at a high rate of speed, 20 or 25 miles per hour, turning from Fifteenth avenue into Brintnall Place, and cutting across the corner directly towards his (respondent's) automobile; that it instantly became apparent to him that there was going to be a collision between the two automobiles, unless he turned either to the right or to the left; that he could not turn to the right and escape the impending collision, because there would not be room between the curb and the course of appellant's truck to safely pass and avoid such collision; that, finding himself and his passengers in such a position of sudden peril, he turned his machine to the left and stepped on the accelerator, with a view to speeding up and allowing the truck to pass to his right, the course which it was manifestly taking at such a high rate of speed; that appellant an instant later turned to his right, and the two machines came together on the south side of the roadway, not far from the south curb thereof. This is the substance of respondent's

version of the accident as told in his testimony. It is corroborated in most of its material particulars by one of his passengers, who seems to have been a disinterested witness.

Appellant claims that his truck was at no time east or north of the center line of either of the two streets, and that, had respondent merely continued on his course, there would have been no collision, though he claims that respondent's automobile was much further to the south—that is, towards respondent's left—than he claims.

[1] We think the evidence was such as to warrant the trial court in believing that respondent was well to the right side of the roadway, where he had a right to be under the law of the road; that he was moving at a low rate of speed, while appellant was moving at a high rate of speed, and cutting across the corner in such a manner as to threaten a head-on collision with respondent near the curb at the northeast corner of the intersection; that the situation thus created by appellant was such as to render it apparent to respondent that he and his passengers were suddenly placed in a position of great peril; that he was induced thereby to turn to the left with a view of avoiding a collision; and that, had he not done so, the injury would probably have been far more serious than resulted. As it was, no one was hurt; the only resultant injury being to the truck and automobile.

[2] Counsel for appellant contend that respondent should not be allowed to recover because the collision actually occurred upon the south side of the roadway—that is, south of the middle of the roadway at a point where appellant had a right to be with his truck—and that this must be so because respondent violated the law of the road in going to that side of the street. This contention would be well grounded if appellant's actions had not been the cause of respondent going to the south side of the street. The evidence being such as to warrant the trial court in believing that appellant created such a condition of apparent sudden peril to respondent and his passengers, we think appellant could not be heard to say that respondent was guilty of negligence in turning to the south side of the street.

Counsel rely particularly upon our decision in *Lloyd v. Calhoun*, 78 Wash. 438, 139 Pac. 231; *Id.*, 82 Wash. 35, 143 Pac. 458. That was a case where two automobiles were approaching each other on a road on a smooth, open prairie, where there was ample room to turn to the right on either side, even off the traveled portion of the road. It became largely a question as to whether or not respondent's turning of his car to the left and colliding with appellant was excusable under the circumstances; that is, whether or not his thus violating the law of the road



was excusable. Judge Morris, in the dissenting opinion, following the first hearing, and which, upon rehearing, became the majority opinion, speaking for the court, held that such turning to the left by respondent was plainly not excusable, and therefore was negligence on his part, and was the proximate cause of the collision. In that case respondent's car was in no such situation as we find respondent's car in this case.

Adopting the view entertained by the trial court, which we think the evidence supports, we find respondent in such position that he could not turn to the right and avoid the apparent impending collision, and that his only possible chance to avoid the collision, or to render it less disastrous, was to turn to the left. In *Sheffield v. Union Oil Co.*, 82 Wash. 386, 144 Pac. 529, we have a decision, written also by Judge Morris, where the one violating the law of the road was excused for doing so, and absolved from the charge of contributory negligence, because of the sudden peril in which he was placed by the driver of the oil company's truck. That, we think, is, in substance, this case. 2 R. C. L. 1196.

Some contention is made that the amount of respondent's damages was not sufficiently clearly shown. This, we think, is without merit. It is true that the evidence as to the exact amount of respondent's damages actually suffered is not very satisfactory; but it is so plain that he suffered at least \$300 damages that we do not feel called upon to further discuss this question.

The judgment is affirmed.

HOLCOMB, C. J., and MAIN, MAOKIN-TOSH, and MITCHELL, JJ., concur.

(56 Utah, 437)

MURRAY CITY v. UTAH LIGHT & TRACTION CO. et al. (No. 3447.)

(Supreme Court of Utah. July 7, 1920.)

1. Constitutional law §126—Reserved power of state to fix fare can be exercised despite city ordinance.

Power to fix fare to be received by a street railway or its proprietary companies having been retained by the state by the Public Utilities Act, such power can be exercised by it whenever the necessity requires, despite ordinance of city granting railway right to operate over a street; such action not impairing obligation of a contract.<sup>1</sup>

2. Street railroads §61(1)—Literal compliance with forfeiture provisions must be shown.

The law does not favor forfeitures, and any party to a contract, as a contract between a municipality and a street railroad, insisting upon a forfeiture of the other's right there-

under, must show literal compliance with all provisions giving him such right.

Appeal from District Court, Salt Lake County; Wm. H. Bramel, Judge.

Action by Murray City against the Utah Light & Traction Company and the Utah Power & Light Company. From judgment of dismissal, plaintiff appeals. Affirmed.

John E. Pixton, of Salt Lake City, for appellant.

J. F. MacLane and C. C. Parsons, both of Salt Lake City, for respondents.

GIDEON, J. The defendants separately demurred to the complaint on the ground that the same does not state a cause of action. The demurrers were sustained. Leave was given to amend. Plaintiff elected to stand upon its complaint. Accordingly a judgment of dismissal was entered. From that judgment this appeal is prosecuted.

As indicated by the complaint, the object which plaintiff seeks is the enforcement by the court of an ordinance revoking or forfeiting the right of the defendants to operate a street or interurban railway over the main street of plaintiff city, designated in the complaint as State street. The right to construct and operate the street railway through such city was granted to the predecessor of the defendant the Utah Light & Traction Company by the city council of said city on March 23, 1909. The ordinance (hereinafter referred to as franchise ordinance) is set forth in full in the complaint. The alleged breach of certain provisions of that ordinance by the company now operating the railroad is the basis of the relief sought by the plaintiff in this action. On May 8, 1919, the board of commissioners of plaintiff city passed or adopted an ordinance (hereinafter called revoking ordinance) revoking in unambiguous language the rights and privileges granted to the defendants and their predecessors by the franchise ordinance. That ordinance, among other things, designates the fares to be charged by the grantee for its services in transporting passengers through said city, and to and from Salt Lake City, situate a few miles north. It is stipulated therein that no greater fare, or more than one fare, will be charged for the services therein named. There are other provisions prescribing the grade at which the track shall be constructed; that the grantee shall keep the same in good repair, both between the rails and outside of the track; that crossings shall be constructed, and other provisions looking to the convenience of the city and its inhabitants. It is stated in the complaint that "the chief and fundamental consideration" which induced the plaintiff city to pass the franchise ordinance was the agreement on the part of the

§126—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

<sup>1</sup> Salt Lake City v. Utah Light & Traction Co., 173 Pac. 556, 3 A. L. R. 715.

grantee railway company to transport passengers over its said line at the price and for the fare stipulated in said ordinance. It is also alleged in the complaint that—

"Said defendants claim some justification for some of the acts herein complained of, because of some pretended order or authority given it or them by virtue of certain laws of the state of Utah, or proceedings had in pursuance thereof; but any such claim was and is in violation of the terms and provisions of the Constitution of the state of Utah and of the United States, and especially of the part relating to the impairing of the obligation of contracts."

[1] The objection to the constitutionality of the Public Utilities Act (Laws 1917, c. 47) and the orders made by the commission are sufficiently discussed and determined by this court in *Salt Lake City v. Utah Light & Traction Company*, 173 Pac. 556, 3 A. L. R. 715. In that case the ordinance in question here was involved. If, as pointed out in that opinion, the state, by reason of its right as a sovereign, retained the power to modify or annul a rate or fixed charge for services rendered by a public utility such as the Utah Light & Traction Company, and any order regularly made by such commission is a legal and binding order, it must follow as a necessary corollary that such act on the part of the state through a commission authorized by the Legislature would in no way affect other rights secured to either party by the terms of a contract such as the franchise ordinance in question here. It is not questioned that the city authorities have and had the right to grant to the defendants or their predecessors the privilege to operate a street railway upon the streets of such city. Neither is it questioned that the right exists to prescribe conditions or limitations under which such privilege may be exercised. The power, however, to fix the fare to be received by the utility, or the defendants in this action, is retained by the state and can be exercised by it whenever the necessity requires action upon its part. *Salt Lake City v. Utah Light & Traction Company*, supra.

Section 5 of the franchise ordinance relating to the forfeiture of the rights granted thereunder is as follows:

"If the grantee herein, its successors or assigns, shall fail to perform any of the stipulations of this ordinance, the city council upon sixty days' notice, and upon failure on the part of said company, its successors or assigns, to perform, may declare said franchise and right of way forfeited."

There is no contention that any notice of 60 days, or otherwise, as required by the foregoing section was ever given or served. The only intimation that any notice was ever given the defendants, or either of them, requiring a compliance with the terms of the ordinance is found in the preamble of the revok-

ing ordinance, which ordinance is copied in full in the complaint. It is stated therein that on April 17, 1919, a notice was served upon the Utah Light & Traction Company, one of the defendants, to show cause, if any it had, before the board of commissioners of said city on said date why the franchise should not be forfeited and that in pursuance of that notice the defendant the Utah Light & Traction Company appeared before said board on April 21, 1919, and declined to make any showing why said franchise should not be forfeited or to in any way make excuse for its violations of the terms of said franchise, and requested that its objection to or protect against the jurisdiction of said board be entered upon the city records, together with its denial of any alleged cause for forfeiture.

It evidently was the intention of the plaintiff at the time of the institution of this action that the chief and principal grievance was the fact that the defendant traction company had increased the fare for services in transporting passengers to a greater amount than as provided in the franchise ordinance, and that the acts of the Public Utilities Commission in authorizing such increase were violative of the contract existing between the city and defendants, and therefore prohibited by the Constitution. That contention, however, as was determined by this court in the case referred to, is untenable.

[2] Other reasons alleged in the complaint as a basis for a forfeiture of the franchise are that the defendants have failed to lay and maintain tracks on the grades fixed by the plaintiff city, have failed and refused to conform to such grades, and that they have neglected to keep in repair the spaces between the tracks and on the outside of the same, and also have neglected to place poles for carrying wires as directed by the officers of plaintiff city. In the very nature of things these alleged grounds for forfeiture could be easily remedied by the defendant traction company, and doubtless would be, if that company were required so to do by a notice such as is provided for in said section 5. We express no opinion, however, upon the right of the plaintiff city to have a cancellation of the privileges granted by the franchise ordinance for failure on the part of the railway company to comply with such provisions of the ordinance last referred to after the notice given as required by section 5. It will be time enough to pass upon such question at any time the determination of the same is necessary or essential to a decision of the matters presented in such a case. It is sufficient to say that the law does not favor forfeitures, and any party to a contract insisting upon a forfeiture of the other's rights thereunder must show a literal compliance with all provisions of the contract giving him such right; otherwise relief will not be grant-

ed. *Camp Mfg. Co. v. Parker*, 91 Fed. 705, 34 C. C. A. 55. See, also, 12 R. C. L. p. 203; 18 C. J. p. 279, § 438.

The judgment of the district court is affirmed, with costs.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

(56 Utah, 442)

HUNTSVILLE IRR. ASS'N et al. v. ROLLO et al. (No. 3471.)

(Supreme Court of Utah. July 8, 1920.)

1. Waters and water courses  $\S$  140 — Prior right of appropriation held not waived by agreement.

Agreement by irrigation associations, prior appropriators of water, to furnish the use of their joint canal to carry specified amount of water to a point from which secondary appropriator diverted water, in consideration of the right to enlarge ditch across the latter's land, held not a waiver of prior right to appropriation of such amount of water, though irrigation association continued for some years to supply him with such water.

2. Evidence  $\S$  207(2)—Statement of counsel held not an admission of prior right of appropriation.

In prior appropriators' action to enjoin secondary appropriator from diverting water, in which plaintiffs conceded that defendant had a secondary right to the water, a statement by plaintiffs' counsel, during cross-examination of a witness, that the defendant's right to water was not in controversy held not an admission that defendant's right to the water was prior to that of plaintiffs.

Appeal from District Court, Weber County; A. W. Agee, Judge.

Action by the Huntsville Irrigation Association and others against Peter Rollo and others. Judgment for the named defendant, and judgment of dismissal as to defendants not named, and plaintiffs appeal. Reversed and remanded.

Chez & Barker, of Ogden for appellants. Halverson, Kimball & Farr, of Ogden, for respondents.

THURMAN, J. Plaintiffs brought this action in the district court of Weber county to enjoin defendants from diverting certain waters from the south fork of Ogden river. Plaintiffs are irrigation corporations, organized under the laws of Utah for the purpose of furnishing and distributing water to their respective stockholders for irrigation and other beneficial purposes.

The joint complaint of plaintiffs alleges that more than 50 years before the commencement of the action the predecessors of

plaintiffs, by means of dams and ditches constructed by them, diverted and appropriated certain quantities of water from the south fork of said river, and conducted the same upon their lands situated in Weber county; that said quantities of water have ever since been used by said plaintiffs from June 1 to October 15 of each and every year for the irrigation of said lands and for the other purposes mentioned; that the quantity of water so appropriated and used by the Huntsville Irrigation Association, hereinafter called the Huntsville Company, was 30 second feet, and that the quantity so appropriated and used by the Felt-Peterson-Slater Water & Canal Company, hereinafter called the Felt-Peterson Company, was  $2\frac{1}{2}$  second feet; that it is necessary to irrigate said lands in order to produce agricultural crops, and that all of said water so appropriated and used was necessary for the irrigation of said lands, and for other beneficial purposes. It is then alleged in the complaint that at various times in the month of July, 1919, while plaintiffs were distributing said water to their stockholders to irrigate their crops, and while said crops were in actual need of said water, defendants entered upon the said south fork of said river at a point above where plaintiffs diverted said water, and cut the banks of said river, and by means of ditches wrongfully diverted therefrom about 4 second feet of said water, thereby making it impossible for plaintiffs to furnish and deliver to their stockholders the aforesaid quantities of water to which they were entitled. The complaint also alleges threats on the part of defendants to continue said unlawful diversions of water and the belief of plaintiffs that defendants will execute said threats and continue said unlawful diversions if not restrained by judgment of the court.

The answer of defendants admits that the lands of plaintiffs' stockholders require irrigation to produce agricultural crops, and denies the remaining allegations of the complaint. It demands judgment that plaintiffs take nothing by their complaint, but does not ask for affirmative relief.

The trial court found that plaintiffs' predecessors in interest appropriated the quantities of water claimed by them more than 50 years ago, and conducted the same upon their lands, and that thereafter said predecessors and plaintiffs had continuously used said water during the irrigation season of each year from June 1 to October 1, for the irrigation of agricultural crops and for domestic use and the watering of stock. The court also found that defendant Peter Rollo in 1878 appropriated 4 second feet of water from the same stream and that thereafter he and his successors in interest had continuously diverted and used the same for irrigation, wa-

tering stock and domestic purposes during the irrigation season from June 1 to October 1 of each and every year. It also found that the said appropriation by said defendant Peter Rollo when made was subject and junior to the appropriation made by plaintiffs. The court further found, in effect, that by reason of a certain agreement entered into July 29, 1891, between the plaintiff Huntsville Company and defendant Peter Rollo said company had waived any priority of right it may have had as against defendants concerning the water in controversy. In this connection the court also found that from and after the date of said agreement and until the year 1904 said Huntsville Company, during each and every irrigation season from June 1 to October 1, had delivered to defendant Peter Rollo said 4 second feet of water of the waters of said stream for the purposes above mentioned, and that said plaintiff Felt-Peterson Company was cognizant thereof and acquiesced therein.

As conclusions of law the court found that plaintiffs were entitled to the quantities of water claimed by them, but subject to the right of defendant Peter Rollo to 4 second feet of the water of said stream. The action as against the other defendants was dismissed. Judgment was entered in accordance with the above findings and conclusions, from which judgment plaintiffs appeal and assign as error the findings of fact and conclusions by which defendant Peter Rollo was awarded 4 second feet of the water as a prior right against the rights of the plaintiff corporations.

The mere statement of the case shows on its face that the agreement between plaintiff Huntsville Company and defendant Peter Rollo in 1891 became and was a controlling factor in the findings and conclusions of the court. Without that agreement and the conduct of the parties thereafter as found by the court, the findings and conclusions must have been in favor of the plaintiffs and relief awarded in accordance with the prayer of their complaint.

What then are the facts in respect to matters leading up to the agreement, and what is the agreement that was entered into by the contracting parties? The record discloses the fact to be, as stated in the complaint, that plaintiff corporations divert the water from the stream in question by means of separate ditches and intakes situated below the intakes of the ditches used by defendant. The plaintiffs made their appropriation in 1861 and 1862. The defendant Peter Rollo made his appropriation in 1877 or 1878. In 1891 the plaintiff Huntsville Company, without the co-operation or knowledge, as far as the record discloses, of its coplaintiff in this action, entered into the agreement upon which the court bases its findings and conclusions to which we have referred. The agreement,

as set forth in respondents' brief, reads as follows:

"An agreement entered into on this 29th day of July A. D., 1891, between Peter Rollo and Portia Rollo, his wife, both of Huntsville, in the county of Weber, territory of Utah, acting for themselves and for William Rollo, their father, whose agent they are, the parties of the first part, and A. W. Garner, president of the Huntsville Irrigation Association Company, and A. J. Anderson, acting president of the Mountain Canal Irrigation Association Company, parties of the second part, witnesseth:

"That the parties of the first part for the sum of \$85.00, receipt whereof is hereby acknowledged, bargain, grant and sell all of their right, title, and interest in the Huntsville and Mountain joint irrigation canals from a point west of the north and south center section line of section 15, provided: That said joint irrigation canal furnish the use of their joint canal to carry 200 inches of water from the head of their canal to a point 10 rods east of said center line of said section 15, and that said companies put in a suitable ditch at said point for the purpose of taking said water on to the Peter Rollo land."

The trial court, in the findings and conclusions of which appellants complain, construes this agreement together with other matters of record to mean that plaintiff, the Huntsville Company, obligated itself to deliver to defendant Peter Rollo 4 second feet of the water of said stream at his point of diversion from the canal mentioned in the agreement during each and every irrigation season, even if it required all the water flowing in the stream. The language of the instrument, standing alone, is not susceptible of that construction. If we construe the language in the light of the circumstances under which the agreement was made, its meaning and intent become reasonably clear. The Huntsville Company evidently desired for its own convenience to move its point of diversion higher up the stream. The defendant Peter Rollo diverted water at two points of diversion, known as his upper ditch and lower ditch. The upper ditch diverted water at a point about one-half mile above the intake of the Huntsville Company's ditch, and was susceptible of enlargement so as to carry water for both the Huntsville Company and the defendant. The plaintiff was willing to pay a consideration for the privilege of enlarging the ditch across defendant's land, and in addition to the money consideration mentioned in the agreement was willing to obligate itself to construct the ditch of sufficient capacity, not only to convey its own water, but also 200 inches for the defendant, down to his point of diversion. It was stipulated that 200 inches is the equivalent of 4 second feet. These are the circumstances under which the agreement was entered into. It certainly cannot be deduced from the language of the instrument, whether considered

alone or in connection with the circumstances mentioned, that the Huntsville Company intended thereby to concede to the defendant a prior right to any portion of the water. The evidence shows that the Huntsville Company ordinarily, during every irrigation season needed all the water it had appropriated. A considerable portion of the time it was compelled to get along with less. In the opinion of the writer the fair and reasonable interpretation of the agreement is that the Huntsville Company only undertook to make the ditch large enough to carry its own water and in addition thereto 4 second feet for the defendant, without any concession whatever that defendant was entitled to that quantity of water. Indeed it is difficult to see why the Huntsville Company should have had any concern as to the quantity of water to which defendant was entitled. That question was not in any manner involved in the agreement as written. Whether the defendant's right was a primary or a secondary right would make no difference. It required the same capacity to convey the water of one class as it did the other.

But the trial court also found that after said agreement was entered into and from that time down to 1904 when the Huntsville Company again changed its point of diversion, it continued to use said canal during the irrigation season, and delivered to said defendant Peter Rollo the said 4 second feet of water from said stream. This is regarded by respondent as a practical construction of said agreement, interpreting the meaning of the contracting parties.

Conceding that this finding is supported by the evidence, there is, nevertheless, a cogent reason why the delivery of the water to the defendant down to 1904 is not available as a practical construction of the agreement. There is no finding of the court that during this same period of time the Huntsville Company did not have all the water to which it was entitled by virtue of its appropriation. If, during the whole period of time from the date of the agreement down to 1904, the Huntsville Company had its 30 second feet of water available for use, and was not deprived of any part thereof by defendant, what grounds did the plaintiff have for complaint? It must be conceded that if such was the case the defendant, even though his right may have been only a secondary right, was entitled to the 4 second feet of water, or even more if the water was available.

[1] For the reasons stated, we are of the opinion that neither the agreement itself nor the agreement coupled with the so-called practical construction justified the findings and conclusions of the court by which defendant was awarded a prior right to 4 second feet of the water as against the plaintiffs.

[2] There is, however, another feature of the case, considered in connection with what

has been said, upon which respondents seem to rely with more than ordinary confidence. During the cross-examination of one of plaintiffs' witnesses concerning the rights of defendants to 4 second feet of water of the ditch in question the witness testified to the effect that such was a recognized right. In response to a question by the court appellants' counsel stated in effect that such right was not in controversy; that that was not why the suit was brought. This on its face would seem to be an unqualified admission that defendant was entitled to 4 second feet of the water. But even if we give to the language a literal construction it would require a strained interpretation to hold that appellants' counsel intended thereby to admit that defendants' right was prior to plaintiffs'. As we read the pleadings and the evidence in the case, the contention of plaintiffs from the beginning to the end of the entire proceeding was that plaintiffs' rights to the water claimed by them was superior to that of defendant. Even the witness who testified as above stated, on redirect examination, explained his meaning by saying, in effect, that defendant was entitled to that quantity of water only when plaintiffs' rights were supplied. In view of these circumstances, it is inconceivable that appellant intended to concede away the very right for which the action was commenced. It was conceded by plaintiffs that defendant had a right to the water, but subsequent and subject to the rights of plaintiffs. Whether defendant also had a primary right, to the extent of 4 second feet, equal with the rights of plaintiffs, or whether he had a superior right by reason of acquiescence or estoppel, is a question which we purposely leave undetermined. The defendant, as before stated, rested without offering any evidence. In view of the apparent admission made by appellants' counsel to which we have referred, defendant, no doubt, felt justified in resting, without offering any evidence. For that reason the court believes it would be manifestly unjust to foreclose the defendant by directing findings and conclusions in favor of the plaintiffs.

Before concluding, it is pertinent to suggest that in our opinion the evidence is wholly insufficient to justify the finding that the Felt-Peterson Company acquiesced in the agreement between the Huntsville Company and the defendant or in the alleged continuous delivery of 4 second feet of the water to the defendant. What the evidence may disclose upon a new trial we have no means of determining, and we have studiously avoided passing upon any controverted question except those specifically referred to in this opinion.

For the reasons stated the judgment is reversed and the cause remanded for a new trial. The parties, at their option, should have the right to recast their pleadings and make

such alterations therein as to them seem proper. The costs to be equally divided between plaintiffs and defendant.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(56 Utah, 449)

**JONES MIN. CO. v. CARDIFF MIN. & MILL CO.** et al. (No. 2401.)

(Supreme Court of Utah, April 28, 1920.  
Rehearing Denied July 15, 1920.)

**1. Corporations** ¶312(1)—“Directors” are managing agents and may be charged as trustees with corporate money or funds.

Directors are not trustees in the true sense of the term, but are the managing agents of the corporation, and as such sustain a fiduciary relation both to it and to the stockholders collectively, and if they wrongfully deal with or appropriate money or funds of the corporation they may be charged as trustees with respect to such property the same as any other agent or person who sustains a fiduciary relation to his principal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Director.]

**2. Limitation of actions** ¶100(7)—Cause of action for corporate directors’ fraudulent act arises on discovery of fraud.

Corporation’s action to have defendants declared trustees for the benefit of the corporation as to mining claim on ground that relocation was pursuant to collusive agreement between director of the corporation and relocators was barred by limitations under Comp. Laws 1917, § 6468, subd. 4, three years from the discovery of the directors’ violation of the fiduciary relationship, the fiduciary relationship of the director to the corporation arising out of a constructive or implied trust and not an expressed trust.<sup>1</sup>

**3. Equity** ¶67—Laches based upon principles of equity.

The doctrine of laches is not based upon time alone, but rests on the maxims and principles of equity.

**4. Corporations** ¶596—Continue to exist though without officers or doing business.

That a corporation was without directors and officers and had entirely ceased to do business did not deprive it from being a corporation and continuing to exist as such.

**5. Corporations** ¶504—That corporation was without officers no answer to defense of limitations and laches.

In an action by a corporation defended on the ground of laches and limitations, it was no answer to such defense that the corporation was without officers and directors and had ceased to do business during the interval between

the time of the fraud complained of and the commencement of the action, since the stockholders could have at any time elected the necessary officers to bring the action or could have brought action in their own name.

**6. Evidence** ¶29—Court will take judicial notice of corporation laws.

The court will take judicial notice that two persons were not the sole incorporators of the corporation and owned all the stock thereof, since such a corporation and ownership would have been in violation of the statute.

**7. Mines and minerals** ¶38(5)—Action as to mining claim based on collusive agreement with corporate director held barred by laches.

Corporation’s action to declare a trust based on the relocation of mining claim on which plaintiff corporation had made original location, pursuant to collusive agreement between defendants and director of plaintiff corporation, brought 15 years after the fraud complained of, was barred by laches; the corporation and stockholders being charged with notice of the relocation.

**8. Evidence** ¶29—Judicial notice taken of mode of obtaining title to mining claim.

Court will take judicial notice how and under what law the title to lode mining claims may be obtained from the government of the United States.

**9. Corporations** ¶319(6)—Limitation of actions ¶179(2)—Allegation of loss of books does not overcome defense of laches and limitations.

Allegation that books of corporation were lost during interval between fraud committed by director and the commencement of action based thereon is not sufficient to overcome defense of laches and limitations in absence of allegation that diligent effort had been made to find books.

**10. Evidence** ¶29—Court will take judicial notice as to land laws.

Court will take judicial notice of the law that lands in the United States bearing metaliferous ores can be acquired only by means of development, and that improvements must be made annually either on the particular claim or on some contiguous claim, and that, if not made on the claim, notice must be posted thereon as to place where work is being done or improvements being made.

**11. Corporations** ¶310(2)—Directors held to high degree of fidelity.

Directors are held to a very high degree of integrity and fidelity in the discharge of their duties.

**12. Equity** ¶65(1)—Will not permit wrongdoer to profit.

Equity will not permit a wrongdoer to profit by his wrong.

**13. Equity** ¶64—Will not encourage stale claims.

Equity should always insist upon reasonable diligence, and not encourage stale claims, and thus open the doors of courts to those who have slept upon their rights.

Gideon and Weber, JJ., dissenting.

<sup>1</sup> Gibson v. Jensen, 48 Utah, 248, 158 Pac. 426; Salt Lake City v. Investment Co., 48 Utah, 181, 134 Pac. 603.

Appeal from District Court, Salt Lake County; Wm. H. Bramel, Judge.

Action by the Jones Mining Company against the Cardiff Mining & Milling Company and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

James Pardee and A. B. Sawyer, Jr., both of Salt Lake City, for appellant.

Wm. M. McOrea, of Salt Lake City, for respondents.

FRICK, J. This action was instituted for the purpose of having the defendants declared trustees and as holding in trust for the use and benefit of the plaintiff a certain mining claim hereinafter referred to. The complaint is very long, and the statements therein are somewhat loose and inartificial, with many repetitions and some conclusions. The material and controlling facts alleged are as follows:

It is alleged that the Jones Mining Company of Utah, hereinafter called plaintiff, is a mining corporation, and that the defendant Cardiff Mining & Milling Company, hereinafter designated company, is a corporation; that in the year 1902 plaintiff was the owner, subject to the paramount title of the United States, and in possession of what is known as the Wrexim mining claim in Salt Lake county, Utah; that the notice of location of said mining claim was duly recorded in Salt Lake county in 1891; that the assessment or representation work upon said claim was performed up to and including the year 1901, and that the same was not open for relocation until after the 1st day of January, 1902; that in September, 1902, one Thomas B. Jones, now deceased, and the defendant Reamer, were the only directors of the plaintiff. (It is, however, stated in plaintiff's brief that "at the time of the commitment of the fraud [1902] Jones was a director and the only director of the company," the plaintiff.) Then it is alleged that the number of directors provided for by the articles of incorporation of plaintiff was five; that all the other acting directors (except Jones) had died prior to 1902 and no successors had been elected; that in the fall of 1902 Jones, Price, and Reamer entered into a conspiracy to defraud the plaintiff of its interest in said claim by relocating the same; that said claim was accordingly relocated in September, 1902, in the name of said Reamer as the "Mountain Chief"; that the location notice was duly recorded in Salt Lake county; that said Reamer, as a part of said conspiracy, "in about a year's time was to convey it to Jones," but that said Reamer at no time conveyed the same to said Jones; that said Reamer thereafter conveyed a one-half interest in said mining claim to his codefendant Price, and thereafter "said Price and Reamer were holding the legal title to said property as trustees

in trust for the benefit and use of the Jones Mining Company of Utah," the plaintiff herein; that on December 6, 1906, said Price and Reamer "conveyed to the defendant Cardiff Mining & Milling Company the entire interest in said Mountain Chief mining claim, and said company received it and based its organization with other claims on said Mountain Chief mining claim, and the defendant Cardiff Mining Company now holds the legal title thereto"; that said company purchased with full knowledge of plaintiff's interest in said mining claim and that it is not an innocent purchaser; that said Price and Reamer promoted and organized the company and became stockholders and officers therein, said Reamer owning 186,000 shares and said Price 250,000 shares of the capital stock; that in the month of March, 1906, said Jones died; that said Reamer was a son-in-law of said Jones and acted as the executor of the last will and testament of said decedent, but made no mention in the inventory or in the final decree of distribution of said estate that it had any interest in or held any stock in the plaintiff; that Reamer's wife was an heir of said decedent and a beneficiary under his will, but none of the other heirs or beneficiaries under said will knew of the decedent's interest in said mining claim, and they did not know until about the month of July, 1917, that they, as heirs of said decedent, owned any stock in plaintiff; that plaintiff never knew that any development work had been done on said claim, and that no work was ever done upon the surface or any ore taken from the surface thereof; that up to the time said Jones died no stockholders' meeting was ever called or held, and that no stockholders' meeting was called or held until in the month of July, 1917, at which time the stockholders of the plaintiff elected a new board of directors, and that at that time the plaintiff, for the first time, became aware of the fraud and misconduct of the defendants; that the books of the plaintiff were lost in or about the year 1901 and were not found until the year 1917; that one Thomas Miller was the first president of plaintiff, and at the time of his death, in September, 1901, owned a majority of the stock of plaintiff; that his heirs lived in New York City and did not know, nor did the plaintiff know, that they, as heirs of said Miller, owned any stock in plaintiff; that the estate of said Miller was administered upon and final distribution thereof made in 1912, and that no stock of plaintiff was ever inventoried and the administrator of said estate did not know that said Miller was a stockholder in the plaintiff; that "Margaret Miller, a daughter of Thomas Miller, visited in Salt Lake City, Utah, about 1903, hearing that her father had an interest in a mining claim, but not knowing that his interest

consisted of shares of stock in the plaintiff mining company, inquired of Thomas V. Jones at that time about the matter, and he told her that they were not shipping any ore from the premises, but if they ever did anything with it that the heirs of Thomas Miller would be protected." It is also alleged that one Robert Jones, an heir of said Thomas B. Jones, had instituted a suit in May, 1917, for the purpose of appointing a receiver for the plaintiff, but that the same failed because no legal service could be made upon it. It is also alleged in general terms that all the stockholders had exercised due diligence in instituting an action and that none of them had any notice of the wrongs that were perpetrated by the defendants Price and Reamer with respect to the property in question. There are some other allegations which are material to which special reference will be made in the course of the opinion. There are also some additional allegations to which I have not specially referred, but they are merely conclusions and have no controlling influence here.

The record shows that a demurrer to a former complaint had been overruled and an answer duly filed; that thereafter the case was transferred to another judge who, without a withdrawal of the answer (as he might do), entertained the demurrer now in question namely, that the complaint does not state facts sufficient to constitute a cause of action, that the action is barred, and that the plaintiff cannot recover on account of laches, and sustained the same. It also appears from the record that a patent was obtained by Price and Reamer for the claim in question in December, 1908. In view, however, that it is expressly alleged in the complaint that Price and Reamer obtained the legal title to said claim and that in 1908 they conveyed the same to the company, who is now holding the legal title, the record referred to is of no importance except by way of explaining plaintiff's contentions, since it is not claimed that fraud was practiced against the United States in obtaining the legal title, but plaintiff confirms the legal title obtained by Price and Reamer and conveyed to the company by them, and prays judgment that the same be conveyed to it.

The plaintiff appeals from a judgment dismissing the complaint and assigns the ruling of the court in sustaining the demurrer as error.

The statute upon which defendants rely, Comp. Laws Utah 1917, § 6468, subdiv. 4, provides that "an action for relief on the ground of fraud or mistake" shall be begun within "three years; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." In considering whether this action is barred, it is important to keep in mind: (1) The relationship of the corporation directors to their

corporations; (2) the character and condition of the mining claim which is the subject-matter of this action; and (3) the dormant condition and utter inactivity of the plaintiff corporation and the stockholders for a period of 15 years or more preceding the beginning of this action.

[1] While corporation directors are constantly spoken of as trustees, they are not trustees in the true sense of that term. They are the managing agents of the corporation, and, as such, sustain a fiduciary relation both to it and to the stockholders collectively, and in case they wrongfully deal with or appropriate the money or funds of the corporation they may be charged as trustees with respect to such property precisely the same as any other agent or person who sustains a fiduciary relation to his principal may be charged. Corporation directors are therefore not trustees of an express trust by virtue of their office, and hence cannot be subjected to the consequences arising out of that relation. Mr. Pomeroy, in his excellent work on Equity Jurisprudence (3d Ed. § 1088), defines the relation of corporation directors as being "analogous" to that of trustees. In section 1089 he more fully defines their status as that of managing agents and fiduciaries, and he there says that it is of the utmost importance to keep in mind the true relationship of the directors to their corporations, since the respective duties, rights, and remedies depend upon such relationship. The relationship of corporation directors to their principals, the corporations, is well and correctly stated in the case of *Wallace v. Lincoln Savings Bank*, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625, by Mr. Justice Lurton, who subsequently became one of the Justices of the Supreme Court of the United States, in the following words:

"Directors are not express trustees. The language of Special Judge Ingersoll in *Shea v. Mabry*, 1 Lea, 319, that 'directors are trustees,' etc., is rhetorically sound, but technically inexact. It is a statement often found in opinions, but is true only to a limited extent. They are mandatories; they are agents; they are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith; they do not hold the legal title, and more often than otherwise are not the officer of the corporations having possession of the corporate property; they are equally interested with those they represent; they more nearly represent the managing partners in a business firm than a technical trustee. At most they are implied trustees in whose favor the statutes of limitations do run. *Hughes v. Brown*, 88 Tenn. 578; *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684; *Morawetz on Private Corporations*, § 516."

That statement is approved and quoted by Mr. Fletcher in his recent work entitled *Fletcher's Cyc. Corps.* (volume 4, § 2261).



The doctrine is also approved by Mr. Thompson, in his work on Corporations (2d Ed. vol. 2, § 1176). The doctrine is also thoroughly supported in 3 Clark and Marshall, Private Corps., § 747, in these words:

"It is sometimes said that the directors, trustees, and other officers of a corporation are trustees for the corporation, or for the stockholders collectively, and in a certain sense that is true. They are not 'trustees,' however, in the strict sense of the term. Properly speaking, the relation is that of principal and agent, and the liability of directors and other officers of the corporation for mismanagement is determined by substantially the same principles which determine the liability of any other agent to his principal for failure to perform the duties which he has undertaken. 'The liability of officers to the corporation for damages by negligent or unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority or neglects his duty to the damage of his principal.'"

In section 755, subdiv. f, the authors further say:

"Some of the courts have held that the relation between the directors and other officers of a corporation and the corporation or the stockholders collectively is that of trustee and cestui que trust to such an extent that the statute of limitations does not run against a suit in equity against them to compel them to account or pay damages for misapplication of assets or mismanagement, at least until they have ceased to occupy the relation. This view, however, is contrary to the weight of authority. Properly speaking, the relation between a corporation and its officers is not that of trustee and cestui que trust, but is that of principal and agent, and in most jurisdictions the statute of limitations applies both to actions at law and suits in equity to compel officers to account for assets misappropriated by them, or to hold them liable for losses caused by their wrongful or unauthorized acts, or by their negligence. The statute, when applicable, will not begin to run until the corporation has knowledge of the fraudulent or wrongful acts, and the knowledge of the guilty officers is not imputable to it.

"An action by a corporation against its officers to hold them liable for losses on the ground of mismanagement may be barred by laches, or the corporation may be estopped by having consented to or acquiesced in the acts complained of. And individual stockholders may be estopped to sue by reason of the participation or acquiescence, or by laches."

In 1 Beach on Trusts and Trustees, § 181, the author lays down the doctrine that directors may be charged as "constructive trustees." To the same effect is 1 Perry on Trusts, § 430. Indeed, there is not a single text-writer, so far as the writer is advised, that does not lay down the same rule.

[2] Plaintiff, in its brief, states:

"At the time of the commitment of the fraud, Jones was a director and the only director of the company."

That did not make him a trustee of an express trust. He was not such by virtue of his office, and there certainly are no facts alleged from which such a relationship can be deduced. There is therefore no question of an express trust in this case, and the statute of limitations is applicable here precisely as in any other fiduciary relations out of which constructive or implied trusts arise. In all such cases the statute begins to run from the time that the complaining party discovered the wrongs complained of or when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry. The law is stated to that effect by this court in the case of Gibson v. Jensen, 48 Utah, 248, 158 Pac. 426, and in Salt Lake City v. Investment Co., 43 Utah, 181, 134 Pac. 603. If therefore the facts and circumstances which came to the knowledge of the plaintiff corporation were such as would have caused a person of ordinary prudence and intelligence to act, then it should have acted, and the statute of limitations was set in motion as to it. This is so quite apart from the doctrine of laches which is always an important element in actions like the one at bar and which is relied on by defendants.

[3] While in actions at law the statute of limitations absolutely fixes the time within which actions may be brought, such is not necessarily the case in equity. The doctrine of laches is not based upon time alone. The general doctrine is well and tersely stated in 10 R. C. L. § 142, p. 395, in the following words:

"It is a familiar doctrine that, apart from any question of statutory limitation, courts of equity will discourage laches and delay in the enforcement of rights. The general principle is that nothing can call forth the court of chancery into activity but conscience, good faith, and reasonable diligence. Where those are wanting, the court is passive and does nothing. The doctrine is founded principally on the equity maxims, 'he who seeks equity must do equity,' 'he who comes into equity must come with clean hands,' and 'the laws serve the vigilant, and not those who sleep over their rights,' and is based on considerations of public policy. Its object is in general to exact of the complainant fair dealing with his adversary, and the rule was adopted largely because after great length of time, from death of parties, loss of papers, death of witnesses, change of titles, intervention of equities, or other causes there is danger of doing injustice, and there can be no longer a safe determination of the controversy."

The doctrine of laches, therefore, rests upon the purest principles of equity.

While courts may not approve of what may have been done, if done wrongfully, they, nevertheless, refuse relief because the complainant did not exercise reasonable diligence in enforcing his rights and has permit-

ted them to become stale and unenforceable. The doctrine is enforced in the case of *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35, 49 L. Ed. 214. In that case there was an express trust which related to a mining claim, Mr. Justice Brown, speaking for the court, in referring to the diligence that is required upon the part of claimants of mining property, and in discussing the doctrine of laches, at page 321 of 195 U. S., at page 38 of 25 Sup. Ct. (49 L. Ed. 214), used the following language:

"There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstance, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

[4] Counsel for plaintiff, however, strenuously insist that the statute of limitations has no application in this case and that laches cannot be invoked against their client because of its legal status. They, in their brief, assert: "The company [plaintiff] had existence, but it was absolutely paralyzed." Further, that because there were no directors or officers the plaintiff was utterly impotent, and, while it always retained its rights as a corporation, yet no duty was imposed upon it, nor upon the stockholders, to act, and no notice of any kind or character can be imputed to it or to them. This contention is based upon the alleged fact that plaintiff was without directors and officers and had entirely ceased to transact business. That fact, however, did not deprive it from being a corporation and continuing to exist as such. In 2 Mor. Priv. Corp. § 1004, the law is stated to be:

"The company still continues to be a corporation in the eye of the law, and may sue and be sued in that capacity."

In 5 Thomp. Corp. § 6479, it is said:

"It has been many times decided by the various courts of this country that there is no dissolution by death, ineligibility or withdrawal of the corporate officers, or by a failure to elect officers for any period of time, so long as there are members having the power under the charter or governing statute to elect officers."

To the same effect are sections 6487, 6489, and 6492.

Now, if, as is contended by plaintiff's counsel, the stockholders had the power to elect new officers in 1917, they necessarily possessed that power all the time from 1901, when, it seems, there already were vacancies on the board of directors. It is utterly unten-

able to insist that the stockholders had such power in 1917, but were impotent during all of the preceding years from 1901 forward. If the corporation had a legal existence for the purpose of keeping intact all of its legal rights, it of necessity must also have existed for the purpose of enforcing them by suing in the courts, just as is stated in the authorities; but, if it lacked the necessary agents to sue, it nevertheless was the duty of the stockholders to elect them. Mr. Cook, in his great work on Corporations, in volume 2 (7th Ed.) § 631, in referring to what constitutes a dissolution of a corporation so that it cannot be sued or cannot sue, says:

"There are acts and facts which do not in themselves constitute a dissolution. A dissolution is not effected by a failure to elect officers; \* \* \* by a cessation of all corporate business and acts; nor by the death of its stockholders. \* \* \*"

In *Carnaghan v. Exporters' & Producers' Oil Co.*, 11 N. Y. Supp. at page 174,<sup>1</sup> in speaking of the effect of a corporation becoming dormant because it has ceased to do business, it is said:

"The company still continues to be a corporation in the eye of the law, and *may sue and be sued in that capacity.* \* \* \*" (*Italics mine.*)

To the same effect is *Evarts v. Killingworth Mfg. Co.*, 20 Conn. 447. In 4 Fletcher, Cyc. Corp. § 2930, after stating that a "want of officers does not affect the capacity of the corporation to be sued," it is further said:

"Obviously the total lack of officers would produce a state of inability to sue due to the want of corporate organs. Either a stockholder's suit in behalf of it or one of the last-elected officers holding over would seem to be the proper practice in such a case."

[5] All this simply goes to show that the stockholders of the corporation may not permit it to become and remain dormant and insist that their own inaction constitutes an answer to the plea of the statute of limitations or of laches. Such a doctrine would necessarily result in permitting the stockholders not only to successfully defend as against all laches, but they could at will extend the statute of limitations for any length of time they desired. If the corporation exists as a legal entity and possesses the right to invoke the aid of the courts at all times, as pointed out by the authorities, but fails or is impotent to do so by reason of the lack of directors and the stockholders may at any time elect the necessary agents to institute an action, or, if they choose, may bring one in their own name or in the name of any one of them in behalf of the corporation, it

<sup>1</sup> Reported in full in the New York Supplement: reported as a memorandum decision without opinion in 57 Hun, 588.

must necessarily follow that those stockholders cannot shield themselves behind their own inaction. The plaintiff may have become dormant, but if it did it was the fault of the stockholders, and hence they cannot gain an advantage upon the one hand and escape legal consequences upon the other by reason of such fault.

[6] By what I have just said I have not been unmindful of the fact that it is alleged that the Miller heirs did not know that their father was a stockholder in the company and that they did not learn of that fact until the books were found, and that substantially the same excuse for the Jones heirs is alleged. It is also alleged that Miller and Jones "practically owned all of the stock" of the company. If it be conceded that the Miller heirs can excuse themselves for not investigating into their father's affairs for more than 15 years after his death, no such excuse is available on behalf of the Jones heirs. Plaintiff's counsel have, however, failed to account for all of the stockholders. No doubt they attempt to do that by alleging that Miller and Jones "practically owned all of the stock." As a pleading the term "practically owned all of the stock" is not only a very loose and unsatisfactory way of stating a fact but it is very uncertain. All that can be asserted with any degree of certainty with respect to it is that it means less than all. It may, however, mean a considerable quantity less than the whole and it may even mean much less, all depending upon whether the capital stock was divided into a large or a small number of shares. In case the capital stock were divided into a million or more shares, 800,000 or 900,000 or 950,000 shares might be considered as "practically all." Be that as it may, however, we must take judicial notice of the fact that under our statutes Mr. Miller and Mr. Jones could not have been the sole incorporators of the Jones Mining Company and thus could not have subscribed for or owned all of the stock. There must have been some additional stockholders who are not accounted for. The attempt is made, however, to make that fact immaterial by the allegation that by reason of the fact that Mr. Price and Mr. Reamer had concealed their acts neither the heirs of Miller nor the heirs of Jones, nor any of the other stockholders, had any knowledge regarding the claims of Price and Reamer. For reasons hereinafter stated, however, it will appear that the law imputed notice to them, and hence the allegation is without force or effect.

If therefore it is desired to arrive at a just and equitable result in this case, it is important to keep in mind the real facts and circumstances and the true relationship of the parties. The controlling facts and circumstances of this case, as they are alleged in the complaint, and as conceded in counsel's

brief, relating to the question of diligence, are in substance as follows: Mr. Jones, in 1902, was the sole director of the plaintiff corporation. For how long a time prior thereto he was such is not disclosed. It is alleged, however, that one Thomas Miller was the principal stockholder of such corporation, that is, that he owned the majority of the stock and that he died in September, 1901. If, as is conceded, there was but one director in the year 1902, we may well assume that that condition existed during the latter part of Mr. Miller's life and that the stockholders, even during that period, no longer complied with our statute in electing directors but permitted the corporation to become dormant, or "go to sleep" as suggested by plaintiff's counsel. That condition continued uninterrupted for a period of more than 15 years, when, according to plaintiff's counsel, the corporation was awakened from its protracted slumber and upon looking around discovered that it had been grievously defrauded in the year 1902. Plaintiff's counsel base their whole claim in meeting the plea of the statute of limitations and of laches upon the fact that the corporation became dormant and remained so for more than fifteen years. This claim, no doubt, is prompted by the necessities of the case. If that claim fails, then all fails. What are the facts that are alleged and are necessarily implied from those that are alleged in respect to the character of the property in question?

It is alleged that the plaintiff was the owner of a certain mining claim and that the location notice was duly recorded in the public records of Salt Lake county as provided by law. It is further alleged that the defendants Reamer and Price, in collusion with Jones, who subsequently, in 1905, died, relocated said claim in September, 1902, and that the boundaries and description of the claim as relocated were identical with the boundaries and description of the claim of the original location and that the notice of relocation of said claim was likewise recorded in the public records of said county as provided by law. It is further alleged that in 1906 "said Price and Reamer were holding the legal title to said property as trustees in trust for the benefit and use of the Jones Mining Company of Utah." Then it is further alleged that in December, 1906, said Price and Reamer "conveyed to the defendant Cardiff Mining & Milling Company the entire interest in said Mountain Chief mining claim [the claim in question in this action] and said company received it and based its organization with other claims on said Mountain Chief mining claim, and the defendant Cardiff Mining & Milling Company now holds the legal title thereof," which title, it is alleged, it obtained with notice and therefore is not an innocent purchaser. It is further

alleged "the ground covered by the Wrexim mining claim is the same and is the identical ground covered by the Mountain Chief mining claim," and, further, "the Mountain Chief mining claim is designated by the Surveyor General as lot 5332," and that the same was "recorded at 9:40 a. m. in book z of mining deeds, pages 114, 115."

[7, 8] If the boundaries and description of the claim as relocated by the defendants Reamer and Price, and for which a patent was obtained, are identical with those of the original location and the relocation notice was recorded as provided by law, then there was absolutely no concealment either attempted or effectuated by them in making the location. A mere casual examination of the records would at once have disclosed that the new location covered precisely the ground covered by the original location. The plaintiff and the stockholders certainly were charged with notice of the description and boundaries of the claim as originally located and of which plaintiff alleges it was in possession in 1902. Plaintiff therefore had ready means of learning just what was claimed by the defendants as early as 1902. In view that the plaintiff alleges that it had no knowledge of the collusive agreement entered into by Mr. Jones on the one hand and by Reamer and Price upon the other, the notice of relocation was notice to it, as it was to all the world, that the defendants who relocated the claim did not locate it for its benefit but did so on their own behalf and for their own benefit. The case in this regard, therefore, is not like the case of an express trust where the trustee transacts business in his own name but for the use and benefit of his cestui que trust. If therefore the record of the location notice was constructive notice to the whole world of what defendants claimed, it necessarily was also constructive notice to the plaintiff and to the stockholders. Moreover, it is alleged that the defendant mining company subsequently acquired from Price and Reamer and now holds the legal title to said mining claim. We are required to take judicial notice of how and under what law the title to lode mining claims may be obtained from the government of the United States. In applying for a patent to the mining claim, the applicant was required to make an official survey and plat of the claim and to file the same with a complete description and an abstract of title, showing the source of title, in the land office of the United States at Salt Lake City and to post the same in a conspicuous place upon the mining claim and in said land office, and, further, to publish notice of the application for patent, with the description, etc., of the mining claim in a newspaper. The notices aforesaid were required to be kept posted and the notice was required to be published in a newspaper for the specified length of time. All this had to

be done openly and in a manner to apprise every one who had or claimed any interest in or to the mining claim in question that the patent was being applied for and for whose use and benefit. Here again, in view that there was no express trust whereby it was agreed that the acts that were being done, while done in another's name, were, nevertheless, done for the use and benefit of the plaintiff corporation, it, like all the world, was required to take notice of the claim of the applicant for patent. If the acts of the patent claimant were notice to all the world, they certainly were notice to plaintiff. Can any one doubt that in view of the publication of the notice and the posting of the plat and notice upon the claim, etc., in applying for a patent, any one who claimed an interest in or to the mining claim adversely to the patent claimant would have to file an adverse claim as required by law and in default of that would waive his right to the claim?

It is true that, in case certain legal relations exist between the applicant for a patent and the one claiming either the whole or only an interest in the mining claim, such as tenant in common, or as a trustee of an express trust, or where a claimant furnished the money to the applicant for the patent and the latter agreed to or legally is required to act for the claimant in obtaining it, no adverse claim need be made. Such is not the case here. Here the alleged trust, if any existed, was based entirely upon the alleged mala fides of Jones, Reamer, and Price. Their acts relating to the mining claim, as I have shown, were, however, not concealed, but, upon the contrary, were all open and done precisely in the same manner as all other similar acts are required to be done by law.

Nor was there any agreement, either express or implied, so that the plaintiff had a right to assume that what was being done should inure to its benefit. If Reamer and Price were wrongdoers, their acts were open and were such that all the world could know them, including plaintiff. What is true respecting the acts of Reamer and Price in that regard is also true of the defendant company. Moreover, the applicant for patent paid the government price for the land. All expenses incident to obtaining the patent, and the expenses of placing the necessary improvements upon the mining claim after relocation to entitle the claimant to a patent, had been paid by such claimant. The plaintiff now comes into a court of equity, and, without alleging facts constituting an express trust or agreement equivalent to such a relation, and without offering to repay the government price which was required to be paid for the mining claim, and without offering to reimburse any one for the costs and expenses incident to obtaining the patent from the United States, and without offering to do

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equity to any extent, coolly demands the title to said mining claim. The whole basis of such a claim is, and of necessity must be, the alleged fact that the plaintiff corporation, many years ago, became dormant and while in that condition all those things transpired and hence no laches can be imputed to it and the statute of limitations does not run because the plaintiff did not know of the acts complained of.

[9] In this connection it is, however, also alleged as an excuse on behalf of the stockholders and why they did not act sooner that "the books and records of said plaintiff company became lost about the year 1901 and were not found until about the year 1917." This statement, like numerous others in the complaint, is about as uncertain as it well could be made. In whose possession were the books prior to and in "about the year 1901"? In whose possession were they found, and by whom? Was there any search of any kind ever made for the books? If so, by whom, when, and in what place or places? As the statement stands it might all be true and yet the books might have been accessible at any time if any reasonable effort had been made to find them. Indeed, they might have been in the possession of a stockholder all of the time or at the place where they had been kept prior to 1901. In the absence of any statement of diligence or of any search of any kind, the statement as it stands is without force or effect.

[10] Of the same character is the statement that neither the plaintiff nor any of the stockholders had any knowledge or means of knowledge that the mining claim was being claimed by Price and Reamer. We must take judicial notice of the law that lands of the United States bearing metalliferous ores can be acquired only by means of development, and improvements must be made annually either on the particular claim or on some contiguous claim, and if not made on the claim notice must be posted on the claim at what place the work is being done or improvements are being made. The original locator is thus always apprised of anything that is being done upon his claim. In view, therefore, of the duty imposed on him by law, may he, without any express agreement with any one that the representation work is being done on his claim for his benefit, remain away from it and deliberately close his eyes for years and after some one has developed his claim and obtained legal title thereto from the United States go into a court of equity and say:

"True, I have done nothing; I have not complied with the mineral laws and regulations of the United States, and have made no effort to do so; I have in no way developed the mineral resources of the government as contemplated by law, but I am, nevertheless, entitled to have the

legal title which the government has conveyed to another declared to be held in trust for me."

A mere statement of the proposition is its best refutation.

I have shown, however, that the acts of the defendants were done in such a manner as to impute constructive notice to the world. If that be true, how can plaintiff or the stockholders escape? Can the stockholders, who are the beneficiaries of the corporation, permit it to go to sleep and continue to slumber peacefully for a period of fifteen years and then revive it for the sole purpose of "winding up its affairs," as is alleged, and after such revival go into a court of equity and claim the property and in doing so defeat the pleas of the statute of limitations and laches by claiming want of knowledge on the part of the corporation of the alleged wrongful acts for the sole reason that it, like Rip Van Winkle, slept while others toiled? If such is the law, then the longer the stockholders permit the corporation in which they are interested to remain dormant the better is their chance to reap a rich reward. The longer they wait the more likely it will be that something will happen which will make the property in which the corporation claims an interest either directly or indirectly more valuable. Suppose the stockholders as individuals were claiming an interest in the mining claim in question. Would any one seriously contend that the acts hereinbefore detailed, all of which had to be and were done openly and in the name of the real claimant, were not such as would put them upon notice or inquiry? Clearly not. Can the same individuals, therefore, accomplish indirectly by claiming through the corporation what they could not accomplish for themselves for the reason that the facts and circumstances are such as to put them upon notice and inquiry and for that reason the statute of limitations had run? If they can, then there are not only scores but there are hundreds of dormant corporations which can be revived for the ostensible purpose of "winding up their affairs" and claim an interest in some property, directly or indirectly, which has become valuable through the efforts of others and which many successfully be claimed through the revived corporations and distributed among the stockholders who are in fact the real parties in interest.

[11-13] I most respectfully submit, therefore, that the rule contended for is a most dangerous one, since it opens the doors of our courts of equity to all enterprising stockholders who were either too careless or too indolent to keep their corporations alive and going concerns. The doctrine does not encourage activity and vigilance, but places a premium on indolence and carelessness. Moreover, it makes a court of

equity a sort of prize court where one may reap where he has not sown. While I most heartily concur in the proposition that corporation directors are to be held to a very high degree of integrity and fidelity in the discharge of their duties, and while I also unhesitatingly assert that a court of equity should not permit a wrongdoer to profit by his wrong, I, at the same time, also recognize the fact that a court of equity should always insist upon reasonable diligence and not encourage stale claims and thus open the doors of our courts to those who have slept upon their rights. The whole difficulty with this case is that counsel for plaintiff have clothed the facts and circumstances with legal and equitable consequences which are not justified. Then counsel assume that Jones was a trustee of an express trust, which, as we have seen, is not the case. It is also asserted that the defendants may be charged as trustees. The assertion is necessarily based upon the assumption that Jones was a trustee and that the defendants claim under or through him, or that they, in some way or by some means, obtained something from Jones as such trustee which belonged to the plaintiff. The fact is however, that Jones had nothing that he could give or barter. Jones did not hold the title to anything; nor did he in any way use, or permit Reamer and Price to use, any corporate funds in doing what they did. Nor did Reamer and Price enter into any promise or agreement with the plaintiff to do anything on its account or behalf and hence practiced no deception upon it. When the whole transactions complained of are stripped of unnecessary verbiage, they, in effect, amount to this: Plaintiff in 1902 had a possessory right to a certain mining claim the title to which was in the government. Reamer and Price, with the consent of Jones, wrongfully relocated the claim and went in to possession thereof and hence dispossessed the plaintiff. The relocation, however, was made openly and the notice thereof was recorded in the public records of Salt Lake county. There was no agreement or understanding, either express or implied, with the plaintiff, nor with any one acting for it or on its behalf, that the relocation was being made for its use and benefit, or that it was not made precisely for the purpose indicated by the notice of relocation. Neither was it done with the plaintiff's funds. It is therefore a plain case of one person having a possessory right to government mineral lands from which he is dispossessed by another and where the acts resulting in the dispossession are done openly and are hostile to the rights of the possessor from their inception, and where the title to such lands is afterwards acquired by the wrongdoer but which is also acquired openly and without any deception or misrepresentation which could have in any way misled the

original possessor. In this case the plaintiff was thus openly dispossessed of its property in 1902. Title was thereafter obtained from the government by paying the full consideration for the mineral land in the usual manner that all such titles must be obtained, which is openly and with notice to the whole world. The transactions in this case, therefore, are no different from those in any case where possession is wrongfully taken from one entitled to possession and the title is thereafter acquired by the wrongdoer from the original owner, except that in this case the act by the wrongdoer was openly done. While the courts afford relief in all proper cases where property has been wrongfully taken, yet the same law respecting the remedy applies in case of mineral lands that applies to other lands. Here although the alleged wrongful acts were openly done and without any deception, no action was commenced until at least 15 years had elapsed from the time the alleged wrongful act was committed. While the courts in such cases do not approve the alleged wrongful acts, they, nevertheless cannot grant relief under the guise of trust relations which do not exist, and hence they are compelled to enforce the law as they find it.

In any view that can be taken, therefore, this action is clearly barred by the statute of limitations, and hence the judgment should be affirmed. In view that the majority of the court concur in the foregoing views, the judgment is affirmed, with costs.

CORFMAN, C. J., and THURMAN, J., concur.

GIDEON, J. (dissenting). The defendants separately demurred to the amended complaint on the following grounds: (1) The complaint does not state facts sufficient to constitute a cause of action. (2) The cause of action attempted to be stated is barred by the statute of limitations and laches. The district court sustained the demurrer of each defendant on the ground that it affirmatively appears from the complaint that the cause of action is barred by the statute of limitations and that plaintiff is chargeable with laches.

The following controlling facts appear from the allegations of the complaint and are set out in the opinion of Mr. Justice FRICK:

(a) In the year 1902 plaintiff was the owner and in possession, subject to the paramount title of the United States, of the mining claim in question. The notice of location of said mining claim was recorded in the county recorder's office of Salt Lake county in 1891, and the annual assessment work upon said claim had been performed to and including the year 1901.

(b) In the year 1902 Thomas B. Jones, now deceased, was a director, and the sole

director (unless the defendant Reamer was a director), of the plaintiff.

(c) In the year 1902 the said Jones, together with the defendants Reamer and Price, entered into a fraudulent conspiracy to relocate the mining claim in the name of Reamer with a view of defrauding plaintiff of its interest therein. Said Jones died in 1905.

(d) One Miller, who died in 1901, and whose family resided in the state of New York, owned a majority of the capital stock of the plaintiff company and was its first president.

(e) The fact of the plaintiff's interest in this mining property was concealed from both the Miller and the Jones heirs (1) by Jones in 1903 when he advised one of the Miller heirs, who was temporarily in Utah, that their interests would be protected; (2) by Reamer in failing as the executor of Jones' will to report to the court or to the heirs of the estate that the estate owned any stock in plaintiff company or had any interest in this mining property.

(f) The defendants Reamer and Price, and likewise the defendant mining company, were cognizant at all times of the plaintiff's interest in the mining property and of the fraudulent conspiracy entered into in 1902 by Jones and the defendants Reamer and Price to deprive plaintiff of such interest.

(g) The fraud or conspiracy was not discovered until the year 1917.

(h) There has been no change in the property by reason of the expenditure of money so as to render the claim of the plaintiff inequitable or unjust as against the claims of the defendants.

(i) No evidence of the transactions has been lost by the lapse of time.

(j) The stockholders of plaintiff had no knowledge of their interest in the mining property, and the fact that they had any such interest was withheld from them by the fraudulent acts of the defendant Reamer and the director Jones, his coconspirator.

(k) No innocent third parties have acquired any interest in the property, or, if so, their interest is not superior to the equity of the plaintiff.

Whatever diversity of opinion may have been expressed by the courts and text-writers respecting the relationship of directors to corporations, it is agreed by all that that relationship is one of a fiduciary character.

The conclusions deducible from the authorities is succinctly stated by the author in 4 Fletcher, Cyc. Corps. 3509, as follows:

"But whether or not directors and other corporate officers are strictly trustees, there can be no doubt that their character is that of a fiduciary so far as the corporation and the stockholders as a body are concerned. In other words, it is unquestionably true that, as agents intrusted with the management of the corporation for the benefit of the stockholders collect-

ively, they occupy a fiduciary relation, and in this sense the relation is one of trust."

It is alleged that neither the director Jones nor either of the defendants ever, at any time, renounced the trust or gave any notice to the plaintiff or its stockholders that they were claiming the mining property adversely to the interests of plaintiff company, unless the relocation in 1902 by Reamer under the conspiracy alleged be held to constitute such renunciation. Jones, standing in a fiduciary relationship to the plaintiff, and to that extent being a trustee of this property, and the defendants Price and Reamer, with knowledge of that fact, having entered into a conspiracy with Jones to defraud the plaintiff, it follows that Reamer and Price took such property burdened with the same trust in favor of the plaintiff company as had existed between Jones as a director and the plaintiff company. "It is a universal rule, that if a man purchase property of the trustee, with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased." Perry, Trusts (6th Ed.) § 217. This principle was adopted by this court in *Schenck v. Wicks*, 23 Utah, 576, 65 Pac. 732. The second headnote in that case, which reflects the opinion, is as follows:

"Where a person purchases property from the trustee, with notice of the trust, he is charged with the same trust in respect to the property as the trustee from whom he purchased."

See, also, 2 Pom. Eq. Jur. (4th Ed.) § 688; *Gautier v. Douglass Mfg. Co.*, 13 Hun (N. Y.) 514.

It may be stated as a general principle upon which there is no conflict of authority that—

"Whenever a person obtains the legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the land so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created." *Felix v. Patrick*, 145 U. S. at page 328, 12 Sup. Ct. 865 (36 L. Ed. 719).

True it is that courts will not encourage nor lend aid to the enforcement of stale claims; but that aid is refused, not because the courts condone the wrongs out of which the claims arose, but because it is often and is generally more inequitable to disturb present vested rights than to leave stale claims unenforced. The grounds on which such refusals are usually based are loss of evidence, expenditure of money, change in the condition of the property, innocent parties having acquired an interest in the property, or, possibly, such increase in its value by reason of improvements that it would be inequitable

to enforce prior existing rights. 16 Cyc. 152 et seq. Under the allegations in this action, which this court must accept as true with all necessary intendments, none of these elements exist. If the allegations of the complaint are true, the property is still in the same state of nature as it was at the time of the alleged conspiracy. No innocent third parties have acquired any interest in the property. Two of the parties to the original conspiracy, if any conspiracy existed, are defendants here and are still living. Their testimony can be obtained. It is reasonable to suppose that if Reamer violated his agreement, as alleged in the complaint, to reconvey this property to Jones within one year after relocation, Jones' testimony would be more favorable to the plaintiff than to the defendant, so that by reason of Jones' death defendants are not deprived of any testimony that would likely be in their favor. Moreover, both Reamer and Price knew of the existence of the conspiracy, if one existed, and their testimony can be obtained as they are both defendants in this action.

It is provided in the statute quoted in the opinion of Mr. Justice FRICK that a cause of action for relief on the ground of fraud or mistake is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. It is affirmatively and repeatedly alleged in the complaint that the alleged fraud was not discovered until the year 1917. If therefore the action is to be defeated, it must be upon the ground of laches. The defense of laches in every case must be determined by its own particular facts. There is no conflict in the authorities upon that point. The defense of laches "rests upon the ground that the equity of the respondent arising from the acts or acquiescence of the plaintiff is greater than the equity set up in the complaint." In 4 Pom. Eq. Jur. (4th Ed.) § 1442, the author quotes with approval the following language from *Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923:

"If, however, upon the other hand, it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances."

In section 1447 of the same volume the author again quotes with approval the following from *Hall v. Otterson*, 52 N. J. Eq. 522, 28 Atl. 907:

"A person cannot be deprived of his remedy in equity on the ground of laches, unless it appears that he had knowledge of his rights. As one cannot acquiesce in the performance of an

act of which he is ignorant, so one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded; excepting always that his want of knowledge is not the result of his own culpable negligence. It is not a little difficult to determine what knowledge is necessary to place the party in the position of negligently delaying his action."

See, also, section 1448 of the same volume.

None of the elements usually invoked to defeat stale or ancient claims are present in this action. To affirm the judgment of the district court closes the door not only against the Cardiff Mining Company but against Reamer and Price as well. If the allegations of the complaint are true, these two defendants have valuable property which ought to be the property of plaintiff and its stockholders. They were both active in concealing from the plaintiff the information that it or its stockholders had any interest in the property in controversy. No third party would be in any way affected or disturbed in requiring these defendants to account to the plaintiff for any gain realized by them growing out of the conspiracy entered into with the director of the plaintiff company. These defendants are still living. They can easily explain their acts, if there is an explanation, in connection with obtaining this property, and no injury would be done to any innocent party by permitting the court to hear the testimony and determine the facts.

The record, in my judgment, does not warrant the statement that the plaintiff now coolly comes into court and demands the title to the mining claim in question without offering to do equity. True it is that in the prayer the complaint asks that the defendant mining company be adjudged to hold the property in trust for the plaintiff, but, at the same time, the prayer is that if that cannot be granted the defendants Reamer and Price be required to account to the plaintiff for any stock they may have received from their codefendant by reason of conveying this property to such codefendant. There is also a prayer for general relief. Under that state of the record, it is clearly within the power of a court of equity to require the plaintiff to do equity before granting any relief against any or all of the defendants. Accepting the allegations of the complaint as true, as we must, and as the defendants by their demurrers admit, I do not believe a case can be found anywhere under a similar state of facts where plaintiffs have been denied a hearing upon the merits.

It is not contended by any one that the statute of limitations has not defeated plaintiff's cause of action unless the acts of the defendants have prevented it from running. Counsel for the plaintiff make no contention that the possession of this property would not defeat plaintiff's claims if the defendants



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had not entered into a conspiracy and concealed the fraud by which they obtained possession. True, obtaining a patent from the government is notice to all the world of that fact, but what court has ever held that a party who was not advised that he had any interest in the property for which patent was being obtained, and where the fact that he had such interest had been concealed from him by the party obtaining title, that such notice would put the statute of limitations in action? It is of little moment to argue and recite facts which would cause the statute of limitations to run. No one disputes that or makes any contention to the contrary, but I do contend that there is no authority to make such notice binding upon any one who is not cognizant of his interest and who has been kept in ignorance by the fraudulent acts of the conspirators who obtained the property. The facts in *Patterson v. Hewitt*, 195 U. S. 309, 25 Sup. Ct. 35 (49 L. Ed. 214), cited in support of the opinion of the court, are different from the facts here. In that case the plaintiffs knew of their interest in the property in question but did nothing to assist in the development work and only attempted to assert their rights after valuable ore had been discovered by great labor and expenditure of money by the defendants. The court in that case, in discussing laches, says:

"True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay."

It is doubtless true that the party defrauded must be diligent in making inquiry; likewise, that means of obtaining knowledge of facts that would put a prudent person upon inquiry is equivalent to knowledge, but "none of the cases holds, nor are we aware of any case elsewhere which holds, that a man must be so keenly on the scent of effort to defraud him that, without knowledge of any facts which would lead a prudent man to suspect that he has been defrauded, he is bound to make investigations which he is not obliged to make for other purposes, merely because if is within his power to make such investigations." *Raymond v. Schriever*, 63 Neb. 722, 89 N. W. 309.

In the opinion of the court the allegation respecting the loss of the books is discussed. The books, I assume, would naturally be in the hands of the officers of the company, since they are the legal custodians of the records of the company, and presumably were in the possession of the officers of the company

in the year 1902. I regard that allegation as wholly immaterial, but the query naturally arises why should any stockholder who is not aware of the fact that he is interested in the corporation attempt to hunt up its records and be charged with laches by failing so to do?

It is suggested in the opinion of the court that if relief were granted to this plaintiff there may be others, even hundreds of corporations, which would shortly come to life and demand recognition in the courts in attempting to enforce some imaginary right. I assume that if there are other corporations which have been, by the fraudulent acts of their directors, deprived of their property, and the acts have been such that the statute of limitations has not run, and the parties have not been guilty of laches, the courts ought to be open to permit those corporations to enforce such rights regardless of whether there may be a hundred or many hundreds of such cases.

In this state the powers of a corporation are exercised by a board of directors. Comp. Laws Utah 1917, § 871. It is a matter of common knowledge that in the management of corporate property the stockholders frequently know very little of the actual property owned and controlled by such corporation. This is especially true of mining companies. The promoters usually retain a majority of the capital stock of such companies. The remaining or treasury stock is sold to purchasers of small blocks and often in widely separated localities. Such stockholders seldom have any absolute knowledge of the location or nature of the property controlled by the company. The title to the land is usually in the general government, and a failure to do the annual assessment work leaves the property open to relocation. In such cases, if the directors and other officers are permitted to disregard the interests of the company and its stockholders, a gateway is left wide open for dishonesty. The facts alleged in this action are illuminating as illustrating the injustice that may follow any relaxation of the inflexible rule announced by all the courts that absolutely fair dealing by the directors in their relationship to the corporate property, either as agents or trustees, must be insisted upon. Parties fraudulently dealing with any one standing in the relationship that a director does to his corporation should be bound by the same rules that apply to the director.

It is insisted by respondent that the plaintiff is a corporation and that any acts of the defendants in concealing from its stockholders the fact that they owned stock or were interested in the corporation cannot be invoked as an excuse or justification on the part of the corporation for failing to institute this proceeding at an earlier date. True it is that the plaintiff is a corporation and as

such has a legal entity independent of its stockholders, but it is likewise true that as such it can act only through officers elected by the stockholders. Whether there are other stockholders in addition to the Miller and Jones heirs does not appear from the complaint. Jones, as the sole director, could have called a stockholders' meeting at any time prior to his death. Neither the Miller nor the Jones heirs knew of their ownership of stock until 1917. The facts were concealed from the Jones heirs by the failure of defendant Reamer to report such property as an asset of Jones' estate. Jones, one of the alleged conspirators, by his statement to one of the Miller heirs in the year 1908, lulled them into inaction by his statement that such heirs would be protected in any interest they might have in the mining property in which their father was interested.

The ultimate rights of the parties are not before this court for consideration in this appeal. The only question is whether, accepting as true the facts stated in the complaint, the action is barred by the statute of limitations or by laches of the plaintiff. In my opinion it is not. The allegations are such that the chancellor ought to hear the testimony and determine the rights of the parties from the facts so developed. I therefore dissent.

WEBER, J., concurs.

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**MURPHY v. HALL et al. (No. 2328.)**

(Supreme Court of New Mexico. July 1, 1920.)

*(Syllabus by the Court.)*

1. Appeal and error  $\S$ 219(2)—Objection that evidence fails to warrant assumed finding cannot be first raised on appeal.

Where findings of fact are not requested in a case tried by the court and no findings are made by the court, except a general finding for the plaintiff, and counsel for the defendant in no way or manner calls attention of the trial court to any claimed error in the findings, and makes no objection to the same, or to the failure of the court to make specific findings of fact, such party so failing to object cannot raise the question that the evidence fails to warrant an assumed finding for the first time in the appellate court.

2. Appeal and error  $\S$ 219(2)—Party aggrieved must object to findings of trial court as not in accordance with evidence.

Where the findings made by a trial court are erroneous because not in accordance with the evidence, it is the duty of the party aggrieved thereby to call the court's attention to the error and seek its correction there.

Appeal from District Court, Bernalillo County; Reynolds, Judge.

Suit by F. A. Murphy against J. W. Hall and others for an injunction. Decree for plaintiff, and defendants appeal. Affirmed.

Burkhart & Coors, of Albuquerque, and Grimm, Wheeler, Elliott & Jay, of Cedar Rapids, Iowa, for appellants.

John F. Simms, of Albuquerque, and Hibbard & Kleindienst, of Los Angeles, Cal., for appellee.

ROBERTS, J. This action was instituted in the court below by appellee against the appellants to enjoin them from refusing to recognize him as a member of the Order of Railway Conductors of America and as a member of the Mutual Benefit Department of such order.

Appellee set forth in his complaint facts showing that he had been expelled from the order, and that he had exhausted all the remedies available to him under the constitution and by-laws of the order; that he had a property right in his membership therein, in that by virtue of such membership he carried a policy of life insurance in the Mutual Benefit Department of such organization, the continuance and validity of which were dependent upon his retaining his membership in the Order of Railway Conductors of America. He was expelled because he had participated in a meeting held at Albuquerque on the 26th day of April, 1918, by individual members of the four railroad brotherhoods, at which certain action was taken relative to demands for increased wages. The members present at this meeting appointed a committee, of which appellee was one, to write a letter to other members of the various organizations employed on the Santa Fe Railroad, which was done. Appellee was expelled, as stated, and in his complaint herein set up that the order of expulsion was illegal and invalid upon seven different grounds, as follows:

"(1) That no adequate or sufficient charges were preferred against plaintiff, in that plaintiff was not charged with the commission of any offense under the constitution and statutes of said order.

"(2) That no proper certified copy of the charges preferred against plaintiff were ever served upon him as required by section 31, or any other section of the constitution and statutes of the order.

"(3) That plaintiff was not accused by a member of said order as required by section 31, or any other section of the constitution and statutes thereof.

"(4) That the proceedings whereunder and whereby plaintiff was expelled from said order and said division No. 389 included a former trial by the last-named division, at which trial plaintiff was acquitted of the charges brought against him. That thereafter an appeal was

taken from said decision by Division No. 602 of said order, to the president, who reversed the same and directed that a new trial be had before Division No. 287. That said appeal was irregular and of no effect for the reason that no provision is made in the constitution or statutes of the order allowing an appeal to be taken from the decision of the division having original jurisdiction by other than a member of said order. That said appeal by said Division No. 602 was prejudicial to plaintiff.

"(5) That there existed in the minds of the members of Division No. 287 who tried and expelled plaintiff a bias and prejudice against plaintiff. That said members believed that they had been instructed by the acting president of the order to expel plaintiff, and that it was their duty to do so regardless of their private opinions. That by reason of the bias and prejudice of the members of said division, plaintiff did not receive a fair and impartial trial, but that result of said trial was reached through the bias, prejudice and caprice of the members of said division and of the officers of said order.

"(6) That no evidence was produced at the alleged trial of plaintiff to prove the commission of the said alleged offense with which plaintiff was charged.

"(7) That the witnesses who testified at said trial were not sworn to tell the truth in accordance with the provisions of section 31 of the statutes of said order wherein it is required that witnesses be given the following oath: 'You do solemnly affirm upon your honor as a member of the Order of Railway Conductors that the evidence you shall give in this case, wherein Brother C. D. is defendant, shall be the truth and nothing but the truth.'"

[1, 2] Issue was joined, and evidence was heard by the court. The court was not requested to make findings of fact or to state conclusions of law, and no tendered findings of any kind whatsoever, by either party, were presented to the court. Only a general finding or a conclusion of law was stated, namely, that the court "find the equities of the case in favor of the plaintiff," and a judgment was entered granting the appellee the relief prayed in the complaint. The only exception taken was as follows:

"To the foregoing judgment, and all thereof, the defendants and each of them by their counsel except."

Appellants in this court assume that the court found that the evidence sustained the invalidity of the order of expulsion on each of the grounds stated in the complaint. We make this statement, because, in their assignments of error and in stating their points, it is charged that the court found that the order of expulsion was invalid on each of the grounds stated in the complaint, and above set out. That is to say, without any finding made by the court, they assume that the court so found. It was the duty of counsel in the court below to have requested such findings as they believed the evidence warranted, favorable to their contention, or by appropriate objections or exceptions have di-

rected the attention of the court to any error which, in their judgment, the court was committing. We have set out the only attempt on the part of appellants to call the attention of the trial court to the fact that they were dissatisfied with this action.

It will be noted that counsel were not complaining of the findings made by the court or to the conclusions of law, but only were finding fault with the judgment. The exception is:

"To the foregoing judgment, and all thereof, the defendants and each of them by their counsel except."

This, under the circumstances, as stated by Mr. Justice Parker, speaking for the court, in the case of Fullen v. Fullen, 21 N. M. 212, 153 Pac. 294, conveyed no intimation that the decree was erroneous, or, if so, upon what ground. The exception there was:

"To which decree, judgment, and orders defendant then and there duly excepts."

In this court it was argued in that case that the overwhelming weight of evidence supported the charges of defendant by way of recrimination, and that the decree for that reason awarding the divorce was erroneous.

In this case it is argued that the findings by the court are erroneous in that there was no sufficient evidence to support the same. In the case of State ex rel. Baca v. Board of Commissioners, 22 N. M. 502, 165 Pac. 213, Mr. Justice Hanna, speaking for the court, said:

"It is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the court below."

There no exceptions were taken to the final judgment until after the same had been entered.

In the case of Blacklock v. Fox, 183 Pac. 402, the rule announced in the Fullen Case was approved, and the court said:

"The question of whether there is sufficient evidence to support a material finding may be raised in any appropriate manner, such, for example, as by a demurrer to the evidence, or by a motion for nonsuit or dismissal, or by an objection interposed to the objectionable finding on the ground that there is no \* \* \* evidence to support it or by an exception to the finding on such ground. The essential thing is that the attention of the trial court should be called to the fact that it is committing error in making the finding, pointing out wherein the finding is erroneous."

It is further stated:

"In this case no objection was made to the findings or judgment of the court, nor were any proceedings taken to secure a ruling of the district court as to the sufficiency of the evidence to support the findings or judgment."

The court also quoted the general rule as stated in 3 O. J. 836, as follows:

"The general rule is that a question of sufficiency of evidence to authorized submission of the case or the defense to the jury, or to support the verdict, findings, or judgment, must be raised by proper objections in the trial court, and will not be considered if raised for the first time on appeal; and in many jurisdictions, although not in all, it is held that the question of law whether there is any evidence tending to support the verdict, findings, or judgment cannot be raised for the first time on appeal."

And in the recent case of *Sandoval v. Unknown Heirs of Vigil*, 185 Pac. 282, we said:

"Where findings made by the trial court are erroneous because not in accordance with the evidence, it is the duty of the party aggrieved thereby to call the court's attention to the error and seek its correction there."

In view of these former decisions of this court, it is apparent that appellants present no question which this court can review, as to the sufficiency of the findings made by the trial court, or the evidence supporting the same.

This leaves in the case only certain minor objections made to the reception and exclusion of certain evidence. The trial court having made no specific findings, it is impossible for this court to determine whether or not there was error in the reception and exclusion of the evidence set forth in the assignments of error. This evidence only went to certain of the grounds upon which the expulsion was claimed to have been illegal, and may have been wholly irrelevant as to the determining issue in the case. For this reason the action of the court will not be considered here.

For the reasons stated, the judgment will be affirmed, and it is so ordered.

PARKER, C. J., concurs.

RAYNOLDS, J., having heard the case below, did not participate in this opinion.

(26 N. M. 275)

**JARAMILLO et al. v. JARAMILLO et al.**  
(No. 2343.)

(Supreme Court of New Mexico. July 1, 1920.  
Rehearing Denied July 22, 1920.)

*(Syllabus by the Court.)*

Appeal and error  $\Leftrightarrow$  1010(1)—Findings supported by substantial evidence not disturbed.

The findings of the trial court will not be disturbed where there is substantial evidence to support them.

Appeal from District Court, Valencia County; Ryan, Judge.

Suit by Jose Angel Jaramillo, administrator of the Estate of Narciso Pino, deceased,

and others, against Julian Jaramillo and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Rodey & Rodey and Felix Baca, all of Albuquerque, for appellants.

Isaac Barth and T. J. Mabry, both of Albuquerque, for appellees.

ROBERTS, J. This suit was instituted in the court below by the administrator of the estate of Narciso Pino, deceased, and certain of his heirs at law, against the appellees to cancel a deed which Julian Jaramillo claimed was executed and delivered to him by Pino in his lifetime. Jaramillo, the appellee, was alleged to have conveyed the real estate in question to his coappellee, Elisco Barela; that the deed under which appellee Jaramillo claimed was a forgery; and that appellee Barela had full knowledge of the forgery at the time he purchased said real estate. The forgery was denied by appellees.

On behalf of appellants, Mr. W. M. Tipton testified as an expert on handwriting that the signature to the deed in question was not the signature of Narciso Pino, but that the same was forged, and by enlarged photographs of admittedly genuine signatures and the signature in question, attempted to demonstrate to the court the fact of the alleged forgery.

On behalf of appellees, three witnesses, testified that they had known the deceased, Pino, for many years; that they were well acquainted with his signature, had transacted business with him; and that the signature to the deed was the genuine signature of Narciso Pino. The officer who took the acknowledgment to the deed and the witnesses were dead.

The trial court elected to believe the three nonexpert witnesses and entered judgment dismissing the complaint.

The only question presented upon this appeal is the finding by the court that the signature to the deed was not a forgery, and counsel for appellants argued, with much earnestness, that the trial judge should have believed the testimony of the expert, by reason of the claimed clear demonstration, which he made, that the alleged signature was a forgery.

There was a conflict in the evidence, and the finding that the deed was not a forgery is supported by substantial evidence. It has been consistently held by this court that, where the findings of the trial court are supported by substantial evidence, such findings will not be disturbed on appeal. *Rush v. Fletcher*, 11 N. M. 555, 70 Pac. 559; *James v. Hood*, 19 N. M. 234, 142 Pac. 162; *Trauer v. Meyers*, 19 N. M. 490, 147 Pac. 458; *Locke*

v. Murdoch, 20 N. M. 522, 151 Pac. 298, L. R. A. 1917B, 287.

Appellants cite several cases holding that a verdict of a jury, based solely upon expert testimony as to handwriting, will not be disturbed on appeal, even though eyewitnesses testify contrary to the expert. Such cases, however, afford no warrant for this court overturning the findings of the trial judge in this case. He saw all the witnesses, heard them testify, observed their demeanor on the witness stand, and elected to believe the non-expert. This was within his province.

For the reasons stated, the judgment will be affirmed, and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(26 N. M. 287)

HERBST v. ROGERS. (No. 2247.)

(Supreme Court of New Mexico. July 2, 1920.)

(*Syllabus by the Court.*)

Injunction  $\S$  252(8) — Counsel fees for dissolving recoverable under injunction bond.

Counsel fees expenses necessarily incurred for necessary services in procuring the dissolution of an injunction, when reasonable in amount, are recoverable as damages upon injunction bonds conditioned in the ordinary terms.

Appeal from District Court, Chaves County; McClure, Judge.

Action by W. E. Rogers against James B. Herbst. Judgment for plaintiff, and defendant appeals. Affirmed.

Reid, Hervey & Iden, of Roswell, for appellant.

R. D. Bowers, of Roswell, for appellee.

PARKER, C. J. This is an appeal from the district court for Chaves county, by James B. Herbst. The appeal as to Robert Kellahin and J. C. Reese was dismissed. 25 N. M. 408, 183 Pac. 749.

On June 15, 1915, the appellant brought suit in the district court for Chaves county against the appellee to enjoin him from connecting or attempting to connect a small feed pipe to the artesian well of appellant, or attempting to change the means of diversion of his water from said well. A temporary injunction issued against the appellee, but upon final hearing the injunction was dissolved. The appellant appealed to this court, and the judgment dissolving the injunction was affirmed. Herbst v. Rogers, 22 N. M. 449, 164 Pac. 827.

Thereafter, on August 8, 1917, this action was begun. It was a suit upon the injunction bond given in the case hereinbefore referred to, the sureties thereon being joined as parties defendant with Herbst. The injunc-

tion bond was in the usual form, reciting the occasion for the necessity of the bond and covenanting that if the appellant shall pay, or cause to be paid, any and all costs and damages, not exceeding \$500, arising from the allowance of said injunction, if the same shall be wrongful and be dissolved by order of the court, then this obligation be null and void; otherwise to remain in full force and effect.

Numerous items of damages were set up in the appellee's complaint in this case, but only two of them are material here. They are: First, that of counsel fees contracted by appellee in the sum of \$250; and, second, travelling and hotel expenses of said counsel in the performance of his duties in attendance upon this court upon the appeal of the original injunction suit.

The appellant concedes that there is but one proposition of law involved in this case on appeal, and that is as to whether fees and expenses of counsel employed in an injunction suit are proper items of damage in a suit upon the injunction bond.

In the case of Webb v. Beal, 20 N. M. 218, 148 Pac. 487, the doctrine of which was approved in Woods v. Fambrough, 24 N. M. 488, 491, 174 Pac. 993, the appellee instituted suit upon an injunction bond for damages for \$300, for attorney's fees, and \$75 for expenses incurred in defending the suit. The appellee there recovered judgment for \$200 for attorney's fees and \$50 as expenses necessarily incurred in and about the defense and dissolution of the injunction. The proposition of the right to recover attorney's fees was fully discussed by the court; the court holding, in substance, that counsel fees paid for necessary services directed to procuring the dissolution of an injunction, when reasonable in amount, are recoverable as damages upon injunction bonds conditioned in the ordinary terms. The court noted the so-called federal rule on the subject, adhered to by a few of the states, as well as the majority doctrine, and adopted the language of a quoted case, as follows:

"It seems just and right that where a party asks the interposition of the power of the courts, in advance of a trial of the merits of the cause, to deprive the defendant of some right or privilege claimed by him, even though temporarily, if on investigation it is found that the plaintiff had no just right either in the law or the facts to justify him in asking and obtaining from the court such a harsh and drastic exercise of its authority, that he should indemnify the defendant in the language of his bond for 'all damages he might sustain,' and that reasonable counsel fees necessary to the recovering [dissolution] of such injunction are properly a part of his damage."

It is to be noted that Mr. High calls attention to the fact that the authorities are in conflict as to the right to recover for coun-

sel fees in those cases where the injunction is the sole relief sought, as was the fact in the present case under consideration. But this eminent authority points out that the view in favor of the allowance of attorney's fees is supported by a slight preponderance of the authority. As we see but little difference in principle between the two classes of cases, we are constrained to follow the weight of authority in this respect.

The appellant in this case takes the position, as we understand his brief, that, when the prayer of the complaint and the allegation as to his inadequacy of legal remedies are eliminated, his action may be said to be akin to a suit to quiet title, either to land or to water in the artesian well. Upon that premise authority is cited to the general effect that attorney's fees are limited to those necessary in procuring a dissolution of the injunction; services rendered in making a general defense on the merits being excluded. The cases so holding do so upon the theory that, where the injunctive relief is merely ancillary to the main relief sought, the incurring of expenses incident to employing attorneys in defense of the main action is manifestly imperative, and therefore, as the expense would have been incurred without reference to the injunctive portion of the action, expenses concerning a defense of the injunctive side of the case will not be allowed; the subject of apportioning what part of the fee should be debited against the services rendered in the main case and what against those rendered only with respect to the injunction being too problematical and uncertain to permit the award of damages. But granting the correctness of the doctrine for which the appellant contends, we have no such case here. Here the original action was solely for injunctive relief. It is true that the right to maintain the injunction depended on the contractual rights of the parties, but that was simply the foundation for the injunction proceeding; the appellant contesting with appellee the right of the latter to take water from the well in the manner in which appellee threatened to divert it. There was no issue in that case as to the general adverse claim of property by appellee in the premises. The case was purely and solely one in equity for a permanent injunction, and the case was tried and decided upon the theory, and that theory and none other was consistently advocated by the appellant. We therefore hold that the doctrine for which appellant contends here is without application, this case falling squarely within the principles we announced in the Webb-Beal Case.

For the reasons stated, the judgment of the trial court will be affirmed, and it is so ordered.

ROBERTS and RAYNOLDS, JJ., concur.

(26 N. C. 541)

HENDERSON et al. v. DREYFUS.  
(No. 2166.)

(Supreme Court of New Mexico. May 8, 1919.)

(Syllabus by the Court.)

1. Jury  $\S$  31(7½)—Partial remittitur not affecting right to determination of damages by jury.

The remission by the plaintiff of a part of the verdict, at the suggestion of the trial court, followed by a judgment for the sum remaining, does not deprive the defendant of his constitutional right to have the question of damages tried by a jury.

2. New trial  $\S$  162(3)—Trial court can authorize remittitur and enter judgment for balance.

The trial court has the power to authorize a permissive remittitur and to enter judgment for the balance, and this although the amount remaining is not capable of definite computation from the evidence.

3. New trial  $\S$  162(3)—Remittitur will not cure verdict excessive through prejudice.

A remittitur will not cure a verdict excessive by reason of prejudice and passion. The reason for the rule is that, where the amount of the verdict is the result of passion and prejudice, such passion and prejudice may, and probably did, influence the jury in the determination of the other issues in the case upon the decisions of which the verdict was found.

4. New trial  $\S$  162(3)—When remittitur and judgment for balance permissible.

The trial court may give the plaintiff the option of filing a remittitur, and thereupon enter judgment for the balance, not only where the damages are capable of ascertainment from the evidence with reasonable certainty, but in cases of unliquidated damages, and likewise in cases where exemplary or punitive damages have been awarded.

5. New trial  $\S$  162(3)—Excessive verdict not determining factor unless result of prejudice.

The excess of the verdict is not the determining factor in cases where a remittitur has been allowed, unless the verdict is so outrageously excessive and beyond all reason that in and of itself it clearly shows that it was the result of passion and prejudice.

6. Appeal and error  $\S$  1004(3)—Determination of trial court that verdict did not result from prejudice.

The trial court is in a much better position to determine whether the excessive verdict was the result of passion and prejudice, and its determination should ordinarily be accepted.

7. Appeal and error  $\S$  1004(3)—Verdict in libel suit not result of passion and prejudice.

Evidence reviewed, and held that, while the trial court found that a verdict in a libel suit for \$35,000 was excessive, there is nothing in the record to indicate that such excess was the result of passion and prejudice.

(191 P.)

8. Libel and slander §104(3)—Repetition of defamatory matter showing malice.

Repetition of the alleged defamatory matter or other defamatory publication of similar character are admissible to show express malice on the part of the defendant.

9. Appeal and error §263(1)—Objection to insufficient instruction.

Where the vice in an instruction is not pointed out to the trial court and proper exceptions saved, in the event the instruction is given, the appellate court will not review error predicated upon the giving of the same.

10. Libel and slander §42(1)—Reports of proceedings in a law court privileged.

Every impartial and accurate report of any proceeding in a public law court is privileged.

11. Libel and slander §50½—Correct account of proceedings in court of justice privileged.

While a person may publish a correct account of the proceedings in a court of justice, yet, if he discolours or garbles the proceedings, or adds comments and insinuations of his own in order to asperse the character of the parties concerned, it is libelous, and not privileged.

12. Appeal and error §216(1)—Failure to ask for instructions limiting effect of evidence.

Where a party in a civil case does not ask the court for an instruction limiting the effect of evidence, he cannot complain of its failure to so instruct.

13. Appeal and error §719(1)—Review of question not raised in assignments of error.

An appellant in a civil case cannot urge upon the court for consideration a question not raised in his assignments of error.

14. Witnesses §372(2) — Cross-examination as to politics admissible to determine weight of evidence.

Ordinarily the fact as to whether a witness is a member of one political party or the other would have no effect upon his testimony or the weight to which it would be entitled, and it would be improper upon cross-examination to inquire into such matter; but in a case growing directly out of a political controversy, where the witnesses on either side may be more or less influenced by their political affiliations, it is proper on cross-examination to inquire into such matter.

15. Trial §83(1, 2)—Objection to admissibility of evidence must point out ground.

In objecting to admissibility of evidence, it is the duty of counsel to advise the court specifically of the ground of objection, so that the same may be intelligently ruled upon, and in order to enable counsel to obviate the objection if possible; and a general objection that evidence is incompetent, irrelevant, and immaterial, or that a sufficient foundation has not been laid for its admission, is too general.

16. Trial §62(2) — Rebuttal evidence on charge of desecration of flag.

Where appellant had shown by its witnesses the fact of the presentation of a flag to a

party, which it was claimed in the alleged libel that appellee had desecrated, it was permissible for appellee, in rebuttal, to show that the parties who so presented the flag were intoxicated.

17. Appeal and error §528(4)—Matters in presence of judge not in record by affidavits.

What is done by the judge or what occurs in his presence is within his knowledge and must be recited over his certificate, and cannot be made a part of the record by ex parte affidavits in support of a motion for a new trial.

(Additional Syllabus by Editorial Staff.)

18. Courts §97(6)—Precedents in reviewing constitutional questions.

In deciding constitutional questions, and especially where a construction of the United States Constitution is involved, a state court should, in construing the state Constitution, give great weight to opinions by the United States Supreme Court, and should, of course, follow that court in its construction of the United States Constitution.

19. New trial §163(2)—Grant of remittitur finding verdict excessive.

Where the trial court in a libel suit made no specific finding as to passion and prejudice, its approval of the remittitur necessarily found that the verdict was excessive, but that such excess was not the result of passion and prejudice, as otherwise it would have granted defendant's motion for a new trial.

20. Libel and slander §120(2)—Right to exemplary damages.

Where express malice in the publication of libel charging a misdemeanor under the law of the state was proven, it was a proper case for the imposition of exemplary damages.

Error to District Court, Valencia County; M. C. Mechem, Judge.

Action by Henry Dreyfus against the New Mexican Printing Company and Bronson M. Cutting. Directed verdict for defendant Cutting, and verdict for plaintiff for \$35,000 against the New Mexican Printing Company, its motion for new trial granted unless plaintiff remitted the verdict in excess of \$10,000, which remittitur was filed, and judgment against the New Mexican Printing Company in that sum, and Ralph M. Henderson, its receiver, brings error. Affirmed.

El. R. Wright and Francis C. Wilson, both of Santa Fe, for plaintiff in error.

W. J. Eaton and M. C. Spicer, both of Socorro, for defendant in error.

ROBERTS, J. On the 10th day of October, 1916, Henry Dreyfus filed a complaint against the New Mexican Printing Company and Bronson M. Cutting in the district court of Socorro county. As the trial court directed a verdict in favor of Mr. Cutting, no fur-

ther mention need be made of his connection with the suit.

The complaint alleged that on the 7th day of October, 1916, the defendant corporation owned and published a newspaper known as the Santa Fe New Mexican; that said paper was a daily and circulated throughout the state of New Mexico, and especially in the county of Socorro; that on said date there appeared in said paper a statement as follows:

"This is the same county where a Bursum henchman named Dreyfus (meaning Henry Dreyfus, of Socorro, N. M., this plaintiff), in the days of Gov. Hagerman, tore down the American flag and stamped and spat upon it and got off with it."

The complaint further alleged that this publication was a criminal charge against the plaintiff, in that to insult the Stars and Stripes is a misdemeanor under the laws of the state. The complaint set forth that the article was wrongfully, unlawfully, willfully, and maliciously published with intent to injure and degrade plaintiff and cause the public in general to believe that he had been guilty of the crime of insulting the Stars and Stripes, and of acts and conduct against the American flag disgraceful to him as an American citizen, which would bring him into contempt among the honorable people, and that the said article was false, scandalous, malicious, and libelous, and did and does expose the plaintiff to hatred, contempt, and ridicule. Judgment in the sum of \$50,000 was asked.

The defendant answered, admitting the publication, but denied that the article so published was false, malicious, scandalous, and libelous, and that it did and does expose the plaintiff to contempt and ridicule. The New Mexican Printing Company further answered that the article published was true; that the matters and things therein concerning the plaintiff were, at the time they were done by him and ever since, matters of common knowledge in the state of New Mexico, and generally believed to be true by residents of the said county and state. The answer in this regard was as follows:

"And for further answer herein, and without waiving any previous or prior defense hereinbefore interposed, the defendant says that the plaintiff ought not to have his aforesaid action against him, this defendant, because he says that before the publication of the alleged injurious article described in said complaint, as this defendant is now informed, and therefore believes, the facts and acts of the plaintiff set forth in said publication did transpire and were true in substance and in fact, and that on or about the 22d day of September, 1906, the plaintiff, then probate judge of Socorro county, and at that time closely allied with a political faction which was doing what it could to oppose the then Governor of the territory of New Mexico, Herbert J. Hagerman,

became angered at the preparations made for the reception of the said Governor of the territory of New Mexico, and tore down a large American flag from the decorations in front of one of the business houses in the town of Socorro, state of New Mexico, rent the said national emblem into pieces, and broke up the pole to which it was attached, and threw the pieces away, and that said incident was at the time commented upon by the said Governor at a reception tendered him in the local opera house of the said town of Socorro, state of New Mexico, in the course of an address made to some 250 citizens and residents of the said town of Socorro, state of New Mexico, all of which said facts were at the time reported in the Albuquerque Morning Journal, a newspaper then of general circulation throughout the state of New Mexico, under the date of September 22, 1906, and that the said Dreyfus did not at that time nor has he subsequently, so far as this defendant is informed and believes, ever denied said act or resented the publication in said newspaper of said article, notwithstanding the wide publicity thereby given to the incident."

And by way of mitigation and justification it was further alleged in the article that the Albuquerque Morning Journal, on the 24th day of October, 1911, published and gave wide circulation to the story which was repeated in the New Mexican and made the subject of a suit, and further that the matters and things alleged in the article upon which this suit was predicated were at the time they were done by him, and ever since had been, matters and things of common knowledge in Socorro county, state of New Mexico, and generally believed to be true by residents of the said county and state.

To the answer plaintiff filed a general denial, and upon the issues thus made up the cause came on to trial at Los Lunas, Valencia county, on the 5th day of March, 1917. The jury returned a verdict in favor of plaintiff for \$35,000. The New Mexican Printing Company filed a motion for a new trial, in which, among other things, it set up the fact that the verdict was excessive and the result of passion and prejudice. The trial court entered an order ordering a new trial unless the plaintiff remitted the verdict of the jury in excess of \$10,000 within ten days from the date of the order, and in case the remittitur should be filed then the motion for a new trial would be overruled. The remittitur was filed and judgment was entered against the New Mexican Printing Company in the sum of \$10,000. The receiver of the New Mexican Printing Company sued out a writ of error from the Supreme Court for the purpose of reviewing the judgment. In the discussion which follows the plaintiff in error will be designated as appellant and defendant in error as appellee.

[1] The sixth point made by appellant in its brief will be first considered, because, if it should be resolved in appellant's favor, the



first point would not require consideration. This contention is that the court erred in granting remittitur in this case for the reason that by so doing it deprived the defendant of a trial by jury as guaranteed by section 12 of article 2 of the Constitution of the state of New Mexico, and denied the defendant the protection of the laws of the state of New Mexico and deprived the defendant of his property without due process, contrary to the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States.

[18] If we should follow the reasoning of the Earl of Halsbury and Lord Davy in the case of *Watt v. Watt*, decided by the House of Lords of England April 3, 1905, and reported in 2 Am. & Eng. Ann. Cas. 672, this point would necessarily be resolved in appellant's favor. In deciding constitutional questions, and especially where a construction of the Constitution of the United States is involved, a state court should, in construing the state Constitution, give great weight to opinions by the United States Supreme Court, and, of course, should follow that court in its construction and interpretation of the United States Constitution.

[2-4] In the case of *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854, this identical question was decided. The verdict returned by the jury was for \$39,958.33. The trial court decided that, if the plaintiff would remit the sum of \$22,833.33, the motion for a new trial would be denied. Remittitur was filed and judgment was entered for \$17,125. The court said:

"The point was much pressed at the bar that the remission by the plaintiff of a part of the verdict, followed by a judgment for the sum remaining, deprived the defendant of his constitutional right to have the question of damages tried by a jury, without interference upon the part of the court, except as it became necessary to instruct them in reference to the principles of law governing the determination of that question. The precise contention is that to make the decision of the motion for a new trial depend upon a remission of part of the verdict is in effect a re-examination by the court, in a mode not known at the common law, of facts tried by the jury, and therefore was a violation of the Seventh Amendment of the Constitution.

"The counsel for the defendant admits that the views expressed by him are in conflict with the decision in *Northern Pacific Railroad Company v. Herbert*, 116 U. S. 642, 646 [8 Sup. Ct. 590, 29 L. Ed. 755], but he asks that the question be re-examined in the light of the authorities. \* \* \*

"The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not in any just sense impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new

trial where the damages are palpably or outrageously excessive."

See, also, *Clark v. Sidway*, 142 U. S. 682, 12 Sup. Ct. 327, 35 L. Ed. 1157, and *Gila Valley, G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521.

Innumerable cases where permissive remittiturs were made and motion for a new trial thereupon denied will be found collected in a case note to the case of *Tunnel Mining & Leasing Co. v. Cooper*, 39 L. R. A. (N. S.) 1064, and this although the amount remaining is not capable of definite computation from the evidence. An examination of the cases there found will disclose that the overwhelming weight of authority in this country upholds the view that the trial court has the power to authorize a permissive remittitur, and to enter judgment for the balance. This practice was approved by the territorial Supreme Court in the case of *Schofield v. Territory ex rel. American Valley Co.*, 9 N. M. 526, 56 Pac. 306, in which case the court quotes with approval from *Arkansas Valley Land & Cattle Co. v. Mann*, supra, and in the case of *Bank of Commerce v. Western Union Telegraph Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120, without discussion. It will thus be seen that the question is settled in this jurisdiction adversely to appellant's contention, and we see no good reason for departing from the almost universal rule in this country.

Having held that the action of the trial court in authorizing the remittitur and entering judgment for the balance did not deprive appellant of its right to a trial by jury, we are logically brought to a consideration of the first proposition urged by appellant, viz.:

"Remittitur cannot cure verdict excessive by reason of prejudice and passion."

A great many courts hold that remittiturs are allowable although the amount of the original verdict is the result of prejudice and passion. *Craig v. Cook*, 28 Minn. 232, 9 N. W. 712; *Trow v. White Bear*, 78 Minn. 433, 80 N. W. 1117; *Bremer v. Minneapolis, St. P. & Ste. M. R. Co.*, 96 Minn. 469, 105 N. W. 494; *Goss v. Goss*, 102 Minn. 846, 113 N. W. 690; *Western U. Tele. Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Alabama G. S. R. Co. v. Roberts*, 113 Tenn. 488, 82 S. W. 314, 67 L. R. A. 495, 3 Ann. Cas. 937; *Gulf, C. & S. F. R. Co. v. Darby*, 28 Tex. Civ. App. 413, 67 S. W. 446; *Gulf, B. & K. C. R. Co. v. O'Neill*, 32 Tex. Civ. App. 411, 74 S. W. 960; *Galveston, H. & N. R. Co. v. Wallis*, 47 Tex. Civ. App. 120, 104 S. W. 418; *Reddon v. Union P. R. Co.*, 5 Utah, 344, 15 Pac. 262 (cited and followed in *Kennedy v. Oregon Short Line R. Co.*, 18 Utah, 325, 54 Pac. 988); *Brown v. Southern P. R. Co.*, 7 Utah, 288, 26 Pac. 579; *Gillen v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 91 Wis. 633, 65 N. W. 373; *Helmlich v. Tabor*, 123 Wis. 565, 102

N. W. 10, 68 L. R. A. 669; *Beach v. Bird & W. Lumber Co.*, 135 Wis. 550, 116 N. W. 245; *McNamara v. McNamara*, 108 Wis. 613, 84 N. W. 901. But the great weight of authority is to the effect that a remittitur will not cure a verdict tainted by prejudice and passion. *Southern P. Co. v. Tomlinson*, 4 Ariz. 126, 33 Pac. 710 (dictum); *Loewenthal v. Streng*, 90 Ill. 74; *Chicago & N. W. R. v. Cummings*, 20 Ill. App. 333; *Chicago & A. R. Co. v. Barnett*, 58 Ill. App. 384; *West Chicago Street R. Co. v. Krueger*, 68 Ill. App. 450; *West Chicago Street R. Co. v. Johnson*, 69 Ill. App. 147; *Chicago & E. R. Co. v. Binkopski*, 72 Ill. App. 22; *West Chicago Street R. Co. v. Wheeler*, 73 Ill. App. 368 (in effect); *Chicago City R. Co. v. Fennimore*, 78 Ill. App. 478; *Pennsylvania Co. v. Greso*, 79 Ill. App. 127; *Nicholson v. O'Donald*, 79 Ill. App. 195; *North Chicago Street R. Co. v. Hoffart*, 82 Ill. App. 539; *Chicago Terminal Transfer R. Co. v. Helbreg*, 99 Ill. App. 563; *Pittsburg, C., C. & St. L. R. Co. v. Story*, 104 Ill. App. 132; *Belt R. Co. v. Charters*, 123 Ill. App. 322; *Sackheim v. Miller*, 136 Ill. App. 132 (see, contra, *Illinois C. R. Co. v. Ebert*, 74 Ill. 399); *Ahrens v. Fenton*, 138 Iowa, 559, 115 N. W. 233; *Atchison, T. & S. F. R. Co. v. Cone*, 37 Kan. 567, 15 Pac. 499; *Steinbuechel v. Wright*, 43 Kan. 307, 23 Pac. 560; *Atchison, T. & S. F. R. Co. v. Dwelle*, 44 Kan. 394, 24 Pac. 500; *Parsons & P. R. Co. v. Montgomery*, 46 Kan. 120, 26 Pac. 403; *Bell v. Morse*, 48 Kan. 601, 29 Pac. 1068; *Drumm v. Cessnum*, 58 Kan. 331, 49 Pac. 78; *Atchison v. Plunkett*, 61 Kan. 297, 59 Pac. 646; *Argentine v. Bender*, 71 Kan. 422, 80 Pac. 935 (dictum); *Chitty v. St. Louis, I. M. & S. R. Co.*, 148 Mo. 64, 49 S. W. 868; *Partello v. Missouri P. R. Co.*, 217 Mo. 645, 117 S. W. 1138; *Doty v. Steinberg*, 25 Mo. App. 328; *Adcock v. Oregon R. Co.*, 45 Or. 173, 77 Pac. 78 (dictum). And the territorial Supreme Court, in the case of *Corcoran v. Albuquerque Traction Co.*, 15 N. M. 9, 103 Pac. 645, approved of the majority rule, but in that case refused to hold that the verdict was the result of passion and prejudice, and said:

"The plaintiff suffered an injury, and the jury simply overestimated that injury, as the trial court found."

In *Bank of Commerce v. Western Union Telegraph Co.*, supra, the rule was also approved by this court.

The reason for the rule is that, where the amount of the verdict is the result of passion and prejudice, such passion and prejudice may and probably did influence the jury in the determination of the other issues in the case upon the decision of which the verdict was founded. In other words, in the absence of such improper influences, the jury might have resolved the issues in favor of the party against whom the verdict was rendered.

*Arkansas Cattle Co. v. Mann*, supra, and cases cited supra.

The majority rule, which undoubtedly is the correct rule, is easy of application where the trial court finds that the verdict was excessive by reason of passion and prejudice. In such event it is the duty of the trial court to grant a new trial. Failing so to do, the appellate court should, of course, remand the cause for a new trial before a jury free from prejudice. The trial court hears the evidence, sees the witnesses, hears the arguments of counsel, and senses the atmosphere of the trial, and is in a position to know whether the verdict was the result of passion and prejudice. Where the trial court simply requires the filing of a remittitur, but does not find that the excess was the result of passion and prejudice, much difficulty is experienced by the appellate courts in determining this question. Some of the appellate courts set aside a verdict under such circumstances, stating as the ground for such action that the verdict was so excessive as to imply such passion and prejudice, and the same courts have refused in other cases to take such action. This is clearly evidenced by a review of the cases cited by appellant in support of its contention and a comparison of such cases with later expressions by the same courts, in connection with the reasons given in the cited cases as a basis for the holding. The following cases are cited: *Tunnel Mining & Leasing Co. v. Cooper*, 50 Colo. 390, 115 Pac. 901, 39 L. R. A. (N. S.) 1064, Ann. Cas. 1912C, 504; *Alabama G. S. R. Co. v. Roberts*, 113 Tenn. 488, 82 S. W. 314, 67 L. R. A. 495, 3 Ann. Cas. 937; *Southern Pac. Co. v. Fitchett*, 9 Ariz. 128, 80 Pac. 359; *Seaboard Air Line v. Randolph*, 129 Ga. 796, 59 S. E. 1110; *Chicago & Electric R. Co. v. Goebel*, 129 Ill. App. 152; *Ahrens v. Fenton*, 138 Iowa, 559, 115 N. W. 233; *Leek v. Northern Pac. R. Co.*, 65 Wash. 453, 118 Pac. 345; *Steinbuechel v. Wright*, 43 Kan. 307, 23 Pac. 560; *Loewenthal v. Streng*, 90 Ill. 74; *Burdict v. Mo. Pac. R. Co.*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; *Plaunt v. Ry. Transfer Co.*, 90 Minn. 409, 97 N. W. 433; *North Chicago St. R. R. Co. v. Hoffart*, 82 Ill. App. 539; *Chicago Term. Transfer Co. v. Helbreg*, 99 Ill. App. 563; *Belt Ry. Co. v. Charters*, 123 Ill. App. 322; *Ewing v. Stickney*, 107 Minn. 217, 119 N. W. 802.

The case of *Tunnel Mining & Leasing Co. v. Cooper*, supra, was based upon a provision of the Code of Colorado which authorized a new trial for excessive damages given under the influence of passion or prejudice. The court held that under this provision trial courts have no longer power to set aside verdicts merely excessive, but can do so only when it has also found that the excess award is due to passion or prejudice. In a later case, *Colorado & S. Ry. Co. v. Jenkins*, 25 Colo. App. 343, 138 Pac. 437, the court ordered

a remittitur of \$1,100 from a verdict of \$5,100. In that case the court upheld the judgment, and in referring to the Tunnel Mining Co. Case said:

"It must be apparent to every one that the size of the verdicts rendered in those cases, the amount which the trial court required the plaintiff in each case to remit, and the specific findings on the part of the Supreme Court that there was passion and prejudice clearly manifest in each of said cases, are sufficient in themselves to distinguish those cases from the case at bar."

The case of *Railroad Co. v. Roberts*, supra, affords no support for appellant's contention. The court sets forth the rule for which appellant here contends, and cites in support thereof 18 E. of P. & P. 144, and says:

"We cannot admit the soundness of the view of these cases under our practice. If a jury, through passion, prejudice, and caprice, has given a judgment, whether excessive or not, when the facts do not warrant any judgment, it is the practice of this court to set aside the verdict, because there is no evidence to support it.

"But when the court can see that there is liability, and especially when that liability is conceded for some amount, as in the present case, and the only error is the reason to set aside the verdict in toto, if justice and right can be reached by reducing the damages."

The court upheld the right to require a remittitur.

In a later case, *Grant v. Louisville & N. R. Co.*, 129 Tenn. 398, 165 S. W. 963, the Supreme Court of Tennessee said:

"The practice now, however, is firmly established in Tennessee, and although a verdict is so excessive as to indicate that it was influenced by passion, prejudice, or caprice, it may be cured, and will stand, if a remittitur is accepted by the plaintiffs, and the verdict reduced to a reasonable amount."

The case of *Southern Pac. Co. v. Fitchett*, supra, was departed from by the Supreme Court of Arizona in the later case of *Gila Valley, G. & N. R. Co. v. Hall*, 13 Ariz. 276, 112 Pac. 845, and this decision was affirmed by the Supreme Court of the United States. See 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521. In the case of *Seaboard Air Line Co. v. Randolph*, supra, in an opinion by Justice Lumpkin, the court holds, following prior decisions, that the trial court in no case has the right to require a remittitur, except where from the application of the law of evidence "excess can be accurately ascertained." While adhering to the former cases cited in the opinion, the court said:

"If the question were an original one, something might be said in favor of the practice adopted in some other states, where, if the presiding judge approves the findings so far as the question of liability is concerned and thinks that the plaintiff is entitled to recover against the defendant, but that the amount found is too large to be approved by him, he may allow a

certain amount to be written off, and if the excess be voluntarily relinquished, the amount of the verdict would no longer be cause for a new trial."

The cases cited from the Illinois Court of Appeals do support appellant's contention, but in the case of *Sandy v. Lake Street Electric R. Co.*, 235 Ill. 194, 85 N. E. 300, the Supreme Court said:

"Remittiturs, in actions ex delicto, by the trial and Appellate Courts have been approved by this court a number of times. *Chicago City Railway Co. v. Gemmill*, 209 Ill. 638 [71 N. E. 43], and cases there cited; *Hanchett v. Haas*, 219 Ill. 546 [76 N. E. 845]. There are cases of such character that it would be difficult, if not impossible, to determine what amount should be remitted from a verdict, but the practice of allowing remittiturs in cases of the character of the one at bar has long been sustained in this state. In *North Chicago Street Railroad Co. v. Wrixon*, 150 Ill. 532 [37 N. E. 805], in discussing this question, it was said ([150 Ill.] p. 535 [37 N. E. 890]): 'But we are committed to the practice of allowing remittiturs in actions ex delicto both in the trial and Appellate Courts to such sum as shall to the court seem not excessive and affirming as to the balance of the judgment.'"

Appellant's contention is likewise supported by *Ahrens v. Fenton*, supra, and there has apparently been no departure from the rule in Iowa. In that case the court reduced exemplary damages from \$800 to \$500. The court said:

"But as the allowance of exemplary damages is wholly within the discretion of the jury in a case where there is a legal basis for the allowance of such damages (*Reisenstein v. Clark*, 104 Iowa, 287 [73 N. W. 588]), the finding of the jury can only be interfered with on the ground of such error of judgment as to indicate passion and prejudice, and where the allowance is so grossly excessive under the evidence that it should not be allowed to stand, the verdict should be set aside."

In the case of *Leek v. North Pac. R. Co.*, supra, plaintiff recovered damages for \$500 for being ejected from the train. The court said, quoting with approval from a prior case:

"We might follow our usual practice and reduce the judgment to such sum as the respondent is entitled to recover in our view of the facts, and require him to accept that amount or submit to a new trial, but the right of recovery is doubtful at best, and the verdict discloses such passion and prejudice on the part of the jury that it would be unjust to hold a litigant foreclosed by any of the findings. The judgment is therefore reversed, and the cause remanded for a new trial."

In a later case, *Peterson v. Seattle Electric Co.*, 71 Wash. 349, 123 Pac. 650, for personal injuries, plaintiff recovered a verdict for \$15,250. The trial court reduced the verdict to \$10,250. The Supreme Court gave plaintiff the option of accepting a remittitur of \$2,500 and affirming the judgment in the

event of such acceptance, thereby reducing the original verdict by almost one-half.

In the case of *Steinbuechel v. Wright*, supra, an action for slander, the jury returned a verdict for \$4,000, and the court required a remittitur of \$3,500. The court held that the damages were so excessive as to show that the verdict was given under the influences of passion or prejudice, and therefore that the amount thereof should be submitted to the judgment of another jury.

In a later case, *Lupher v. A., T. & S. F. R. Co.*, 86 Kan. 712, 122 Pac. 106, Ann. Cas. 1913C, 498, the trial court required the plaintiff to remit \$4,000 from a verdict of \$17,000. The court, after referring to the *Steinbuechel-Wright Case*, said:

"In the present case the record simply discloses that the trial court believed the verdict to be excessive to the amount of \$4,000; but there is nothing to show that the excess in the amount was caused by the passion or prejudice of the jury, or that the trial was not fairly conducted."

And the judgment was sustained.

In Kansas they have the same Code provision as in Colorado, viz.: That the verdict shall be vacated wherever it appears that it was given under the influence of prejudice or passion.

In the case of *Burdick v. Mo. Pac. R. Co.*, supra, the court said:

"If it can be seen and fairly said the jury gave the excessive verdict by reason of prejudice, passion, or any other improper motive, a new trial should be awarded; for the inference would be a fair one that the finding for the plaintiff was also brought about by improper influences, and this is especially so when there is any doubt as to the right of the plaintiff to recover. Indeed, the verdict may be so large and out of all reason as, of itself, to furnish sufficient evidence that it was the result of passion or some other improper influence. But it does not follow that a verdict is necessarily the result of prejudice or passion because it is excessive. It might just as well be said that the mistakes made by appellate judges are the offspring of prejudice. Jurors, like other persons, may, and often do, err, though conscientious in the discharge of their duties. Common experience teaches us that verdicts differ widely, even in the same case, where the evidence as to the extent of the injury is precisely the same, and this, too, when there is nothing whatever from which the conclusion can be fairly drawn that the jurors were under the influence of any improper motive. Nor is there anything strange in this when it is remembered that no exact guide can be given as to the amount of damages to be allowed. In the very nature of things, the amount of damages must, to a large extent, rest with the jury. This court is constantly reviewing verdicts in this class of cases, and is in a position to be able to judge when a verdict is so far beyond those usually allowed in like cases as to be excessive, and litigants ought to have the benefit of its judgment."

In the case of *Plaunt v. Railway Transfer Co.*, supra, the verdict was reduced from

\$800 to \$150. The court said that the diminution was so great that it was obliged to conclude that the court below was of the opinion that the verdict was a result of passion and prejudice, and a new trial was awarded.

In the later case of *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690, a verdict of \$4,000 was reduced to \$3,000. The court said:

"The rule is now too well settled to be seriously questioned that the trial court may, in actions of tort, as well as in actions on contract, in the exercise of a sound judicial discretion, when it deems a verdict excessive and the result of passion and prejudice on the part of the jury, deny a new trial on condition that the prevailing party remit such sum as shall leave the recovery not excessive in the judgment of the court. When, however, the damages are so excessive, and the circumstances as disclosed by the evidence as to other issues are such, as to indicate a fair probability that the jury were influenced by passion or prejudice in the determination of the other issues, a new trial should be granted. Whether in any given case a new trial should be granted or denied on condition that the verdict be reduced rests largely in the sound discretion of the trial court."

It will be noted that in some of the later cases the court approved of the remittitur, even where the original verdict was the result of passion and prejudice.

In a case note to the case of *Tunnel Mining & Leasing Co. v. Cooper*, 39 L. R. A. (N. S.) 1064, will be found collected several hundred cases upholding the right of the trial court, and in many instances of the appellate court, to require a remittitur as the alternative of granting a new trial to the unsuccessful party. It would unduly lengthen this opinion to set out the cases. This appears to be the almost universal practice in the state courts, and has met with the unqualified approval of the Supreme Court of the United States.

[5] And the rule is applied to cases not only where the damages are capable of ascertainment from the evidence with reasonable certainty, but in cases of unliquidated damages, and likewise in cases where exemplary or punitive damages have been awarded. In *Sutherland on Damages* (4th Ed.) § 460, p. 1518, the author says:

"Though the case be one in which exemplary damages may be awarded if the trial court grants a new trial because the award is inadequate, it may suggest, so far as the defendant is concerned, the sum he may pay to avoid such trial. The tendency of the late decisions in the state courts, except as has been otherwise indicated, is in the direction of unqualified support for the practice which allows the Appellate and trial courts, in cases in which excessive damages have been awarded, and in which plaintiff is entitled to substantial damages, to indicate the excess and give him the option to remit it and take judgment for the residue or be awarded a new trial."

(191 P.)

The case of *Gila Valley, G. & N. Co. v. Hall*, supra, decided by the Supreme Court of the United States, was a personal injury case, and that court approved of a judgment where one-half of the verdict had been remitted. Many of the cases heretofore cited were cases of unliquidated damages.

If mere excess in the verdict indicated passion and prejudice on the part of the jury, then in no case could a remittitur be allowed under the majority rule. The excess of the verdict, then, is not the determining factor in such cases, unless the verdict is so outrageously excessive and beyond all reason that in and of itself it clearly shows that it was the result of passion and prejudice.

[6, 19] The trial court, as we have said, is in a much better position to determine whether the excessive verdict was the result of passion or prejudice, and its determination should ordinarily be accepted. *Gila Valley, G. & N. Co. v. Hall*, supra. When appellate courts refused to accept the determination of the trial court as to the existence of passion and prejudice, and there is nothing in the record which apparently was calculated to arouse the prejudice and passion of the jury, and no error has intervened, and the amount of the damages to be awarded, or of the verdict, is a question upon which the minds of reasonable men might differ, and the verdict is within the instructed amount which the jury is authorized to return, and such appellate court determines for itself the question as to whether there was such passion and prejudice, and finds that it did exist, basing such finding solely upon the amount of the verdict, and the evidence discloses no rule by which the damages or award might be determined, and the law affords none, further than the unbiased and unprejudiced judgment of reasonable men, how can such appellate court, in all cases where the verdict has been found by the trial court to be excessive, refuse to set it aside? In other words, if an excessive verdict in one case indicates passion and prejudice on the part of the jury to the appellate court, absent the opportunity afforded the trial judge of personal observation and the atmosphere of the trial, why will not such excessive verdict in all cases indicate such passion and prejudice? While the trial court in this case made no specific finding upon the question, nevertheless by its action in approving of the remittitur it necessarily found that the verdict was excessive, but that such excess was not the result of passion and prejudice; otherwise it would have granted appellant's motion for a new trial.

[7, 8, 20] Thus we are brought to a consideration of the question as to whether the record here shows that the original verdict was the result of passion and prejudice on the part of the jury. This will require a consideration of the facts in the case.

Appellee was, and had been for many years, a resident of the city of Socorro, Socorro county, N. M., and apparently a man of good standing in that community. He had been a deputy sheriff, cell house keeper at the state penitentiary, marshal for many years of the city of Socorro, and in 1911 a candidate for sheriff of Socorro county. At the time of the publication of the alleged libel he was not a candidate for public office and held no official position. Appellant, by its published article, accused appellee of having desecrated the flag of the United States, by spitting upon it, stamping upon it, and breaking its standard and throwing it in the dust. This was a misdemeanor under the laws of the state. Express malice, as we shall hereafter show, was proven; consequently it was a proper case for the imposition of exemplary damages. *Colbert v. Journal Publishing Co.*, 19 N. M. 156, 142 Pac. 146. The complaint asked damages in the sum of \$50,000, and the jury was told in the instructions that it should award proper damages to compensate appellee for the injuries suffered, and that it might award exemplary damages, but that the total of such damages should not exceed the sum of \$50,000. There was no guide as to the measure of damages, save the unbiased judgment of the jury. The jury fixed the amount of damages at \$35,000, and this was, in the judgment of the trial judge, \$25,000 too high. The amount of the proper award in the case was a question upon which there might be much divergence of opinion. One man might think that even \$35,000 was too low where the person libeled had been unjustly and wrongfully accused of desecrating the flag of his country by spitting upon it and otherwise evidencing his disloyalty to it and the institutions for which it stands, and wide circulation being given the libel, in other words, being placed in the same class with *Benedict Arnold*; while others might think a much smaller amount was amply sufficient.

The case was tried by the jury just a few days before the declaration of war by the United States against Germany, and at a time when the patriotic impulses of the people had been aroused, and increased love and devotion for the flag was everywhere in evidence. At the time of the trial, had any one desecrated the flag, as Dreyfus was accused of having done, his life would not have been safe. But this intense patriotism on the part of the people generally could hardly amount to such passion and prejudice against the appellant as would vitiate the verdict. It was not the prejudice against the appellant, but it did possibly move the jury to give a larger verdict than the trial court would approve.

Appellant cites several cases where much smaller verdicts have been returned, even where the person libeled had been charged

with the commission of a felony. Indeed, there are but few cases where so large a verdict has been returned and upheld, but there are some where even a much larger verdict has been sustained. It argues that appellee was only charged with a misdemeanor; hence there was no warrant for the return of such a verdict. But there is no yardstick by which to measure the damages, and we apprehend that any man, imbued with patriotism and love of country, would suffer much greater from a charge of disloyalty and desertion of the flag than he would even though charged with a felony, and the stigma upon his family and his name would be much greater.

In *Newell's Slander & Libel* (3d Ed.) p. 1092 et seq., will be found many cases where verdicts returned in libel suits have been held not to be excessive, the verdicts ranging from very small amounts to as high as \$50,000, and on page 1107 will be found cases in which verdicts have been held excessive. Many cases in suits for unliquidated damages as large or larger remittiturs have been ordered and the judgment upheld on appeal. A few cases will suffice: *Partello v. Railroad*, 240 Mo. 122, 145 S. W. 55, the verdict was reduced from \$30,000 to \$10,000; *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S. W. 332, the reduction was from \$150,000 to \$50,000; *Finnegan v. Railroad*, 261 Mo. 481, 169 S. W. 969, the verdict was for \$50,000, and was reduced to \$25,000 by the trial court.

Appellant attempted to show that the charge published was true, and placed upon the stand for this purpose one J. W. Wilson. He did substantiate the truth of the charge, but was impeached by a showing that his reputation for truth and veracity was bad. Four or five eyewitnesses to the incident upon which the charge was predicated testified to its untruth, and the jury elected to believe them in preference to Wilson.

In mitigation it showed that in 1906 a rumor was in general circulation to the effect that Dreyfus had done the things charged, and that the charge was published in the *Albuquerque Journal* in 1911. The writer of the article in question testified that he had heard the rumor and believed it to be true, but failed to show that he had made any investigation to ascertain the truth of the same. True, he said he had made inquiries, but he failed to state the name of any person of whom he sought information. But all this evidence, assuming that it was admissible, which is very questionable (17 R. C. L. pp. 449-451; *Odgers on Libel and Slander* [5th Ed.] pp. 394, 395; *Newell on Slander and Libel* [3d Ed.] § 1048), only went to the amount of the damage, and there is nothing to indicate that the jury disregarded it, save only the amount of the verdict.

Appellant argues that the evidence shows that all the property which it owned was mortgaged, and that in view of its poverty

the verdict was so excessive as to indicate passion and prejudice. It is true there are copies of two mortgages executed by appellant in the record for something like \$50,000 or \$60,000, but these were introduced for the purpose of showing the connection of Col. Cutting with the paper; the mortgage having been executed to secure an indebtedness owing by the corporation to him. But there is not a syllable of evidence showing the value of the property owned by appellant, and, so far as this record discloses, it may have been possessed of unlimited means. There is an apparent conflict in the authorities as to the right of the plaintiff to show the wealth of the defendant and of the defendant to show his poverty. 17 R. C. L. p. 454. But, where exemplary damages are claimed, evidence of defendants' poverty has been held admissible. *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561. But in this case, as there was no showing as to the poverty of the appellant, this fact, if it existed, was not before the jury for consideration.

Appellant argues that, since express malice was not proven in the case, the jury could not assess punitive damages in its verdict. This may be accepted without question as a correct statement of the law, but we cannot agree with appellant as to the facts. There was a subsequent publication of the slanderous article, or a publication of similar nature, which we shall later show was properly admitted in evidence. In the case of *Colbert v. Journal Publishing Co.*, 19 N. M. 156, 142 Pac. 146, in an opinion by Mr. Justice Hanna, this court said:

"The authorities, in speaking of malice as an element in libel or slander, divide it into two classes, to wit, malice in law and malice in fact. Malice in law is implied malice and arises by operation of law when a publication is made without lawful excuse. *Times Pub. Co. v. Carlisle*, 94 Fed. 762 [36 C. C. A. 475]. Actual malice or malice in fact, sometimes denominated as express malice, implies personal hatred or ill will towards the plaintiff, or wanton disregard of the civil obligations of the defendant toward the plaintiff. *Jillison v. Goodman*, 43 Me. 287, 69 Am. Dec. 62; *Childers v. San Jose, etc., Co.* [105 Cal. 284] 38 Pac. 903 [45 Am. St. Rep. 40]; *Cooley on Torts* (3d Ed.) § 245; *Odgers on Libel and Slander* (5th Ed.) 341 et seq.; 25 Cyc. 372; *Times Pub. Co. v. Carlisle*, 94 Fed. 762 [36 C. C. A. 475].

"It has been quite generally held by the courts of this country that repetitions of the alleged defamatory matter or other defamatory publications of a similar character are admissible to show actual or express malice on the part of the defendant. *Ransom v. McCurdy*, 140 Ill. 626 [31 N. E. 119]; *Meyer v. Bohlring*, 44 Ind. 238; *Sharp v. Bowler*, 103 Ky. 282 [45 S. W. 901]; *Bailey v. Bailey*, 94 Iowa, 598 [63 N. W. 341]; *Davis v. Starrett*, 97 Me. 568, 55 Atl. 516; *Hastings v. Stetson*, 130 Mass. 76; *Frederickson v. Johnson*, 60 Minn. 337, 62 N. W. 388; *Krup v. Corley*, 95 Mo. App. 610 [69 S. W. 609]; *Enos v. Enos*, 135 N. Y. 609 [32 N. E.

1231; Cavanaugh v. Austin, 42 Vt. 576; Hansbrough v. Stinnett, 25 Grat. [Va.] 495; Swindell v. Harper, 51 W. Va. 381, 41 S. E. 117; Odgers, p. 349; Newell (2d Ed.) p. 549.

"In the present case there appears to have been a republication of the original article, and other publications with reference thereto, which, having been proven, furnishes the evidence of express malice, or malice in law, asserted to be lacking in this case."

The subsequent publication was made after certain officers of the New Mexican Printing Company had been arrested for criminal libel, and when the officers and agents of appellant knew that appellee denied the charge. Appellant is foreclosed as to this contention by the Colbert Case; hence, in determining whether this verdict is so grossly excessive as to indicate passion and prejudice, we must take into consideration the fact that the jury included in its award exemplary damages by way of punishment.

In arriving at the question as to whether the size of this verdict indicates passion and prejudice, let us glance at the guide posts pointing in either direction:

First. The jury were told that they could properly allow compensatory and exemplary damages, malice in fact having been shown, not to exceed \$50,000.

Second. The verdict of the jury and the evidence supporting it showed that the article was published of and concerning appellee without excuse or justification; that at the time of its publication appellant was not before the public in any manner, and apparently was taking no part in the political campaign which inspired its publication.

Third. The publication was admitted and the evidence abundantly established its untruth.

Fourth. By the article appellee was charged with desecrating the United States flag.

Fifth. No error intervened upon the trial of the cause (at least none has been called to our attention), and no fact is shown which was calculated to arouse the prejudice or passion of the jury.

Sixth. The trial judge evidently found that the verdict was not the result of passion and prejudice, and he possessed superior advantages over the appellate court in determining this question.

Seventh. Larger verdicts in similar cases have been upheld, and much larger remitturs have been required, and appellate courts have upheld the same as being free from passion and prejudice, viz.: Cook v. Globe Publishing Co., 227 Mo. 471, 127 S. W. 332, original verdict \$150,000 reduced by remittitur to \$50,000; Duke v. Morning Journal Association (C. C.) 120 Fed. 860, and 128 Fed. 657, 63 C. C. A. 459, original verdict \$36,000 reduced to \$20,000; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668, a verdict for \$27,000 was held not excessive; Young v. Fox, 26 App. Div. 261, 49 N. Y. Supp. 634, verdict

for \$25,000 held not excessive; Press Pub. Co. v. Gillette, 229 Fed. 108, 143 C. C. A. 384, verdict for \$20,000 held not excessive.

As pointing toward passion and prejudice we have two circumstances alone, viz. the size of the verdict, and the further fact that in many cases for libel, even where a felony was charged, much smaller verdicts have been returned.

In view of all the facts and circumstances, as heretofore recited, we are not prepared to say that the verdict in question was returned as the result of passion and prejudice on the part of the jury; hence this question must be resolved against appellant.

[9] The second point urged is that the court erred in giving instruction No. 5 to the jury, on the subject of punitive damage. No objection was interposed by appellant to the giving of this instruction, and no exception saved, and under the familiar rule that, where the vice in an instruction is not pointed out to the trial court and proper exceptions saved, in the event the instruction is given, this court will not review error predicated upon the giving of the same (Spencer v. Gross Kelly & Co., 22 N. M. 433, 163 Pac. 1087; Tietjen v. McCoy, 24 N. M. 94, 172 Pac. 1042), this question is not here for review.

[10, 11] The third point urged is that the court erred in admitting in evidence Plaintiff's Exhibit B, for the reason that it was privileged and could not be offered to prove malice, nor for any other purpose in the case. The exhibit in question is as follows:

"[Taken from Santa Fe New Mexican, October 11, 1916.]

"Mr. Bursum is working this time through one of his tools named Henry Dreyfus, his city marshal in the town of Socorro, where they bulldoze bill posters and crippled movie proprietors and threaten their livelihood if they dare to exhibit Democratic bills or slides. The city marshal is the gentleman whom Mr. Bursum ran for sheriff in 1911 and who was repudiated by the dear voters. Mr. Bursum, through Henry Dreyfus and through Hon. Judge Amos Green, a Bursum justice of the peace, through an illegal warrant, to-day sought to seize and capture the person of Col. Bronson M. Cutting, president of the New Mexican Printing Company, and hale him in chains, manacles, fetters, and disgrace, to Mr. Bursum's Socorro county jail. The chains, however, failed to clank.

"Sheriff Emil James, of Socorro county, arrived to-day at noon and served a warrant on Col. Cutting, sworn out by Hon. Judge Amos Bursum Green, on complaint of one Henry Bursum Dreyfus, charging Col. Cutting, who returned yesterday from El Paso, with wickedly libeling Dreyfus by reason of a statement printed in this paper Saturday to the effect that 'a Bursum henchman named Dreyfus, in the days of Gov. Hagerman, tore down the American flag in Socorro and stamped on it,' and otherwise desecrated it. It will be remembered that the infamous incident of flag desecration in

Socorro was one of the things used with telling effect by Gov. Hagerman and newspapers in the campaign which defeated Bursum in 1911. Mr. Bursum, through Henry Dreyfus, who thus claims that he is the 'Bursum henchman named Henry Dreyfus' mentioned, also brings a civil suit for libel damages in the modest sum of \$50,000, papers in this case being served today on President Cutting and Secretary Dorman of the New Mexican Printing Company."

The rule is that evidence of the repetition of defamatory matter is competent to show malice. It is thus stated by Newell on Slander and Libel (3d Ed.) § 404:

"Any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the animus of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on, or to some one else. Such other words need not be connected with or refer to the defamatory matter sued on, provided they in any way tend to show malice in defendant's mind at the time of publication."

See, also, *Colbert v. Journal Publishing Co.*, 19 N. M. 156, 142 Pac. 146.

Was the article in question privileged? If so, it would afford no evidence of malice and was improperly admitted in evidence.

"Every impartial and accurate report of any proceeding in a public law court is privileged." Newell on Slander and Libel (3d Ed.) § 646.

And this is the general rule, and applies to all proceedings in any court of justice, superior or inferior, whether of record or not. While a person may publish a correct account of the proceedings in a court of justice, yet, if he discolors or garbles the proceedings, or adds comments and insinuations of his own in order to asperse the character of the parties concerned, it is libelous, and not privileged. *Thomas v. Crowell*, 7 Johns. (N. Y.) 264, 5 Am. Dec. 269.

In 17 R. C. L. p. 346, it is said:

"Although a person may publish a correct account of the proceedings in a court of justice, if he discolors or garbles the proceedings, or adds comments and insinuations of his own in order to asperse the character of the parties concerned, it is libelous."

In Newell on Slander and Libel (3d Ed.) § 647, many cases will be found illustrating the rule.

If Exhibit B is tested by the above rule, it will be found to be clearly libelous, hence not privileged. It contains comments and insinuations of the publisher tending to cast aspersions upon the character of Dreyfus, outside the facts of the judicial proceedings. One example will suffice. After reciting the statement theretofore published upon which the criminal charge was based, it continued:

"It will be remembered that the infamous incident of flag desecration was one of the things used with telling effect by Gov. Hagerman and newspapers in the campaign which defeated Bursum in 1911. Mr. Bursum, through Henry Dreyfus, who thus claims that he is the 'Bursum henchman named Henry Dreyfus' mentioned, also brings a civil suit."

See, also, 25 Cyc. 406-409.

We do not understand appellant to contend that sections 1730 and 1732, Code 1915, make this publication privileged. Those sections relate only to criminal libel, and can have no application to this case.

We conclude that the court properly permitted the second publication to go to the jury for the purpose of proving express malice.

[12, 13] It is next urged that the court erred in permitting Appellee's Exhibit B to go to the jury without limiting its scope or cautioning the jury not to allow damages for such publication. There are two reasons why this alleged error cannot be considered: First, appellant did not ask the court to so instruct the jury, hence cannot complain of its failure in that regard (*State v. Baker*, 17 N. M. 479, 131 Pac. 489; *State v. Johnson*, 21 N. M. 433, 155 Pac. 721); second, the failure of the court to so instruct was not assigned as error, and it is well settled that an appellant in a civil case cannot urge upon the court for consideration a question not raised in his assignments of error.

[14] The fifth point is predicated upon the action of the court in permitting counsel for appellee on cross-examination to inquire into the political affiliations of certain witnesses for the appellant. Appellant placed upon the stand certain witnesses, for the purpose of showing that rumors were circulated in Socorro in 1906 and in 1911 to the effect that appellee had desecrated the flag, and such witnesses were asked as to whether they believed the rumors to be true. This was admitted by the trial court for the purpose of mitigating the damages by showing the good faith of appellant. Some of the witnesses were asked as to their political affiliations at that time. The evidence in the case showed that in 1906 there was a heated political controversy on between Gov. Hagerman and H. O. Bursum, one of the leading Republicans of the state. Dreyfus was city marshal for many years, under appointment by Mr. Bursum, who was mayor of Socorro. In 1911 Mr. Bursum was a candidate on the Republican ticket for Governor, and Mr. Dreyfus was a candidate for sheriff of Socorro county on the same ticket. The flag incident was used for the purpose of discrediting both Bursum and Dreyfus with the voters of the state and Socorro county. These witnesses testified that they heard rumors of the incident in 1911 and theretofore, and believed them to be true. The court permitted the inquiry on cross-examination as to their polit-



ical affiliations for the purpose of showing bias and prejudice, in order that the jury might determine what, if any, influence upon their testimony their political prejudice might have. Appellant cites but one case in support of its contention, viz. *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216, which was a case where, in a personal injury suit, counsel for plaintiff on cross-examination attempted to show that defendant had not shown proper sympathy or paid proper attention to the plaintiff after he was injured. The court held that such evidence was improper. That case affords no support for the present contention.

Familiar principles will disclose that the evidence was properly admitted. In *Jones on Evidence*, § 821, vol. 5, p. 117, the author says:

"All matters that may modify, explain, contradict, rebut, or make clearer the facts testified to in chief by the witness may be gone into on cross-examination."

And further, at section 826, vol. 5, p. 128, the same author says:

"For the purpose of testing the credibility of a witness, it is permissible to investigate the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, inclinations, and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony," etc.

The jury had a right to know whether the witnesses in question were affiliated with, and in some cases active in behalf of, the party which made use of the truth of the charge against Dreyfus to encompass his defeat, and likewise the defeat of the man who had appointed him to the office of city marshal, and to weigh such fact in determining whether they were unprejudiced and unbiased in the present controversy. Of course, the fact that whether a witness is a member of one political party or the other ordinarily would have no effect upon his testimony or the weight to which it would be entitled. But in a case directly growing out of a political controversy, where the witnesses on either side may be more or less influenced by their political affiliations, and where, as here, the witness might be inclined to believe or disbelieve rumors or form opinions as to the truth of a given matter, one way favorable to his party, and the other contrary to its interest, why should not the political affiliations of the witness be laid before the jury along with all the other facts, so that the jury will be in a position to determine what, if any, influence, upon the testimony of the witness his political affiliations might have? It is clearly competent on cross-examination to show the relationship existing between the witness and the parties to the case, the friendship or enmity existing between the witness and the parties, and

any other fact that will enable the jury to determine whether the witness has any motive for suppressing or discoloring the truth. Hence no error was committed by the trial court in permitting the inquiry.

Our holding that there was evidence of express malice disposes of appellant's seventh point. Under this point it is argued that the court should have instructed the jury that the elements of exemplary damages could not enter into their verdict. The court properly refused to so instruct the jury.

Dreyfus, as a witness, testified as follows:

"I don't remember that any person at that time asked me anything in regard to the flag; I didn't think about the flag until 1911, when the paper, not the New Mexican, but the Journal, had my picture and Mr. Bursum behind me. When I was painted by the paper there, that I was the man that had the flag, and Mr. Bursum right behind me, saying I was his man—I was running as a candidate for sheriff—I made a protest; I sent one to the New Mexican and one to the Journal denying this."

[15] Attorney for appellant objected and moved to strike out the answer and take it from the jury "as no foundation has been laid for his testimony." The trial court, in ruling on the objection, said:

"He certainly can't be denied the right to show his protest and his denials, when you have shown by your witnesses that they had never heard of his denials. It doesn't come within the rule of a certain communication—the act merely. I will overrule the objection. Go ahead; save your exception."

Appellant here argues that no foundation for this testimony was laid, because the witness did not show that he had deposited the notice in the United States post office, properly stamped and addressed, and in support of this contention it cites the case of *Feder Silberberg Co. v. McNeil*, 18 N. M. 44, 133 Pac. 975, in which case it was held that there was a failure of proof of demand upon the defendant for the return of the sample delivered into his custody for the reason that it did not appear from the evidence that the letter containing the demand had been addressed, stamped, and deposited in a proper place for the receipt of mail, and that the presumption of mail being received when it is properly addressed, mailed, stamped, and deposited in a post office or post office box could not arise from the testimony that the letter had been "mailed."

From the statement made by the trial judge in ruling upon the objection it is clear that he did not have in mind the objection which appellant here urges. In objecting to the admissibility of evidence, it is the duty of counsel to advise the court specifically of the ground of objection, so that the court can intelligently rule thereon, and in order to enable counsel to obviate the ob-

jection if possible. In 9 Ency. of Evidence, p. 79, it is said:

"Thus the general objection that evidence is 'incompetent, irrelevant, and immaterial,' or that a sufficient foundation has not been laid for its admission, is too general."

In the case of *Tanderup v. Hansen*, 8 S. D. 375, 66 N. W. 1073, the court said:

"The objection 'that the proper foundation had not been laid' was too general to be available to the appellant in this court. The specific objection that it had not been shown that the witness could give the substance of all the testimony of the deceased witness, both on the direct and cross examination, should have been made, in order to have called the attention of the court and opposing counsel to the particular point of the objection."

See, also, to the same effect, *Clark v. Conway*, 23 Mo. 438; *Walker v. Hoeffner*, 54 Mo. App. 554; *People v. Conklin*, 111 Cal. 616, 44 Pac. 314.

Had appellant called the attention of the court to the specific point which he now makes, and the notice had in fact been sent by mail, in the absence of proper preliminary proof, undoubtedly the court would have sustained the objection. For the above reason this objection will not be here considered. But, aside from this, the witness later testified that a response to the notice was published in appellant's newspaper. A part of the witness' testimony in this regard was stricken by the court upon motion of appellant, but to the following testimony appellant made no objection, and it is in the record:

"A. It was in the paper.

"Q. Did you see the paper? A. Yes, sir.

"Q. Where is the paper? A. I don't know."

This possibly cured the error, but it is not necessary to pass upon this question.

[16] Appellant placed upon the stand *Ex-Gov. H. J. Hagerman* and other witnesses, who testified that *Gov. Hagerman* in 1906 was holding a hearing in *Socorro*, and that certain men came into the room where the hearing was being held, carrying a flag with a broken staff and badly mussed up, and presented the flag to *Gov. Hagerman*. This was the flag which it was charged *Dreyfus* had desecrated. *Mr. Hagerman* and other witnesses testified to rumors to the effect that *Dreyfus* had desecrated the flag. By rebuttal evidence appellee sought to show that the men who brought the flag to *Gov. Hagerman* were intoxicated. Appellant argues that this evidence was inadmissible, but there is no merit in this contention. The story apparently originated from these men, and as appellant had gone fully into the facts of the presentation of the flag to *Gov. Hagerman*, it was competent for appellee to show that the men were intoxicated at that time.

[17] Lastly it is urged that the court erred

in not setting aside the verdict upon the affidavit showing contained in the motion for a new trial as to the misconduct of counsel, for the reason that such misconduct went to the proposition that it did not have a fair trial. An affidavit made by one witness and filed with the motion stated positively that during the cross-examination of appellee his counsel signaled to him, by putting one hand to his face when he desired a negative answer and the other when he desired an affirmative answer, and by raising both hands when he desired a noncommittal answer. The affidavits of four other witnesses were filed, but these were not so direct and positive and afforded but very slight evidence as to the charge made.

Upon the trial the matter had been called to the attention of the court, and counsel for appellee vehemently denied the charge. Nothing further was done as to the matter during the trial. The court denied the motion for a new trial, without any statement as to the alleged misconduct, but by the denial of the motion evidently found that such misconduct did not occur. In 14 Ency. of P. & P. p. 930, it is said:

"Generally the motion for a new trial is addressed to the discretion of the court, except where a party is entitled to a new trial as a matter of right. The trial court, having seen and heard all that takes place on the trial, and having better opportunities for the ascertainment of the merits of the case, is allowed a wide latitude of discernment in determining motions for new trial, and appellate courts are reluctant to interfere unless it clearly appears that such discretion has been abused."

The trial court probably did not doubt the good faith and honest belief of the witnesses who testified to the supposed signaling by the attorney to the witness, but concluded from his own observations that such did not occur. He was in a position to see and know what was taking place, and, as lawyers well know, very little escapes the notice of the astute judge.

But, aside from this, it would be an anomalous practice indeed that would cast upon a party to a suit the burden of proving or disproving some fact that occurred, or is alleged to have occurred, in the presence of the judge upon the trial of a case, and about which the judge may have personal knowledge. What occurs upon the trial of a cause, in the presence of the judge, is within the knowledge of the judge, and must be recited in the bill of exceptions, and cannot be made a part of the record by *ex parte* affidavits.

In the case of *Peyton v. Village of Morgan Park*, 172 Ill. 102, 49 N. E. 1003, the court said:

"What is done by the judge or what occurs in his presence is within his knowledge and must be recited over his certificate, and cannot be made a part of the record by *ex parte* affidavits."

In this case, on motion for new trial, the unsuccessful party attempted to show certain action by the judge in endeavoring to ascertain whether the jury had agreed.

In the case of *Mayes v. People*, 106 Ill. 306, 46 Am. Rep. 698, it was attempted to be shown by affidavit that the state's attorney had made certain unwarranted statements of fact in his closing argument. The court said:

"This is not shown by proper recitals in the bill of exceptions, as it should be if it is to be considered by us, but appears only in an ex parte affidavit of the prisoner, made and presented in support of the motion for a new trial. If the fact occurred, it is to be presumed the judge knew it, and there was no need of an affidavit to bring it to his attention."

In the case of *Kelly v. O., R. I. & P. R. Co.*, 175 Ill. App. 196, the court said:

"What is done by the trial judge and what occurs in open court in his presence is within his knowledge and must be recited in the bill of exceptions vouched for by his certificate, and cannot be made a part of the record by ex parte affidavits. If such a practice should be tolerated, then on a motion for a new trial affidavits might be filed to show what rulings the court made upon the evidence and upon the instructions. If a trial judge does not remember what occurred, he may refresh his recollection by examining the stenographer's notes, by recalling witnesses or jurors, or he may receive affidavits, but, when his recollection has been refreshed, it is he who must certify to the fact, and such fact can only be reviewed upon his certificate as to what occurred. Indeed, if after the filing of such an affidavit for a new trial the court denies the motion, it will be presumed in support of the action of the court that the presiding judge, of his own knowledge, knew that the statements in the affidavits of what occurred in open court were untrue."

Other authorities to the same effect will be found cited in the cases referred to. In the case of *State v. Balles*, 24 N. M. 16, 172 Pac. 196, appellant attached to his motion for a new trial certain affidavits tending to show certain improper remarks by the trial judge to certain of the jurors who sat in a former case, tried at the same term, for their failure in that case to find the defendant guilty. We said:

"The statement is in no manner authenticated as the record in this case; it is simply contained in appellant's motion for a new trial. We have no way of ascertaining whether it is true or not. It should have been settled as a part of the bill of exceptions."

As this question is not here for consideration, nothing further need be said.

Finding no error in the record, the judgment will be affirmed; and it is so ordered.

PARKER, C. J., and REYNOLDS, J., concur.

(26 N. M. 262)

HENDERSON et al. v. DREYFUS.  
(No. 2166.)

(Supreme Court of New Mexico. June 30, 1920.)

(Syllabus by the Court.)

1. Appeal and error  $\Leftrightarrow$  776—Appellant cannot as of right dismiss appeal.

An appellant cannot, as a matter of right, dismiss an appeal. Such dismissal may be had only by leave of court.

2. Courts  $\Leftrightarrow$  65—Commencement and duration of Supreme Court term stated.

The Supreme Court of the state of New Mexico, under the Constitution, holds one term of court each year, commencing on the second Wednesday in January, and such term continues until the beginning of the next succeeding term.

3. Judgment  $\Leftrightarrow$  298, 341—Power of court over judgment during term is unlimited.

The power of the court over its judgment during the entire term at which they are rendered is unlimited, and the court may, during such term, without notice to the parties, vacate, modify, or set aside its judgments.

Appeal from District Court, Valencia County; Mechem, Judge.

Action by Henry Dreyfus against the New Mexican Printing Company and Ralph M. Henderson. Directed verdict for Cutting and verdict for plaintiff for \$35,000 against the New Mexican Printing Company, its motion for new trial granted unless plaintiff remitted the verdict in excess of \$10,000, which remittitur was filed, and judgment against the New Mexican Printing Company in that sum, and Ralph M. Henderson its receiver brings error. After an affirmation the appeal was dismissed and the opinion withdrawn, but subsequently the case was reinstated. On motion to vacate order of reinstatement. Motion denied.

Lorlon C. Collins, of Santa Fé, for plaintiffs in error.

ROBERTS, J. A judgment was rendered against the New Mexican Printing Company in the district court of Valencia county for \$10,000 in an action of libel instituted by appellee Dreyfus. Afterwards the printing company became insolvent, and Ralph M. Henderson was appointed receiver and prosecuted the appeal. On the 8th day of May, 1919, an opinion was filed by this court affirming the judgment of the trial court. For a full statement of the facts and the opinion, see 191 Pac. 442.

Various extensions of time to file a motion for rehearing were granted plaintiff in error, and the case was pending upon leave to file such motion, when, on the 22d day of October, 1919, upon stipulation of counsel for the respective parties, and at the earnest solicita-

tion of counsel for plaintiff in error, this court entered an order dismissing the appeal and withdrawing the opinion from the files. On the next day there appeared in the Santa Fé New Mexican, a daily newspaper published and controlled by the same parties who were managing and directing its policies at the time of the publication of the articles which gave rise to the present action, an article with large and conspicuous headlines which gave an incorrect and misleading account of the reasons which prompted this court to withdraw its opinion and dismiss the action. The dismissal of the appeal and the withdrawal of the opinion, as stated, were done upon the earnest solicitation of counsel for plaintiff in error and as an act of grace extended to such party. While it is true the parties had stipulated that the appeal might be dismissed and the opinion withdrawn, they, of course, had no control over the opinion or the judgment after it had been rendered, save the right to enter satisfaction thereof. The article, published the next day by the newspaper referred to, gave out the false impression that the opinion handed down was erroneous, was a one-judge opinion, and was withdrawn by the court of its own motion; that the newspaper had won a great victory, and the article was calculated to, and did, place this court in a false position. Subsequently both counsel who appeared for plaintiff in error in the negotiations leading up to the dismissal of the appeal and the withdrawal of the opinion—both of whom are gentlemen of the highest personal and professional character—appeared before the court and disclaimed any knowledge of the intention to publish such an article, and withdrew from further representation of plaintiff in error.

On the 24th day of October, 1919, this court, upon its own motion and without notice to any of the parties, entered the following order:

"For reasons satisfactory to the court, the court now, of its own motion, sets aside the order heretofore entered in this cause, on, to wit, the 22d day of October, 1919, withdrawing the opinion heretofore filed on the 8th day of May, 1919, and dismissing the writ of error at the costs of plaintiffs in error, and

"It is ordered that said cause be restored to the docket of this court, and the opinion so withdrawn from the files be restored to the files as the opinion of this court in said cause, and that the plaintiff in error be given 10 days' time within which to file a motion for rehearing."

Thereafter, and prior to the expiration of the January, 1919, term of this court, plaintiff in error filed a motion to vacate said order, which stated grounds as follows:

"First. That said order of, to wit, October 24, 1919, and the proceedings of the court in making said order, are void and of no effect, inasmuch as the same are and were among other

things, beyond the power, authority and jurisdiction of the court.

"And for further grounds of their motion and as further objections to said order and proceedings, and also as reasons supporting the present motion and each and every ground and point thereof, they further set out, allege and show to the court:

"Second. That said order and proceedings were made and had sua sponte, and without motion, demand or request of any party litigant herein or of any one authorized to initiate or apply for said proceeding or order.

"Third. That from and after the making of its said order of October 22, 1919, this court became, was, and ever since has remained, without jurisdiction to make said order or to undertake said proceedings.

"Fourth. That said opinion so written had not become a final opinion of the court and should not so appear on its records or be published as an opinion of the court at the cost of the taxpayers or otherwise, and could not be reinstated after being withdrawn as aforesaid.

"Fifth. That said opinion, being withdrawn as aforesaid, became of no virtue nor effect, and that said cause having been terminated by the action of the parties thereto there was no pending cause between them in which an opinion could or should be filed.

"Sixth. That said order and proceedings were not made or had to correct any clerical or other error or any inadvertence or mistake, but that the order of, to wit, October 22, 1919, duly and properly expressed the decision and intent of the court and duly and properly carried out the stipulation and agreement of the parties and fixed the rights and status thereof in accordance therewith and as they were lawfully entitled to have them fixed and remain and that the court could not lawfully place them again in the position of litigants.

"Seventh. That said order and proceedings were made and had without notice to these movants and without opportunity to be heard wherefore, as well as for all of the reasons set out above, movants were deprived of liberty and property without due process of law and in violation of the provisions of the fifth amendment to the Constitution of the United States of America in that behalf provided, and in violation of the provisions of section 1 of the fourteenth amendment to the Constitution of the United States of America in that behalf provided, and in violation of the provisions of section 4 of article 2 of the Constitution of the state of New Mexico, providing that all persons have an inherent and inalienable right of enjoying and defending life and liberty, of acquiring, possessing and protecting property and of seeking and obtaining safety and happiness, and of section 18 of article 2 of the Constitution of the state of New Mexico, providing that no person shall be deprived of liberty or property without due process of law nor shall any person be denied the equal protection of the laws, and especially and particularly because under and by virtue of the said constitutional provisions and each of them, all persons are entitled to discontinue, cease and determine litigation pending between them and set their controversies at rest not only in fact, but also upon the records of the court, upon such terms

and conditions as they may stipulate, subject only to such approval and control of the courts as may be necessary or requisite (if any) for their protection, and for the protection of their jurisdiction, prerogatives and rights, which approval and consent was in the instant case duly and fully had and given and all such protection fully afforded by the said order of October 22d, 1919, and for the proceedings upon which same was founded, to which reference has heretofore been made, after which jurisdiction of this Honorable court in said matter ceased and determined and thereafter it became and ever since has remained without jurisdiction or power to make the said order of, to wit, October 22, 1919, or to take the proceedings upon which the same was based."

Plaintiff in error does not here question the propriety of the court's action, but stands solely upon the proposition that the court had lost jurisdiction of the case and the parties and had no further control over its judgment; hence further attention need not be given to the reasons which prompted the action taken.

The motion was argued by plaintiff in error under two propositions of law which were stated as follows:

"(1) The parties had a right to dismiss the appeal, especially with the consent and approval of the court, and after such dismissal the court had no jurisdiction of the case.

"(2) The order of October 24th, by which the court sought to have dismissal set aside and to restore the appeal, without notice to the plaintiffs in error, constituted a deprivation of liberty and property without due process of law."

In support of the first proposition, counsel cites the cases of *Westerfield v. Rogers*, 174 N. Y. 230, 66 N. E. 813, and *Cline Plano Co. v. Sherwood*, 57 Wash. 239, 106 Pac. 742, and 2 R. C. L. 168. These authorities, however, do not go to the extent claimed for them by counsel. The New York case was where the Appellate Division dismissed an appeal and as part of the same order attempted to vacate and set aside the judgment appealed from. The court of appeals held, and correctly, that it could not in the same judgment dismiss an appeal—which of course deprived the court of jurisdiction over the judgment, and at the same time vacate and set aside the judgment appealed from. The Washington case simply held that the parties may settle and satisfy the debt pending entry of judgment.

[1] The authorities are uniform to the effect that an appeal cannot be dismissed except on leave of court, and that an appellant cannot, as a matter of right, dismiss an appeal. Many authorities to this effect will be found collected in 4 C. J. 564. In 6 Ency. P. & P. 870, it is said:

"The court exercises, under every form of procedure, a latent discretion in the allowance or denial of a voluntary termination of the suit by the plaintiff."

The discretion of the court, of course, cannot be used arbitrarily or in defiance of the rights of the plaintiff. The court has, however, undoubted control over the right of dismissal and discretion to grant or refuse the right, which of course is a judicial discretion, and the right to refuse the dismissal should not be exercised save upon justifiable grounds. Here at the time the stipulation for a dismissal of the appeal was filed the judgment of the trial court had been affirmed and an opinion filed. The parties could have satisfied the judgment, but of course had no control over the opinion of this court and no right to direct the court to withdraw the judgment. The setting aside of the judgment and the withdrawing of the opinion, as heretofore stated, were acts of grace extended to the parties by the court.

The second proposition urged by plaintiff in error is discussed under two heads in the brief filed: First, that a failure of the court to give notice of its intended action was a deprivation of liberty and property without due process of law; second, that the court had no power, either with or without notice, to set aside the order of dismissal. Many cases are cited discussing due process of law, which of course has a well-known and understood meaning, and would be applicable if, under the circumstances, plaintiff in error was entitled to notice.

[2] We will discuss both propositions together as they are directly related here. The Constitution of the state provides (section 7, art. 6) that—

"The Supreme Court shall hold one term each year, commencing on the second Wednesday in January, and shall be at all times in session at the seat of government."

The order of dismissal was entered on the 22d day of October, 1919, and the order setting aside the same was entered on the 24th day of the same month; hence both orders were entered at the same term of court.

[3] In *Freeman on Judgments* (4th Ed.) § 90, the author says:

"The power to vacate judgments was conceded by the common law to all its courts. This power was exercised in a great variety of circumstances, and subject to various restraints. The practice in the different states is, in many respects, so conflicting that few rules can be laid down as universally applicable. One rule, however, is undoubted. It is, that the power of a court over its judgments, during the entire term at which they are rendered, is unlimited. Every term continues until the call of the next succeeding term, unless previously adjourned sine die. Until that time the judgment may be modified or stricken out."

The Supreme Court of the United States, in the case of *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872, said:

"The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable." *Goddard v. Ordway*, 101 U. S. 745, 25 L. Ed. 1040.

In the latter case the court said:

"As a part of the 'roll of that term,' they are deemed to be 'in the breast of the court during the whole of the term.'"

See, also, *Ætna Life Ins. Co. v. Board of County Commissioners*, 79 Fed. 575, 25 O. C. A. 94. In the case of *Smith v. Perkins*, 124 Mo. 50, 27 S. W. 574, the court held that a circuit court could, of its own motion, set aside a judgment rendered by it at the same term, and take the case under advisement.

In the case of *Durre v. Brown*, 7 Ind. App. 127, 34 N. E. 577, the control of the court over its judgments during the same term is exhaustively and ably discussed. The court said:

"The theory of the law is that courts have full and complete control of the record of their proceedings during the entire term at which such proceedings are had, and, during the term, the court may, for good cause shown, correct, modify, or vacate any of its judgments. Any proceeding in a court is in fieri until the close of the term. When the parties are once rightfully in court, its jurisdiction over them continues without further notice as long as any steps can be rightfully taken in the cause. *Burnside v. Ennis*, 43 Ind. 411; *Knight v. State*, 70 Ind. 375; *McClellan v. Binkley*, 78 Ind. 503; *Stout v. Duncan*, 87 Ind. 383; *Chicago, etc., R. W. Co. v. Johnston*, 89 Ind. 88.

"It is for these reasons that no notice is required when the motion is made during the term. After the term has closed, and the proceedings have ceased to be in fieri, no legal steps can be taken against any party who has a substantial interest in them, except after notice given."

This case and the authorities therein cited conclusively dispose of both contentions urged by plaintiff in error. The proceeding being in fieri until the close of the term, no notice was required to be given the parties as to the contemplated action of the court. They were supposed to be present in court and cognizant of all proceedings taken in the case during the term.

Plaintiff in error cites the following cases which, it is contended, hold that the court had not the power to vacate the order of dismissal and reinstate the case without notice: *Green v. Driskell*, 99 Ga. 624, 25 S. E. 938; *Johnson v. First National Bank of Whiting* (Ind. App.) 117 N. E. 676; *Goodrich v. Huntington*, 11 Ill. 646; *Collins v. McBlair*, 29 App. D. C. 354; *Karrick v. Wetmore*, 22 App. D. C. 487.

In the Georgia case the following quota-

tion from the syllabus will show that the order vacating the judgment was made after the term had expired:

"An order granted thereafter in vacation, and without notice to the opposite parties or their counsel, by the terms of which the judgment of dismissal is vacated and a reinstatement of the case directed, is void."

In the case of *Johnson v. First National Bank*, supra, the order redocketing an action theretofore dismissed was made at a subsequent term.

In the case of *Goodrich v. Huntington*, supra, an order of dismissal was entered. Afterwards, and during the same term, without setting aside the order of dismissal, the court proceeded to render a judgment at the instance of the plaintiff. The court simply held that the judgment was void because made after the order of dismissal had been entered and without first setting aside the order of dismissal.

The case of *Collins v. McBlair*, supra, is not in point. That was an action in the nature of a creditor's bill to subject to sale the interest of one, in certain lands in satisfaction of two judgments. The following quotation from the syllabus clearly shows the inapplicability of this case to the point here under discussion:

"Scire facias to renew a former judgment is a judicial writ, expiring within a year and a day from its issuance, although it may be converted into an action by appearance and plea by the defendant; and where the defendant does not appear, and the plaintiff fails to obtain a fiat thereon within that period, the proceeding is discontinued; and a subsequent fiat, without a new writ, before the expiration of twelve years from the last renewal of the judgment, will not bind the defendant."

Neither is the case of *Karrick v. Wetmore*, supra, in point. We quote from the syllabus as follows:

"A suit begun in the name of a deceased plaintiff is a nullity, and under District of Columbia Code, § 399, allowing amendments in 'pending' cases, a declaration in such a suit cannot be amended by substituting as plaintiff the administrator, even though that section of the Code should be liberally interpreted."

For the reasons stated, we conclude that at the time the order of October 24 was entered vacating and setting aside the order of dismissal, this court had full control over the judgment theretofore entered, and no notice to plaintiff in error of its action was necessary.

For these reasons the application to set aside the order of reinstatement will be denied, and it is so ordered.

PARKER, C. J., and RAYNOLDS, J., concur.

(26 N. M. 277)

(191 P.)

## In re MIERA'S ESTATE.

BOND-CONNELL SHEEP CO. v. MIERA  
et al.

(No. 2349.)

(Supreme Court of New Mexico. July 1,  
1920.)*(Syllabus by the Court.)*Sales  $\Rightarrow$  72(1)—Cull lambs held not included  
in contract for purchase of sheep.

Contract for purchase of sheep construed.

Appeal from District Court, Sandoval  
County; Raynolds, Judge.Action by the Bond-Connell Sheep Com-  
pany against V. S. Miera and others, as ad-  
ministrators with will annexed of the es-  
tate of E. A. Miera, deceased. Judgment  
for plaintiff, and defendants appeal. Af-  
firmed.

A. B. Renehan, of Santa Fé, for appellants.

A. B. McMillen, of Albuquerque, for appel-  
lee.ROBERTS, J. On March 11, 1916, E. A.  
Miera, of Cuba, New Mexico, signed the fol-  
lowing contract:

## "Sheep Contract.

"Albuquerque, N. M., March 11, 1916.

"This is to certify that I have this day sold to Bond-Connell Sheep & Wool Company, or their representative, of Albuquerque, N. M., not less than 5,000 to 8,000 head of unshorn lambs out of my flocks, and what I purchase and all the lambs I sell, Navajo Lambs not included in this contract, earmarked, at the price of seven cents per pound to be delivered f. o. b. cars, weighing and inspection fees paid, at Lamy, N. M., between the 15th day of Nov., 1916, and the 20th day of Nov., 1916, at the option of the buyers and subject to the railroad company furnishing cars (seller to hold lambs at their own expense until cars are furnished). Said lambs to be free from body wrinkles, from scab and all other diseases, and to pass both U. S. government and state inspections. I further agree that I will not top my herds before making delivery on this contract. At the time delivery is made the lambs as to be in good merchantable condition to have dry fleeces and the minimum weight of any lamb on this sale shall not be less than 45 pounds, and the average weight not less than 53 pounds after the same have been in a dry corral without feed and water for at least twelve hours.

"Received on this bill of sale as part payment the sum of three thousand dollars (\$3,000.00) balance to be paid when delivery is

completed. All cull lambs (nothing under 35 pounds) at 6½ cts. All subject to conditions named in contract above.

"[Signed] E. A. Miera."

The contract was accepted by the Bond-Connell Sheep & Wool Company in writing, and \$3,000 was paid in cash on the contract at that time. Before time for performance of the contract Miera died, and his administrators delivered to the Bond-Connell Company 1,329 lambs, which averaged 53 pounds in weight, all being over the minimum weight of 45 pounds. 1,451 "cull" lambs were delivered at the same time.

Appellee sued appellant in the court below for damages for failure to deliver a minimum of 5,000 head of lambs of the average weight of 53 pounds, claiming that only 1,329 lambs of the kind contracted for had been delivered, and that appellants should have delivered 3,671 additional lambs of such average weight.

The only controversy in the court below and here is as to the construction of the contract. Appellants' contention is that the "cull" lambs should have been counted in on the 5,000 head, delivery of which was guaranteed; while appellee contends that under the contract appellants intestate guaranteed the delivery of 5,000 head of lambs of the average weight of 53 pounds, none of which should weigh less than 45 pounds. The trial court accepted appellee's construction of the contract, and entered judgment for it against appellants in the sum of \$2,918.44. There is no dispute but that the amount of the judgment is correct if the construction placed upon the contract was warranted by its terms.

We construe the contract as did the trial court. Under this contract Miera warranted that there would be not less than 5,000 head of unshorn lambs, none to be less than 45 pounds in weight, and to average 53 pounds. The "cull" lambs were to be received and accepted by appellee, but it was not contemplated that they should be counted on the contract.

Appellants argue that the court erred in permitting the contract to be put in evidence, but there is no merit in this contention.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

PARKER, O. J., concurs.

RAYNOLDS, J., having tried the case be-  
low did not participate in this opinion.

(26 N. M. 239)

**PAGE v. TOWN OF GALLUP et al.**  
(No. 2327.)(Supreme Court of New Mexico. June 15,  
1920.)*(Syllabus by the Court.)*

1. Pleading  $\S$ 343 — Judgment on pleadings improper where material issue tendered thereby.

Where a material issue is tendered by the pleadings, judgment on the pleadings is improper.

2. Municipal corporations  $\S$ 81—Mode of exercise of powers within discretion of trustees.

Where power to do an act is conferred upon a municipality in general terms without describing the mode of exercising it, the trustees have the discretion as to the manner in which the power shall be employed, and the courts will not interfere with this discretion. This rule prevails, of course, only where there is no fraud or collusion on the part of the officers charged with the performance of the duty.

3. Municipal corporations  $\S$ 225(1) — Property may be used for incidental purpose.

A municipality in its discretion may authorize its property to be used incidentally for a purpose other than that for which it is primarily purchased or constructed, if the use for incidental purposes does not interfere with the use for the primary purpose.

4. Municipal corporations  $\S$ 1000(4) — Parties necessary to suit to set aside written contract and for injunction annul.

In a suit to set aside and annul a written executory contract, and to perpetually enjoin one of the parties thereto from performing the contract on his part, all the parties to the contract are necessary and indispensable parties to the suit, without which the court is without jurisdiction to annul such contract, or to enjoin a party from performing it.

5. Dismissal and nonsuit  $\S$ 56 — When suit will be dismissed on account of defect of parties stated.

Where a suit cannot be entertained and a decree made in respect to the interest before the court without doing manifest injustice to interested parties who are not and cannot be brought before the court, the suit will be dismissed.

6. Appeal and error  $\S$ 843(1) — Moot questions will not be considered.

The court will not decide a question which has become moot.

Appeal from District Court, McKinley County; Raynolds, Judge.

Suit by Gregory Page against the Town of Gallup and others. Judgment for complainant, and defendants appeal. Reversed and remanded with instructions.

Burkhart & Coors, of Albuquerque, and Alfred Ruiz, of Gallup, for appellants.

H. C. Denny, of Gallup, and C. M. Botts, of Albuquerque, for appellee.

ROBERTS, J. Appellee instituted this suit in the district court of McKinley county against the appellants, town of Gallup and its officials, by which he sought to enjoin and restrain the said appellants from carrying out the terms of a certain contract, entered into by the said town with the Stearns-Rogers Manufacturing Company for the purchase of electrical machinery and equipment. The complaint alleged that it was given out by said town that said machinery had been purchased for the purpose of pumping and supplying water to said town, but in truth and in fact such stated purpose was but a subterfuge, and that the machinery contracted for was purchased for the purpose of installing an electric light plant; that bonds had been voted and sold for the purpose of constructing a water-works system, and that the town officials were diverting funds so raised for the purpose of constructing and equipping an electric lighting system. Appellee was alleged to be a resident and taxpayer of the town, and suit was brought on behalf of himself and all others similarly situated. The complaint further alleged that the said electrical machinery and equipment so contracted to be purchased was not necessary or essential for a complete water-works system for the said town, and that the purchasing of the same would be a waste of the public funds of the said town. This constituted what might be designated as appellee's first cause of action, and the relief sought as to this was an injunction preventing and restraining the appellants from performing or carrying out any of the terms of the contract for the purchase of said electrical equipment, and from entering or attempting to enter into further contracts for the purchase of additional electrical equipment, and from misappropriating and misapplying any of the funds from the issuance and sale of said water bonds, and from appropriating and applying any of the proceeds of said bond issue and sale to any other purpose than that of the construction and extension of the system for the purpose of supplying water to the said town of Gallup.

The appellants filed an answer, denying the misappropriation and that appellants intended to purchase, or had contracted to purchase, the machinery for the purpose of installing a lighting plant for the said town, and denied that the machinery was not necessary to furnish power for pumping a necessary supply of water for the town. The answer affirmatively alleged that the machinery contracted to be purchased was necessary for a modern electrical pumping plant to furnish an adequate supply of water for



the present and reasonable anticipated needs of the town and its inhabitants; that no machinery whatever had been contracted for that was not necessary for said pumping plant, and to pump water, and that the town intended to use the same machinery which was installed and was necessary to operate the water pumps of the town to supply electric current for lighting purposes, but that such latter use was incidental to the primary use for pumping, and would not interfere with or impair the usefulness of the plant for the primary use of pumping water; that such incidental use was for the benefit of the town and its inhabitants; that no additional machinery whatever over that required for furnishing power for pumping water had been or would be purchased by the appellants with the proceeds of said bond issue.

The appellee in his complaint set up what is designated as a second cause of action against the appellants, in which he alleged that the town trustees were proposing to issue water and light revenue warrants of the town of Gallup in the amount of \$30,000, and to use the proceeds derived therefrom for the purpose of installing an electric light plant and system for lighting the streets and residence of the town of Gallup; that they were pledging revenues derived from the waterworks, and the lighting plant to be constructed, to the payment of such revenue warrants and interest thereon; that such revenue warrants constituted an indebtedness of the town of Gallup, and the warrants when issued would be void for two reasons: First, the proposition to create the indebtedness had not been submitted to a vote of the qualified electors of the town, as required by section 12 of article 9 of the state Constitution; and, second, that it would create an indebtedness in excess of the limitation imposed by section 13 of article 9 of the state Constitution.

The answer as to this denied that the revenue warrants would constitute any indebtedness against the town of Gallup; alleged that only certain portions of the revenues derived from the water and lighting system were pledged to the payment of such revenue warrants; that the money to be derived therefrom was to be used for the construction and installation of a lighting system for the town of Gallup, which was to be operated in conjunction with the waterworks.

The trial court granted a temporary injunction upon the filing of the complaint, and, when appellants filed their answer, they moved the court to dissolve the temporary injunction, which was refused. Appellants then asked that the case be set down for trial. This was refused because of the view entertained by the court that the answer stated no defense to the matter set forth in the complaint. Appellee filed a

reply, denying that portion of the answer which set up the fact that the purchase of the machinery in question was necessary for the operation of the water system.

After the court announced that no evidence would be heard counsel for appellee moved for a judgment on the pleadings, which was granted, and the temporary injunction was made permanent. By the final judgment the appellants were perpetually restrained and enjoined from fulfilling or carrying out any of the terms of the contract theretofore attempted to be entered into by them for the purchase by the said town of Gallup of electrical supplies and equipment, and from entering into, or attempting to enter into, further contracts for the purchase of additional electrical equipment, and from issuing or negotiating any of the evidences of indebtedness or so-called water and light revenue warrants attempted to be authorized by Ordinance 125 of the town of Gallup, and from misappropriating or misapplying any of the funds derived from the issue and sale of bonds theretofore made for the purpose of securing funds for the construction and extension of a system for supplying water for said town of Gallup, and from applying any of the proceeds of said bond issue and sale to any other purpose than that of the construction and extension of a system for supplying water for said town, and from doing or suffering to be done each and all of the acts and threatened acts complained of in appellee's complaint. To review this judgment this appeal is taken.

[1] The first point to be considered is whether the appellee was entitled to judgment on the pleadings. It is the contention of appellants that an issue of fact was raised by the answer; consequently they were entitled to a trial. The rule of law is well settled that "where a material issue is tendered by the pleadings, judgment on the pleadings is improper." 31 Cyc. 608; Sutherland on Code Pleadings, vol. 1, § 1447; Reed v. Rogers, 19 N. M. 177, 141 Pac. 811; Dugger v. Young, 25 N. M. 671, 187 Pac. 552. The material issue tendered here by appellants' answer was as to whether or not the town council, acting in good faith within its discretion, determined and decided that it was necessary to install the electrical machinery in question for the purpose of pumping water for the town. The answer set up that competent engineers had advised the town council that the economical and efficient way to pump the water was to do it by electric generators, and use the current for the purpose of power with which to pump the water, and that the town council, in its discretion, had decided that this was the proper and most economical way to operate the plant. This tendered necessarily an issue of fact.

[2] Where power to do an act is conferred upon a municipality in general terms with-

out describing the mode of exercising it, the trustees have the discretion as to the manner in which the power shall be employed, and the courts will not interfere with this discretion. 1 Dillon on Municipal Corporations, § 242; McQuillin on Municipal Corporations, vol. 1, § 376. This rule prevails, of course, only where there is no fraud or collusion on the part of the officers charged with performance of the duty. The discretion which the officers are to exercise is an honest one, and so long as such officials are so acting the court has no power to interfere. But if the court should be satisfied in a proper case that the town trustees, or other officers charged with the performance of the duty and the exercise of the discretion, were fraudulently pretending that a certain course should be pursued, or act done, the court would interfere. Take, for example, the present case. Suppose the trial court had heard evidence, and therefrom had become satisfied that the town trustees had not in good faith determined that the electric generators should be installed for the purpose of pumping water, but such were to be installed primarily for the generating of electric current to light the town, and that the stated purpose of installing the generators for pumping water was only a subterfuge and a fraud for the purpose of using the money voted for a water system for the installation of a lighting plant; clearly the court would have been justified in interfering. But the court could not say without proof, in the face of the denials and statements contained in the answer, that the town trustees were not acting in good faith. The court probably drew the inference, from the allegations contained in the complaint and admitted in the answer as to the intended use of the \$30,000 to be derived from the issuance and sale of water and light revenue warrants, which it was admitted was to be used for installing a lighting plant and system in connection with the waterworks, that the primary purpose of installing the machinery purchased from the Stearns-Rogers Manufacturing Company was in connection with the lighting plant. But the answer stated that such was not the primary purpose.

[3] A municipality in its discretion may authorize its property to be used incidentally for a purpose other than that for which it is primarily purchased or constructed, if the use for incidental purposes does not interfere with the use for the primary purpose. This principle was affirmed by this court in the case of *Smith v. City of Raton*, 18 N. M. 613, 140 Pac. 109, and is supported by many other authorities; *Pike's Peak Power Co. v. City of Colorado Springs*, 105 Fed. 1, 44 C. C. A. 433; *City of Henderson v. Young*, 119 Ky. 224, 83 S. W.

583; *Overall v. Madisonville*, 125 Ky. 684, 102 S. W. 278, 12 L. R. A. (N. S.) 433. If it was true, as alleged in the answer, that the machinery which it was proposed to install was necessary for the present and reasonably anticipated needs of the town for pumping water, the fact that the town proposed to use the machinery in connection with some other municipal use could not operate to prevent the town from installing the machinery. A moment's consideration will demonstrate the unsoundness of appellee's position in this regard. It was a question of fact, of course, as to whether the machinery in question was necessary for the operation of the water plant, or whether the council in good faith had determined that it was necessary. Suppose, for example, that the court after hearing evidence had come to the conclusion that the said machinery was proper and necessary for such purpose. Would it have enjoined the town from installing it simply because the town proposed incidentally to use it in connection with some other use while not being used in pumping water? If so, then the town would be precluded from installing any kind of machinery or equipment that might be used incidentally for any other purpose. This, as we have shown, is an erroneous view, and the court should have heard evidence upon the issue of fact tendered.

[4, 5] While the case must be reversed upon this ground, there is another vital question that should be determined for the guidance of the court upon a remand of the case; and that is as to whether or not the Stearns-Rogers Manufacturing Company was a necessary and indispensable party to this suit. The appellee asked the court to determine that the contract between the town and the Stearns-Rogers Manufacturing Company was null and void, and that the town be enjoined from carrying out such contract for the purchase of the machinery in question, and from paying out any money under the contract, and the decree was in accord with the relief asked.

In a suit to set aside and annul a written executory contract, and to perpetually enjoin one of the parties thereto from performing the contract on his part, all the parties to the contract are necessary and indispensable parties to the suit, without which the court is without jurisdiction to annul such contract, or to enjoin a party from performing it. This principle of law was announced by this court in the case of *Walrath v. Board of Commissioners*, 18 N. M. 101, 134 Pac. 204. It was there said that the court will take notice of the absence of indispensable parties when such fact is made to appear, though not raised by the pleadings, or suggested by counsel, and will dismiss the plaintiff's bill, when to grant the relief prayed would injuriously affect per-

sons materially interested in the subject-matter and not made a party. See, also, *Miller v. Klasner*, 19 N. M. 21, 140 Pac. 1107. Appellee, contends, however, that the present case is distinguishable from the case of *Walrath v. Board of Commissioners*, supra, in that there the contractors were within the jurisdiction of the court, while here the contractor is without the jurisdiction, and to require the appellee to make the Denver corporation a party would be to permit the wrong complained of to be without any remedy whatsoever, because there is no court, state or federal, which can acquire jurisdiction of both the municipality and the Denver company, unless the Denver company elects to voluntarily appear in the state court. The only case cited by appellee in support of his contention is the case of *Water Supply Co. v. City of Ottumwa* (C. C.) 120 Fed. 309. This was a decision by a federal district judge from which no appeal was taken, and so far as we know the case has never been cited or referred to by any other court. It stands alone, and we are unable to agree with the views therein expressed.

In determining the question of parties, it is said in *Bates on Federal Equity Procedure*, vol. 1, § 42:

"\* \* \* It would seem that courts of equity are guided by three leading principles, viz.:

"(1) A court of equity cannot make a decree which materially and directly affects the rights of a person, without that person being either actually or constructively before the court, and having, according to the established forms of procedure, a full opportunity to vindicate his right, and invoke the powers of the court for its protection and preservation; and the court can make no decree between the parties before it which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without materially and directly affecting the rights of the absent person. This is an inflexible principle, and is not confined in its operation to courts of equity; no court can adjudicate directly upon a person's right without the person being actually or constructively before the court. The principle is founded in natural justice, and is secured by constitutional guaranty; it is due process of law.

"(2) Another principle acted upon is that 'it is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the decree of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation.'

"(3) A third principle acted upon is founded in the solicitude of the court of equity to protect the defendant in suits from 'being sued or molested again respecting the same matter either at law or in equity.' This principle is clearly distinguishable from the one last above mentioned, which seeks to prevent future litigation generally. Aside from the general policy of preventing litigation, courts of equity are

careful to frame their decrees for the special protection of the defendant before the court against further molestation respecting the same matter decreed upon; and for the accomplishment of this purpose the plaintiff is required to bring before the court 'all such persons who are so circumstanced that, unless their rights be bound by the decree of the court, they might cause future molestation or inconvenience' to the defendant against whom relief is sought."

The Supreme Court of the United States in the case of *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825, with reference to the subject of parties, said:

"The learning on the subject of parties to suits in chancery is copious, and within a limited extent, the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. And there is a third class, whose interests in the subject-matter of the suit and in the relief sought, are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction."

In the case of *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158, the court after discussing the act of Congress of February 28, 1839 (5 Stat. at L. 821), and the forty-seventh rule of the equity practice of the Circuit Court of the United States, which authorized the court to proceed without all the parties in certain cases, said:

"It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a circuit court can make no decree \* \* \* between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in *Elmendorf v. Taylor*, 10 Wheat. 167: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of another state, ought not to prevent a decree upon its merits.' But if the case cannot be thus completely decided, the court should make no decree."

These principles have been consistently adhered to by the United States Supreme Court.

and all the state courts, so far as we are aware. The fact that the absent party would not be bound or concluded by a decree does not establish the fact that it is dispensable. Of course the Stearns-Rogers Manufacturing Company would not be bound by the decree in this case, because it was not a party to the suit, and to attempt to bind it by the decree would be depriving the corporation of its property without due process of law. But the interest of the absent corporation would be vitally affected by the decree, for on the one side the town of Gallup would be perpetually enjoined from carrying out the contract, or paying the contractor the stipulated price. The effect of such an injunction was pointed out in the case of Walrath v. Board of Commissioners, *supra*.

In Street's Federal Equity Practice, vol. 1, § 521, the author quotes from many cases decided by the Supreme Court of the United States and the various federal courts, and says:

"The general principle recognised in these cases is that where a suit cannot be entertained and a decree made in respect to the interest before the court without doing manifest injustice to interested parties who are not and cannot be brought before the court, the suit will be dismissed."

The following cases are cited: *Mallow v. Hinde*, 12 Wheat. 193, 6 L. Ed. 599; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Barney v. Baltimore*, 6 Wall. 280, 18 L. Ed. 825; *Bank v. Carrollton Railroad*, 11 Wall. 624, 20 L. Ed. 82; *Ribon v. Railroad Cos.*, 16 Wall. 446, 21 L. Ed. 367; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061; *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, 35 L. Ed. 792; *New Orleans, etc., Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; *Equitable Life Assurance Soc. v. Patterson (C. C.)* 1 Fed. 127; *Bell v. Donahoe (C. C.)* 8 Sawy. 435, 17 Fed. 710; *Conolly v. Wells (C. C.)* 33 Fed. 205; *Jessup v. Illinois Cent. R. Co. (C. C.)* 36 Fed. 735; *Chadbourne v. Coe*, 2 C. C. A. 327, 51 Fed. 479; *Hull v. Chaffin*, 54 Fed. 437, 4 C. C. A. 414; *Averill v. Southern Ry. Co. (C. C.)* 75 Fed. 736.

And the fact that it will be impossible to bring the indispensable parties before any court apparently is of no importance, and we fail to see how it can be given consideration in the face of the constitutional provision forbidding the deprivation of property without due process of law. The reason for the rule is that where a party goes into a court of equity, asking the court to give him relief, he must have before the court all parties whose rights may be affected by the relief sought, because the court will not extend its arm to give him relief, at his solicitation, unless the parties to be affected are before the court and have an opportunity

to resist the application, the granting of which will be detrimental to them. When a party goes to the court seeking relief, he must bring the parties to be affected by the decree before the court, otherwise the court will not act.

In the case of *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499, the state filed a suit in the Supreme Court of the United States to prevent by injunction the Northern Securities Company, a corporation organized under the laws of another state, from obtaining and exercising ownership and control of two or more competing railroad companies of the state of Minnesota. The court held that the two railroad companies were indispensable parties, and said:

"When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless."

The same rule was followed by the court in the case of *California v. Southern Pacific Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 653, in which it was held that the city of Oakland was an indispensable party; and, because the joinder of this party would have defeated the jurisdiction of the court, the case was dismissed.

Cases almost analogous to the present are those where suit is brought by a taxpayer to enjoin the levying of taxes, or the payment of money on county bonds or warrants, because of alleged invalidity of the bonds or warrants. In such cases the courts are practically unanimous in holding that the holders of the bonds or warrants are indispensable parties. See note to the case of *State ex rel. v. Gormley*, 5 Ann. Cas. 856, and note to the same case in 3 L. R. A. (N. S.) 256. The case of *Hoppock v. Chambers*, 96 Mich. 509, 56 N. W. 86, is identical with the present case, except that it does not appear whether the contractor was within or without the jurisdiction of the court.

From the authorities we are compelled to hold that the contractor was an indispensable party to this suit, in so far as the suit sought to have the contract declared null and void, and the town and its officers enjoined from carrying out the same. It is probable that the town and its officers might have been enjoined from unlawfully diverting the moneys raised by the sale of the water bonds without making the Stearns-Rogers Manufacturing Company parties, but this question is not here for consideration.

(191 P.)

[6] As to the other cause of action stated in the complaint—i. e., the injunction sought to restrain the town and its officers from issuing the \$30,000 worth of water and light revenue warrants and using the proceeds in the construction and completion of a lighting system and plant—it is sufficient to say that the question presented under this ground of the complaint is now moot. The state Legislature by chapter 68, Laws 1919, enacted since this suit was instituted, provided in part:

"No \* \* \* incorporated city, town, or village shall be permitted to issue or negotiate any certificate of indebtedness, the payment of which is secured by a pledge of or lien upon any property, or the income or revenue derived therefrom, belonging to such municipality, and all such certificates or other evidences of indebtedness issued contrary to the provisions hereof, shall be void."

By chapter 137, Laws 1919, it is made a penal offense for any officer or agent of any municipality to issue or negotiate any certificate of indebtedness on behalf of said municipality, the payment of which is secured by pledge or lien upon property, or the income or revenue derived therefrom, belonging to such municipality, and all such certificates are declared to be null and void.

In view of these two legislative acts no authority exists in the town of Gallup, at this time, to negotiate or sell these proposed certificates of indebtedness. It would be useless, therefore, to pass upon the question as to the validity of these certificates, as of the time the injunction was issued, and the other questions raised in connection therewith. The court will not decide a question which has become moot. State ex rel. Woods v. Montoya, 23 N. M. 599, 170 Pac. 60.

For the reasons stated, the cause will be reversed and remanded to the district court, with instructions to set aside its judgment and to proceed in accordance with this opinion; and it is so ordered.

(28 N. M. 253)

# TOWN OF GALLUP v. GALLUP COLD STORAGE CO. (No. 2352.)

(Supreme Court of New Mexico. June 18, 1920.)

(Syllabus by the Court.)

## 1. Intoxicating liquors ~~§~~44—Liquor license fee a privilege price and not a tax.

Under the law, as it existed in this state prior to the adoption of the constitutional prohibition amendment, the amount fixed by municipalities as a liquor license fee was not a tax, but was a burden imposed as the price of a privilege, and was exacted under the police power of the state.

## 2. Intoxicating liquors ~~§~~80, 94—Liquor license issued without prior payment of fee void; fee not recoverable by action unless so provided.

Fees or charges for liquor licenses are not debts in the ordinary acceptance of that term. The only methods for the collection of such fees are those provided by statute; and, if the statute does not provide for their collection by civil action, no such action can be maintained, and a liquor license issued without payment of the fee by the officer authorized to issue the same, upon payment of the prescribed fee, is null and void.

Appeal from District Court, McKinley County; Reynolds, Judge.

Action by the Town of Gallup against the Gallup Cold Storage Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Edmund R. French, of Gallup, Francis C. Wilson, of Santa Fé, and Daniel K. Sadler, of Raton, for appellant.

McFie, Edwards & McFie, of Santa Fé, and E. A. Martin, of Gallup, for appellee.

ROBERTS, J. This suit was instituted by the town of Gallup, a municipal corporation, against the Gallup Cold Storage Company, a corporation, to recover the sum of \$5,080, alleged to be the balance due to said municipality for licenses issued to it by the defendant authorizing the sale and disposal of intoxicating liquors at wholesale within such municipality between July 1, 1916, and June 30, 1918.

The complaint had attached to it as an exhibit Ordinance No. 85 of said town which fixed the license fee for wholesale liquor dealers at \$3,000 per annum, payable semi-annually in advance. To the complaint a demurrer was interposed on various grounds, only one of which need be considered, which, briefly stated, was to the effect that, the ordinance requiring the payment of the license fee in advance, the town authorities were without power to issue the license upon credit; that the license so issued was null and void and the relation of debtor and creditor did not exist between the municipality and the appellee. The trial court sustained the demurrer, and appellant elected to stand upon its complaint; judgment was entered for appellee.

[1] As the ordinance under which the licenses in question were issued required the payment of the license fee semiannually in advance, no authority existed in the town authorities to issue the license on credit. The licenses, thus issued without the payment in advance of the fee required under the ordinance, were void. In this state, the amount fixed by municipalities as a liquor license fee, under the law as it then existed, was not a tax, but was a burden imposed

as the price of a privilege, and was exacted under the police power of the state. This was the effect of the opinions by this court in the cases of *Schwartz v. Town of Gallup*, 22 N. M. 521, 165 Pac. 345, and *Stalick v. Town of Gallup*, 23 N. M. 405, 168 Pac. 707. In those cases we held that the trial court was not authorized to inquire into the question of the reasonableness of the license fee exacted by the town ordinance for the privilege of engaging in the sale of intoxicating liquor. Had these ordinances been revenue measures and the license exacted under the taxing power, it would, of course, have been proper for the court to have inquired into the question of the reasonableness of the tax. Laid under the police power for the purpose of regulating, restricting, and, to a certain extent, prohibiting the sale of intoxicating liquors the question of the reasonableness of the license fee was immaterial.

In *Woollen and Thornton on Intoxicating Liquors*, section 491, the author says:

"Where a statute requires the fee for a license to be paid before it is issued, it must be paid for the entire period of the license and be paid in advance, or the license will be void. No officer can waive such a provision of the statute. Payment in part is not sufficient, even pro tanto."

And the same rule would apply to a city ordinance enacted under authority of a legislative act.

In *Joyce on Intoxicating Liquors*, § 196, the author says:

"As a general rule, it is a condition precedent to the issuance of a valid license that the fee therefor shall be paid in advance. A license issued on credit, and without authority to so issue it is held not to be voidable merely, but void in the sense that it may be assailed even in a collateral proceeding."

In the case of *Sandoval v. Meyers*, 8 N. M. 636, 45 Pac. 1128, the court, in effect held that a liquor license issued by a county, without collection of the license in advance would be issued in violation of law.

In the case of *Hencke v. Standiford*, 68 Ark. 535, 52 S. W. 1, the town ordinance in question authorized the issuance of a liquor license by the recorder upon the applicant filing with him the receipt of the treasurer for the amount of money required to be paid for such license. Instead of paying the amount in cash the applicant gave his note to the treasurer, and the license was issued. Suit was instituted by the town to recover on the note. The court held that the license issued before the fee was paid in cash was void. Hence there was no consideration for the note.

In the present case, if the action in assumpsit can be sustained, clearly there would be sufficient consideration to give validity to a note given for the debt.

[2] In the *Arkansas Case* the court says:

"Fees or charges for liquor licenses are not 'debts,' in the ordinary acceptance of that term. The only methods for the collection of such fees are those provided by statute; and, if the statute does not provide for their collection by civil action, no such action can be maintained. Especially could this not be done in the face of an ordinance which provides for the payment of the license fee before the license shall issue, and prescribed the amount of the liabilities to the town, county or state in case of a sale without license, which is collectible by criminal procedure."

To the same effect are the following cases:

*Ristine v. Clements*, 31 Ind. App. 333, 66 N. E. 924; *Doran v. Phillips*, 47 Mich. 228, 10 N. W. 350; *Spake v. People*, 89 Ill. 617; *McWilliams v. Phillips*, 51 Miss. 196; *City of Craig v. Smith*, 31 Mo. App. 286; *Zielke v. State*, 42 Neb. 750, 60 N. W. 1010; *Fry v. Kaessner*, 48 Neb. 133, 66 N. W. 1126; *U. S. v. Jourden*, 4 Alaska, 354; *U. S. v. Jourden*, 193 Fed. 986, 113 C. C. A. 606.

Appellant cites the following cases as justifying the recovery in this case: *Mayor, etc., of Jersey City v. North Jersey Street Ry. Co.*, 78 N. J. Law, 72, 73 Atl. 609; *State v. Wall*, 18 Idaho, 300, 109 Pac. 724; *City of Lexington v. Wilson*, 118 Ky. 221, 80 S. W. 811; *City of Philadelphia v. A. & P. Tel. Co. (C. C.)* 109 Fed. 55; *State v. Fleming*, 112 Ala. 179, 20 South. 846.

The *New Jersey Case* first referred to, was a suit by the city against the railway company for license fee due under an ordinance granting to the railroad company the right to construct and operate its road, which, it will be readily observed, is quite a different question from that involved in the issuance of a liquor license.

The case of *State v. Wall*, *supra*, arose under a statute of Idaho which specifically provided that an action might be instituted against any one required to take out a license who did not do so, and notwithstanding which they carried on the business for which the license was required. In such a case, of course, there could be no doubt as to the right to maintain such an action, where the license had not been obtained and the business was nevertheless conducted.

The Court of Appeals of Kentucky, in the case of *City of Lexington v. Wilson*, *supra*, considered a license required of the proprietor of a feed, livery, and sale stable, and held that the ordinance was adopted for the purpose of raising a revenue. The court held that an action to recover the amount due, as in case of debt, could be maintained on failure of a party carrying on business to take out the license.

The federal case was an action brought by the city of Philadelphia to recover license fees charged against the defendant in respect of its polls and wires, by virtue of

certain ordinances. Clearly a revenue measure, consequently not governed by the same principle as that involved in the cases above, which consider the question of liquor licenses.

The case of *State v. Fleming*, supra, was decided by the Supreme Court of Alabama, and the court of that state has consistently held that liquor licenses are a tax for revenue.

Under the authorities we are required to hold that no right existed in the town of Gallup to recover the license fees in question in an action of debt. In the briefs filed by both parties here, many facts are referred to not contained in the record, cognizance of which of course cannot be taken by the court.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

PARKER, C. J., and HOLLOMAN, District Judge, concur.

RAYNOLDS, J., having tried the case in the court below did not participate in this opinion.

(28 N. M. 280)

**SANDOVAL v. PEREZ et al. (No. 2350.)**

(Supreme Court of New Mexico. July 1, 1920.)

*(Syllabus by the Court.)*

1. Adverse possession §70 — Oral transactions cannot constitute "color of title."

Where the statute requires adverse possession to be "under color of title," some writing which purports to give title to the premises is essential to give title to an adverse occupant, and oral transactions, however effective they may be as between the parties, do not contribute color of title; neither does actual adverse possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Color of Title.]

*(Additional Syllabus by Editorial Staff.)*

2. Ejectment §142(3)—To recover for improvements, defendant must have entered under claim of title.

In order to be entitled to raise the issue of improvements under Code 1915, §§ 4372, 4375, in an action in ejectment, defendant must have entered under some claim of title.

Appeal from District Court, Sandoval County; Raynolds, Judge.

Action by Jesus M. Sandoval against Maximino Perez and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Rodey & Rodey, of Albuquerque, for appellants.

Marron & Wood, of Albuquerque, for appellee.

ROBERTS, J. Appellee sued appellants in ejectment, and recovered judgment by default. The land involved was a section of what is known as "railroad land," having been granted to the Atlantic & Pacific Railroad Company by act of Congress. Appellants some time after the judgment had been entered moved the court to set aside and vacate the judgment upon the ground that process had been served upon the wife of the appellant Maximino Perez while she was sick in bed, her husband being absent; that, without reading the summons or appreciating what it was, she had given it to one of the children, and that it had been destroyed, and the husband was not advised and did not know the suit was pending until notified that he would be required to vacate. He tendered an answer with his motion and an affidavit of merit, in which he set up that by himself and his predecessors in interest he had been in possession of said section of land for more than 11 years last past, using and cultivating the same, and making the same the home of himself and family; that affiant had lived upon the land as a home for about 5 years last past with his wife and their 8 children; that he acquired title thereto by verbal sale made to him by his wife's father, and also by inheritance by his wife from her father, who died in possession of the land, she being his only heir at law.

The court below determined the motion to vacate upon the single ground that the answer and affidavits in support thereof did not state a defense to the complaint in ejectment. Hence the court was not warranted in setting aside the default judgment. This is the only question which we deem it necessary to consider.

[1] It is appellant's contention that a writing is not essential to color of title, and that actual adverse possession by virtue of which the occupant claims ownership is under color of title. The statute (section 8365, Code 1915) requires the adverse possession to be under "color of title." An extended note will be found to the case of *Brooks-Scanlon Co. v. Childs*, 2 A. L. R. 1453, in which the author of the note states the prevailing rule in the United States as follows:

"By the weight of authority, some writing which purports to give title to the premises is essential to give title to an adverse occupant; and oral transactions, however effective they may be as between the parties, do not constitute color of title."

The territorial Supreme Court in the case of *Armijo v. Armijo*, 4 N. M. (Gild.) 63, 13 Pac. 92, said:

"Color of title, strictly speaking, cannot rest in parol. There must be a document of some sort [citing numerous cases]. As there was no paper title of any kind introduced in evi-

dence to support the claim of title set up by defendants, it follows that their possession was not under color of title."

In order to afford appellants the relief which they seek, it would be necessary for this court to overrule this case and many subsequent ones following it and depart from the majority rule in the United States. No sufficient reasoning has been advanced to justify this departure. The statute under consideration was enacted in its present form by the Legislature in 1905, and the words "color of title" had been theretofore defined by the territorial Supreme Court and had a well-understood meaning. If the Legislature had intended that adverse possession, where the same was actual and visible, should have the same effect as a holding under color of title as theretofore construed by the courts, it would doubtless have selected appropriate language to convey its meaning.

[2] This same argument applies with equal force to appellants' contention that they were entitled to prove the value of their improvements under sections 4372 and 4375, Code 1915. In order to be entitled to raise the issue of improvements in an action in ejectment, the defendant must have entered under some claim of title. *Maxwell Land Grant Co. v. Santistevan*, 7 N. M. 1, 32 Pac. 44.

For the reasons stated, the judgment of the trial court will be affirmed; and it is so ordered.

PARKER, C. J., concurs.

RAYNOLDS, J., having tried this case below, did not participate in this opinion.

(107 Kan. 422)

WOODBURN v. HARVEY et al. (No. 22542.)

(Supreme Court of Kansas. July 19, 1920.)

(Syllabus by Editorial Staff.)

On Motion for Rehearing.

1. Pleading  $\S$ 367(3)—Complaint on contract may be amended to show whether oral or written.

In an action on a contract, it is permissible for defendant to ask that the pleadings be amended to show whether the contract was oral or written.

2. Appeal and error  $\S$ 835(3)—Affidavits not part of evidence below cannot be considered on appeal to disturb judgment.

In an action on a contract, affidavits of witness from another state to the contract, presented for the first time in support of a motion for rehearing in the Supreme Court, forming no part of the evidence upon which the trial court based its judgment, cannot be considered on appeal to disturb such judgment.

Appeal from District Court, Jackson County.

On motion for rehearing. For former opinion, see 190 Pac. 620.

DAWSON, J. [1] It is urged that the pleadings were not broad enough to include an issue of fraud. True, but there was no such issue; it was an action on a contract, and so continued through the trial. Defendant could have asked that the pleadings be amended to show whether that contract was oral or written, but he chose to traverse the issue as pleaded—not to have the issue more specifically pleaded. While a slight intimation of fraud crept out in the evidence, that was only a minor incident in the narrative of the transaction between the parties.

[2] Affidavits of Colorado witnesses to the contract are presented for the first time in support of this petition for a rehearing. They formed no part of the evidence upon which the trial court based its judgment. They cannot be considered now to disturb that judgment. See *Wideman v. Faivre*, 100 Kan. 102, 107, 108, 163 Pac. 619, Ann. Cas. 1918B, 1168.

Rehearing denied.

All the Justices concurring.

(107 Kan. 264)

SPENCER v. MARSHALL et al. (No. 22591.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Master and servant  $\S$ 405(2)—Evidence held to show that defendants were operating drilling machinery.

The evidence of the plaintiff was sufficient to prove that E. L. Fairbanks, J. M. Clover, D. Vensel, Frank Wolfe, and D. B. Golden were operating the oil and gas lease and the drilling machinery thereon, on which the plaintiff was injured, and was sufficient to justify the court in overruling their demurrer to the plaintiff's evidence.

2. Master and servant  $\S$ 361, 405(2)—Evidence insufficient to show that plaintiff was employed by subcontractor; subcontractor's employé held entitled to recover under statute.

The evidence was not sufficient to establish that the plaintiff, when he was injured, was employed by a subcontractor; but, even if he were so employed, the parties named in the first paragraph of this syllabus were liable to the plaintiff for compensation, under section 5398 of the General Statutes of 1915.

3. Master and servant  $\S$ 405(2)—Evidence held insufficient to show that injured employé was subcontractor.

There was not sufficient evidence to show that the plaintiff was a subcontractor.



Appeal from District Court, Sedgwick County.

Proceedings under the Workmen's Compensation Act by Harvey J. Spencer, opposed by Deering J. Marshall and others. Judgment for plaintiff against certain defendants, and they appeal. Affirmed.

George Gardner and J. E. McElvain, both of Wichita, for appellants.

Matson & Stearns, of Wichita, for appellee.

MARSHALL, J. E. L. Fairbanks, J. M. Clover, D. Vensel, Frank Wolfe, and D. B. Golden appeal from a judgment in favor of the plaintiff under the Workmen's Compensation Act of 1911. The action was commenced by the plaintiff against Deering J. Marshall, the Commercial Refining Company, C. C. Whittaker, the Seven Fields Oil & Gas Company, E. L. Fairbanks, J. M. Clover, D. Vensel, Frank Wolfe, D. B. Golden, and S. C. Clover. A demurrer to the evidence of the plaintiff was sustained as to the Commercial Refining Company, the Seven Fields Oil & Gas Company, and C. C. Whittaker, and was overruled as to the remainder of the defendants. Evidence for the defense was introduced by them, a verdict for the plaintiff was returned, and judgment was rendered on the verdict. The questions presented arise out of the demurrer of the appellants to the evidence of the plaintiff.

[1] 1. The plaintiff was injured while working on machinery that was then being used in drilling for gas or oil. The appellants argue that they were not owners or operators of the property at the time the plaintiff was injured, January 7, 1917, and that therefore they were not liable to him for compensation. Numerous leases of the property for the purpose of developing gas and oil and numerous assignments of those leases were introduced in evidence. By those leases and assignments it was clearly shown that the appellants at one time were owners of interests in the property. John Risher testified that he was employed as field man and superintendent in charge of drilling on the property from October, 1916, to April, 1917, and that he recalled the incident of the plaintiff being injured while working on the lease. Risher further testified that from October, 1916, to January 15, he was employed by Frank Wolfe, J. M. Clover, S. C. Clover, E. L. Fairbanks, D. Marshall, D. Vensel, P. Elliott, and Henry Rutherman; that he employed Harvey J. Spencer for Frank Wolfe and others to pull the casing; that he knew who owned the lease and interest in the well in which they were working; that it was those parties whom he named as Frank Wolfe and others; that he was not employed by the Commercial Refining Company at the time the plaintiff was hurt; that the Commercial Refining Company took charge of the work on the 15th, about eight days after the plaintiff was

hurt, and did not have anything to do with the operation of the lease until after January 15. That evidence was sufficient to establish the fact that the appellants were operating the property and compelled the overruling of their demurrer to the plaintiff's evidence.

But the appellants argue that they had been divested of their interest in the property at the time the plaintiff was injured, by a sale of their rights therein to L. C. Riley and C. C. Whittaker under a written contract dated October 16, 1916, but which, it is contended by the plaintiff, and there was evidence to support that contention, did not take effect until after the plaintiff was injured. There was also evidence which tended to show that the Commercial Refining Company was operating the lease and paying the bills at that time. A question was thus presented on conflicting evidence, and on a demurrer thereto the evidence most favorable to the plaintiff must be considered and the other be disregarded. *Acker v. Norman*, 72 Kan. 586, 84 Pac. 531. Under all the evidence the jury could have found that the appellants were operating the lease, or could have found that they were not, but that it was being operated by the Commercial Refining Company. The finding of the jury on that evidence is necessarily conclusive.

[2] 2. Another question argued by the appellants is that the evidence showed that the plaintiff was working for Lawrence Spencer, who the appellants claim was a subcontractor, and that therefore Lawrence Spencer was liable to the plaintiff for compensation. Lawrence Spencer testified, in substance, that he was working as manager of a casing crew known as the Santa Fé casing crew; that the plaintiff and four other men constituted the crew; that he collected for them and generally got the gang together; that he got labor hire and 5 cents on the dollar for collecting; that the men paid him out of their salaries; that he called whomever he wanted to go; that they were working for the lease owner; that he got the checks cashed and then divided up the money at times, and at other times the members of the crew were paid individually; and that in this particular instance he was given the check for the whole crew. That evidence does not establish that Lawrence Spencer was a subcontractor; it does establish that he acted for his four companions; that they worked together; and that part of the time he received the wages for all and divided them. The court was compelled to overrule the demurrer of the appellants to the evidence of the plaintiff so far as this question was concerned, and the jury was justified in finding from the evidence that the plaintiff was not working for himself or for Lawrence Spencer, but was working for the appellants.

Even if the plaintiff was working for a sub-

contractor when he was injured, section 5898 of the General Statutes of 1915 fixes on the appellants liability for compensation to the plaintiff. That section, in part, reads:

"Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, references to the principal shall be substituted for references to the employer, except the amount of compensation shall be calculated with reference to the earnings of the workmen under the employer by whom he is immediately employed."

[3] 3. The appellants in their brief state that—

"It was sought by the defendants in the trial of this case to establish the fact that this plaintiff, being the manager of the Santa Fé casing crew, was responsible for the injuries of the men whom he employed, being a subcontractor. The evidence showed that the plaintiff hired these men and paid their salaries and supplied new men when needed."

The court is unable to ascertain that this statement corresponds with the evidence as abstracted. That evidence shows that the plaintiff was hired substantially as has been set out.

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 354)

**GLASGOW v. SOVEREIGN CAMP, W. O. W.\***  
(No. 22768.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Insurance §723(2)—Provision as to effect of misrepresentation does not apply to fraternal certificates.

The provision of chapter 226 of the Laws of 1907 that "no misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable" (section 1), does not apply to certificates issued by fraternal benefit societies.

2. Insurance §723(6), 819(2)—Misrepresentation as to medical attendance held material; finding as to medical attendance contrary to evidence.

Questions asked upon an application for a beneficiary certificate as to whether or not the applicant had consulted or been attended by a physician for certain named diseases are material, and false answers given by him operate to annul the certificate, and it is further held that a finding of the jury herein that the insured had not consulted or been attended by a physician within a fixed time is contrary to the evidence.

Appeal from District Court, Wyandotte County.

Action by Mattie Glasgow against the Sovereign Camp of the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

Harding, Deatherage, Murphy & Stinson, of Kansas City, Mo., and McAnany, Alden & Van Cleave, of Kansas City, Kan., for appellant.

E. A. Enright, of Kansas City, Kan., for appellee.

JOHNSTON, C. J. This appeal is brought to review trial errors, and a judgment in favor of the plaintiff, based upon a beneficiary certificate issued by the defendant to the husband of plaintiff.

[1] The certificate was issued on January 14, 1916, and the insured died on February 4, 1918. In the application for insurance the insured made a number of representations as to his bodily health and as to whether he had consulted or been attended by physicians within a period of five years preceding his application. These answers it was contended were false, and such as avoided the beneficiary certificate. It is contended that the findings and verdict of the jury are unsupported by the evidence and that the case was tried upon an erroneous theory of the law. Defendant asserts that the case was tried and submitted to the jury upon the theory that chapter 226 of the Laws of 1907 (General Statutes, 1915, §§ 5290, 5291), providing that misrepresentations of an applicant for life insurance shall not defeat the insurance policy, unless the matters misrepresented contributed to the contingency or event on which the policy was to become due, applies to fraternal benefit societies. The record does not contain all of the instructions, but the contention of defendant that the case was submitted on that theory is not denied by plaintiff, and, as other parts of the record indicate that it was so submitted, the question will be considered.

The act of 1907 in title and body refers generally to insurance on the lives of persons

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 29, 1920

(191 P.)

who are citizens of this state and to life policies and premiums. In its enactment the Legislature did not in terms limit its application to any particular kind of life insurance, nor treat it as an amendment of any of the insurance laws. Being general in its terms, it has been held to be applicable to a policy issued by an accident insurance company which provided indemnity for loss of life by accidental means. *Becker v. Surety Co.*, 105 Kan. 99, 181 Pac. 549. It does not follow from this ruling that the provision covers and applies to fraternal benefit societies. The legislative purpose and policy as to these have been declared in other legislation. Because of differences in design and nature, the Legislature has placed these organizations in a class separate from insurance companies, and provided for each a distinct code of laws for their regulation and control. While benefit societies have insurance features, they are not designed to give indemnity or insurance for profit, as are insurance companies; but the theory on which they are organized is to provide mutual benefits and benevolences to members and their families, with no profit in view, and the benefits and relief extended are confined to those associated together in their lodges and societies. Most of the statutory provisions regulating insurance companies are inconsistent with those governing benefit societies, and to make the distinction clear and prevent the application of the governing rules of one organization to the operations of the other, it was expressly provided in the Fraternal Benefit Act:

"\* \* \* Such association shall be governed by this act and shall be exempt from the provisions of insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein." Laws Sp. Sess. 1898, c. 23, § 1.

This provision has been retained in the subsequent amendments of the act and is still in force. Laws 1899, c. 147, § 1; Laws 1917, c. 208, § 1; Laws 1919, c. 216, § 1. It was given consideration in *Bolce v. Shepard*, 78 Kan. 308, 96 Pac. 485, where it was held that the acts relating to insurance companies had no application to fraternal benefit societies, and it was added that:

"The Legislature, having separated beneficiary societies from insurance companies and made special provisions for providing and paying benefits to members, simply declared that hereafter this distinction should be maintained, and that acts relating to insurance should not be understood as applicable to beneficiary societies unless they were expressly mentioned in the act. The act in question, instead of making express reference to beneficiary societies, uses language, as we have seen, appropriate only to insurance companies, and its provisions are not in harmony with the theory of beneficiary societies."

In providing for the organization and regulation of fraternal benefit societies, it was the manifest purpose of the Legislature that insurance statutes then in force or thereafter enacted should not be applicable to benefit societies, unless they were expressly included in such statutes. There is no reference to benefit societies in chapter 226 of the Laws of 1907, and nothing in the nature of the societies or the acts relating to them indicates a purpose to include them in the provision in question, and following the legislative interpretation it must be held that this provision is not applicable to benefit societies, since it is not expressly made so by its own terms.

[2] There remains the question whether the findings and verdict of the jury are contrary to the evidence and the law. In his application the insured represented and warranted that he was of sound bodily health and had no diseases that would tend to shorten his life, and he warranted that the answers he had made upon his application for a beneficiary certificate were full, true, and complete. The truthfulness of the answers to material questions, being a part of the warranty, was essential to the validity of the contract. Among the representations and warranties made by him was one to the effect that he had never had certain named diseases, nor any kidney disease or dropsy; another, that he had never consulted or been attended by a physician during the past five years for any injury or disease, except on one occasion in 1918, when he had been attended by Dr. Lowther for chills and fever. There was testimony by Dr. Clifton that he had treated the insured in 1915, when he found his kidneys diseased, his urine heavily loaded with albumen, his condition dropsical, and that he had then informed the insured that he had Bright's disease. Furthermore, he testified that afterwards the insured applied to him for an examination preparatory to obtaining insurance with the defendant, but that he (Dr. Clifton) declined to make the examination, saying that, owing to the physical condition of the insured, he could not certify that he was a fit subject for insurance. The testimony of the witness is that in reply to this statement the insured remarked:

"Well, if you won't examine me, I can get one that will."

Another witness, Dr. Bobo, testified that the insured consulted him in 1915 as to his illness, and that the diagnosis then made by him was that the insured had cirrhosis of the liver and chronic nephritis, or Bright's disease. Dr. Bobo testified that he then informed the insured as to his condition, and also that his ailments were incurable. Dr. Lowther, who was mentioned in the application as having treated the insured for chills and fever, testified that the insured

came to him for examination and treatment several times during 1914 and 1915, and that he found him to have an infection of the kidneys known as chronic Bright's disease, and that he communicated to Glasgow the nature of his ailments, telling him that he regarded them to be incurable.

As against this evidence there was a certificate of Dr. Davis, the physician of the camp, given when the application was made, to the effect that the insured was in good health, free from the diseases mentioned, and safely insurable. Besides this certificate, the evidence offered by plaintiff was negative in character, and was mainly that of the widow of the insured, who testified that she did not know of the treatment of her husband for Bright's disease, nor of his having any ailments, except chills and fever. However, she did corroborate the testimony of Dr. Clifton in one respect. She testified that she called Dr. Clifton in 1915 to visit and treat her husband for an illness which she said was the result of inhaling a poisonous gas. She admitted that the doctor made an examination of his condition and prescribed certain medicine, which was given to the insured. The finding that he had not consulted nor been attended professionally by Dr. Clifton was therefore contrary to the evidence of both plaintiff and defendant. It was practically admitted that there was a consultation, and while there is a dispute as to the nature of the ailment for which the doctor was called, it is conceded that he made an examination and attended the insured within the period named in the application. This is a material question, to which an untruthful answer was given by the applicant. It has been held that a false answer of a material question operates to annul the insurance contract. *Hoover v. Royal Neighbors*, 85 Kan. 618, 70 Pac. 595. In *Insurance Co. v. Brubaker*, 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267, the effect of a false answer to a like question was under consideration, and it was said:

"The question is important, because if an affirmative answer be given the company may make an investigation, and ascertain the exact truth regarding the cause for the consultation and the state of health it revealed, or ought to have revealed. It requires no argument to show that the action of the company may well be influenced by the answer to this question."

In the finding made the jury manifestly ignored the evidence, and this of itself is enough to overthrow the verdict returned. While the jury were at liberty to disbelieve and disregard the testimony of any witness, if they deemed it unworthy of belief, that given by the medical witnesses, who stated that they had been consulted by the applicant

and had treated him for Bright's disease, was circumstantially given and has the marks of verity. It was corroborated by a witness to whom the insured admitted that he had been attended by these physicians and that they treated him for kidney diseases. The jury had no right to disregard credible testimony merely because the plaintiff testified that she had no knowledge of such consultation and treatment. Negative testimony of that character is entitled to little, if any, weight, since the insured might have consulted the physicians and been treated by them without her knowledge. Their testimony on these questions can hardly be said to have been contradicted, and is of a very convincing character.

We place the decision, however, upon the baseless finding that the insured had not consulted or been attended by Dr. Clifton in 1915. For the error of the court in upholding the finding and verdict, the judgment is reversed, and the cause remanded for a new trial.

All the Justices concurring.

(107 Kan. 359)

HIATT v. SOVEREIGN CAMP, W. O. W.  
(No. 22745.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

Insurance § 723(2, 6)—Provision as to effect of misrepresentations does not apply to fraternal benefit certificates; questions as to applicant's treatment for certain named diseases held material.

The law declared in the syllabus of the preceding case (*Glasgow v. Sovereign Camp, W. O. W.*, 191 Pac. 470) is applied, and further held, that questions asked upon an application for a beneficiary certificate as to whether or not the applicant ever had certain diseases, and whether he had ever consulted or been treated by a physician for any disease or injury during the preceding five years, are material, and that findings showing that his answers to these questions were false operate to annul the certificate.

Appeal from District Court, Wyandotte County.

Action by Florence Hiatt against the Sovereign Camp of the Woodmen of the World. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

Harding, Deatherage, Murphy & Stinson, of Kansas City, Mo., and McAnany, Alden & Van Cleave, of Kansas City, Kan., for appellant.

E. A. Enright, of Kansas City, Kan., for appellee.

(191 P.)

PORTER, J. This appeal from a judgment in plaintiff's favor upon a beneficiary certificate issued by the defendant to Sylvester T. Brown, who was then the husband of the plaintiff, is in many respects a companion case to the preceding one (*Glasgow v. Sovereign Camp, W. O. W.*, 191 Pac. 470), and they were submitted together.

Substantially the same defense was made; the answer alleging that the insured made certain representations and warranties concerning his bodily health and whether he had been attended by physicians within the period of five years preceding the date of his application, and that the answers he returned to these questions were false. As in the preceding case, the court adopted an erroneous theory with respect to the provisions of chapter 226 of the Laws of 1907 (*Gen. Stats. 1915, §§ 5290, 5291*). The law as declared in the first and second paragraphs of the syllabus of the preceding case is controlling, and there remains only the question whether the findings of the jury with respect to the representations of the insured are contrary to the evidence and the law.

In his application the insured was asked the following questions, the answers to which are claimed to be false:

"Have you now or ever had any disease of the following named organs, or any of the following named diseases or symptoms: Palpitation, shortness of breath, dropsy or dropsical swellings, fainting spells, enlarged veins, or any other symptoms of disease of the heart or blood vessels?" Answer: "No."

"Have you been attended or consulted by any physician for any diseases or injury during the past five years?" Answer: "No."

"Have you ever had any disease or injury not referred to above?" Answer: "No."

The medical examiner for the defendant testified that he read to the insured all of the questions in the application, and wrote down the answers exactly as the insured gave them; that the foregoing questions were asked of him, and to each of them he answered, "No." The contention is that the answer to the first question was false, in that the insured had for a number of years been afflicted with enlarged veins, or varicose veins, of the leg. Dr. J. A. Dillon testified, in substance, that he had been engaged in the practice for 25 years; within the period stated he treated Sylvester T. Brown professionally; Brown had a sudden fainting spell, and was thought to be dying; the witness diagnosed the disease as pulmonary embolism; the patient afterwards developed phlebitis, or inflammation of the leg, and was laid up for some time. Dr. Dillon was called in consultation two or three times with Dr. Koons, the family physician of Brown. The patient had the appearance of being a very sick man, was emaciated and

pallid, and walked with very great difficulty.

Dr. Koons testified that he was well acquainted with Sylvester T. Brown; that five or six years before the trial he was called in haste to Brown's house to treat him professionally; that Brown had a stroke of the heart of some kind, and had fallen; that when the witness reached the house he found him breathing with difficulty; that upon returning in the afternoon, or possibly the next day, Brown's condition was so serious that witness called Dr. Dillon in consultation, and they diagnosed the case as an inflammation and infection of the femoral vein; they found the patient suffering from phlebitis; that the witness continued to treat Brown off and on for several months, and during that time he improved, but the witness feared a return of the trouble and advised him against taking long walks or violent exercise; that the disease called phlebitis affects the circulatory system, and causes the blood to clot where an inflammation starts, and afterwards to adhere to the walls of the veins, which will sometimes obstruct the blood vessels, detaining the rate of circulation and causing a white inflammatory swelling; that there is a connection between this condition and embolism, which is likely to be produced by femoral phlebitis, and that it had this effect on Mr. Brown.

Dr. Michener, a physician and surgeon for 35 years, well acquainted with Sylvester T. Brown in his lifetime, testified that he treated him professionally in July, August, and September, 1914, and found him afflicted with a large varicose ulcer in the right leg, about as large as the back of his hand and a half inch in depth; from the size and condition of the ulcer, he thought it had been there for a year or more; that he put on a dressing, and left it on several weeks, then split it, and took it off, and that the ulcer was healing; that he recommended that Brown wear an elastic stocking, in order to support the veins, and that after the veins became dilated, as they were in this case, they seldom regain their tenacity, and need some artificial support. He advised the patient that it would be necessary to wear this stocking continuously, and that in case he failed to do so the veins would again become dilated, filled with blood and become stagnant, and there would be a recurring ulcer. In his opinion and judgment, the ulcers on Brown's leg were incurable. He further testified that Brown and his wife came to Wichita about six months afterwards, and that at that time the leg was in good condition; that he further impressed upon Brown at that time the necessity of continuously wearing the rubber stocking, because the veins would again become enlarged and the trouble return.

Dr. Cloyd, Sovereign Physician of the defendant, testified that the application for the

beneficiary policy could not have been accepted without his approval, and would not have been approved, if the application had disclosed that the applicant had suffered from enlarged veins in the leg, commonly called varicose veins, to the extent that it was necessary to have treatment by a physician.

The proprietor of a printing plant where the deceased at one time was employed testified that he had occasion to notice the physical appearance of Brown, and that during part of two years he appeared to have a great deal of trouble with his leg, and every few weeks was laid off from work for two or three days at a time by reason of it, and that he knew of Brown going to Wichita to consult a doctor, and that at times Brown had a limp when he walked.

In rebuttal, plaintiff offered the deposition of a witness, who testified that he was instrumental in getting Brown to join the order, and was present when he was examined by the local camp physician, and that not more than 10 minutes was occupied in the examination. In answer to a direct question, he said that Dr. Smolt, under the questions in the blank application entitled "Personal History," did not explain to Brown the meaning of the terms used, and to the best of his knowledge he did not hear Brown asked any questions concerning varicose veins, and did not hear any question about enlarged veins; that he heard the question asked, "Have you consulted or been attended by a physician for any disease or injury during the past five years?" and that Brown named Dr. Michener of Wichita.

Sylvester T. Brown's death occurred on January 18, 1918, after an operation at a hospital in Newton for the relief of a ruptured appendix, and the physician who performed the operation and who filled out the death certificate stated that embolism was the cause of the death. He was a witness, and testified that he was prompted to make this statement on account of the suddenness of the death and the character of the attack. He also testified that when the appendix was removed there was found a congested, inflamed, gangrenous area near the end, and a perforation; that he did not observe any evidence of the existence of a blood clot causing the death, and that the operation might have contributed.

The jury returned the following special findings:

(1) Did Sylvester T. Brown sign an application through Hazelwood Camp, No. 15, for membership in defendant society and for participation in its beneficiary fund, in which he was asked this question: "Have you now or ever had any disease of the following named organs or any of the following named diseases or symptoms: Palpitation, shortness of breath, dropsy or dropsical swelling, fainting spells, enlarged veins, or any other symptoms

of disease of the heart or blood vessels?" Answer: No.

(3) At the time Sylvester T. Brown signed the application for membership, did said application have this question and answer: "Have you consulted or been attended by a physician for any disease or injury during the past five years?" Answer: "No." Answer: Yes.

(4) Did Sylvester T. Brown, prior to July 25, 1914, and within five years before January 3, 1916, consult, or had he been attended by, Dr. C. C. Koons, of Larned, Kan., for phlebitis of the right femoral vein? Answer: Yes.

(5) Did Sylvester T. Brown consult, or was he attended by, Dr. J. A. Dillon, of Larned, Kan., prior to July, 1914, and within five years prior to January 3, 1916, for phlebitis of the right femoral vein, or any other disease or ailment? Answer: Yes.

(6) Did Sylvester T. Brown consult, or was he attended by, Dr. H. Michener, during July, August, and September, 1914, for ulcers of the right leg and enlarged veins? Answer: Yes.

(7) Did Sylvester T. Brown answer the question in the application, "Have you consulted, or been treated by, a physician for any disease or injury during the past five years?" by saying, "Dr. Michener." Answer: Yes.

(8) Did Sylvester T. Brown answer the question asked him by Dr. A. E. Smolt, in his application for benefit certificate, in good faith and without intentional evasion or suppression of matters inquired about said questions? Answer: Yes.

(9) Was the death of Sylvester T. Brown caused by a diseased appendix and the operation to remove the same? Answer: Yes.

(10) Was the cause of Sylvester T. Brown's death embolism? Answer: No.

Upon the return of the verdict and special findings, the defendant moved to set aside the answers to special questions 1, 7, 8, 9, and 10, and for judgment for defendant on the findings. The motion to set aside the findings was overruled, except as to finding No. 10; that was set aside, obviously, because the findings, in the opinion of the court, showed that the cause of Brown's death was embolism. It is clear, in our opinion, that several of the other findings should have been set aside. In finding No. 1 the jury say that Brown did not file an application for the insurance "in which he was asked" the question, "Have you now or ever had any disease of the following named," etc.? We think the finding is contrary to the evidence. In support of the finding the plaintiff contends that it is correct, because there was no evidence to show that the insured was orally asked the question. If the answer of the jury was based upon this technicality, it was simply an evasion of the question. The application, with questions and answers, was in writing, and the question submitted to the jury referred to the written application.

The testimony of the witness Lyle, who claimed to have been present at the examination, and that to the best of his knowl-

edge he did not hear any question asked about varicose veins, or enlarged veins, is negative in character, and not sufficient to overcome the written application, or the positive testimony of the physician who made the examination. Finding No. 7, in which the jury say that to the question, "Have you consulted or been treated by a physician for any disease or injury during the past five years?" Brown answered as follows: "Dr. Michener"—is contrary to the evidence and should have been set aside. The testimony of the witness Lyle being in the form of a deposition, this court is as qualified to pass upon its weight as the trial court, and in our opinion it is not sufficient to overcome the written application. Finding No. 8 with respect to the good faith of the insured in answering the questions is not, in our opinion, sustained by the evidence.

Finding No. 8, that the insured signed an application for membership in which he answered that he had not consulted or been attended by any physician for any disease or injury during the past five years, and findings Nos. 4, 5, and 6, that he had within that time consulted and been attended by three physicians for phlebitis of the right femoral vein, and the statement in the written application that he had never had any disease such as enlarged or varicose veins, establish the falsity of the representations and warranties upon matters which were material, and it follows that the false answers of the insured to questions of this character annul the certificate.

Reversed and remanded, with directions to enter judgment for the defendant.

All the Justices concurring.

(107 Kan. 463)

**TUTTLE et al. v. MILLER et al.**  
(No. 22596).\*

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

Sales §202(4)—Title passed on delivery, although price not paid.

Where hay is sold under a contract that the final payment therefor shall be made when the hay is delivered on board cars, and the hay is burned before being placed on the cars, and a statement of the evidence prepared by the court under section 582 of the Code of Civil Procedure (Gen. St. 1915, § 7486) shows that the hay was delivered before being burned, a judgment in favor of the seller for the balance of the purchase price will not be reversed.

Appeal from District Court, Woodson County.

Action by Frank Tuttle and others against L. M. Miller and others. Judgment for plain-

tiffs, and defendants appeal. Modified and affirmed.

Lamb & Hogueland, of Yates Center, for appellants.

S. C. Holmes, of Yates Center, and J. L. Stryker, T. J. Hudson, and D. J. Sheedy, all of Fredonia, for appellees.

**MARSHALL, J.** The plaintiffs recovered judgment for the remainder of the purchase price of hay, and the defendants appeal. In their brief they say that they—

"present but one matter to this court for review, to wit: A construction of the contract sued on in this case concerning the ownership of the 68.44 tons of hay at the time same was destroyed by fire."

The contract referred to read:

"Know all men by these presents, that Tuttle Bros. have heretofore sold to Woodson County Grain Company 225 tons of baled prairie hay stored in barn in three Tuttle barns and in Sellars and in Mays barn in Woodson county, Kansas, for the agreed price of \$17 per ton on board of cars either Rose, Buffalo, or Chanute, Kansas; and whereas, they have moved about 10 tons on cars and about 44 tons and stored same at Rose, Kansas, said grain company to pay for barn rent: It is now further agreed that said Tuttle Bros. shall move now about 64 tons more to Rose, Kansas, and all the other hay to be loaded on cars as soon as cars can be procured, and load the hay stored at Rose on cars as soon as cars can be obtained, and the said Woodson County Grain Company shall pay, in addition to the \$500 heretofore paid on said hay, the additional sum of \$500 this day, and \$500 more to be paid when the 100 tons are stored at Rose. The balance of the pay is to be paid on delivery on cars, less the proportional sum heretofore paid on the entire 225 tons. Said Woodson County Grain Company to furnish all cars for shipment. Insurance to be paid for by Woodson County Grain Company on hay stored at Rose, and Tuttle Bros. on the other hay."

No transcript of the evidence was made by the stenographer, but a statement of the evidence and proceedings in the case has been made and filed by the trial court under section 582 of the Code of Civil Procedure (Gen. St. 1915, § 7486). That statement contains the following:

"From the pleadings in the cause and under all the evidence introduced upon the trial thereof the following facts are clearly shown, indeed, may be regarded as admitted by the parties, to wit:

"(1) The execution of contract set out as Exhibit A attached to plaintiffs' petition.

"(2) That all hay actually delivered upon cars at Rose, Woodson county, Kan., has been fully paid for by defendants pursuant to contract referred to.

"(3) That plaintiffs, at the request and by direction of defendants, stored a portion of

hay purchased under the terms of contract in hay barn at Rose, Kan., the defendants to pay the rental for use of said barn for the storing of such hay therein.

"(4) That defendants should pay the insurance upon the hay so stored in said barn at Rose, Kan.

"(5) That on the — day of January, 1918, the said hay barn at Rose, Kan., was struck by lightning, and said barn and contents were wholly destroyed by fire, among which contents were 66.44 tons of hay sold and delivered by plaintiffs to defendants and placed in said hay barn under the terms of contract hereinbefore set out at length.

"(6) That under contract the agreed price for hay was \$17 per ton, payable 'on delivery on cars'; the defendant to furnish all cars for shipment.

"(7) That no part of the value of the 66.44 tons of hay destroyed by fire has been paid to plaintiffs by the defendants, or by any person for or on their behalf.

"(8) That the plaintiffs, at all times subsequent to the storing of hay in the hay barn at Rose, Woodson county, Kan., aforesaid, and before its destruction by fire, were not only willing, but anxious, to load same on cars at Rose, Kan., upon the defendants' procuring cars for shipment."

The court concluded that the defendants were liable for the hay that had been burned.

The defendants argue that nothing is involved in this appeal but an interpretation of the contract, for the purpose of ascertaining who was the owner of the hay at the time it was burned. The evidence should be considered, but it is not before the court. In the place of the evidence must be considered one of the things that the trial court says was clearly shown thereby; that is, that the hay had been sold and delivered by the plaintiffs to the defendants and placed in the barn under the terms of the contract. After reciting the statement of what was shown by the evidence, a discussion of the refinements of law involved in the final transfer of property sold becomes unnecessary. If the hay had been delivered, it was the property of the defendants, and they must bear the loss. A large part of the purchase price for the hay had been paid before it was burned. If the hay had not been burned, and the plaintiffs had refused to load it on the cars, the defendants could have loaded it, and could have deducted the cost of loading it from the balance of the purchase price to be paid. The remainder of the purchase price was to have been paid when the hay was placed on cars. The contract fixed the time for the payment of the balance of the purchase price at the time when the hay should be placed on board the cars, and did not fix that as the time when the hay should become the property of the defendant. The plaintiffs did not put the hay on the cars; to have done so would have cost them something. That they

should not collect. What it would have cost the plaintiffs to put the hay that was burned on the cars should be deducted from the amount of the judgment.

The cause is remanded, with instructions to ascertain that amount and deduct it from the judgment. Other than this, it does not appear that the conclusion reached by the court was incorrect.

With this modification, the judgment is affirmed.

All the Justices concurring.

(107 Kan. 407)

STATE v. ALLEN et al. (No. 22906.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Criminal law §1024(1)—When state may appeal on reserved questions, stated.

An appeal "upon a question reserved by the state" (Crim. Code, § 283 [Gen. St. 1915, § 8199]) may be taken from an order overruling the objection of the state to evidence offered by the defendant on the trial of a criminal charge, and from instructions given by the court to the jury. The appeal may be taken after the jury has disagreed and after the cause has been continued to another term of court for trial.

2. Homicide §194—Evidence as to accused's knowledge of character of deceased held admissible.

On a trial for murder the defendant, after he has introduced evidence tending to prove that he acted in self-defense, may, for the purpose of showing that he took the life of the other under a reasonable apprehension of danger to his own life, introduce evidence to show that he had heard of particular acts of violence on the part of the deceased, and that the deceased was a turbulent, quarrelsome, and dangerous man.

3. Homicide §300(3) — Instruction as to rights to arm and go to home of deceased to obtain property claimed, held erroneous.

It is error to instruct a jury that a defendant, who has had a dispute with another concerning the ownership of property which each claimed and which is in the possession of the other, may arm himself and go to the home of the other to obtain the property when the defendant has information that the other person is a violent man, and has made threats against the defendant, and when the defendant has reason to believe that a visit to the home of the other person will result in an altercation and in a possible encounter in which it may be necessary for him in self-defense to take the other person's life.

Porter and Burch, JJ., dissenting.

Appeal from District Court, Pawnee County.

Albert Allen and others were charged with murder, a mistrial resulted, the action was



continued for the term, and the State appeals. Appeal sustained.

R. J. Hopkins, Atty. Gen., Carr W. Taylor, of Hutchinson, C. L. Wilson, of Tribune, E. D. McKeever, of Topeka, and Roscoe Peterson, of Larned, for the State.

E. R. Thorpe, of Lakin, Edgar Foster, of Garden City, L. A. Madison, of Dodge City, and Cline & Cline, of Larned, for appellees.

**MARSHALL, J.** The state presents a question reserved by it under section 283 of the Code of Criminal Procedure (Gen. St. 1915, § 8199). The defendants were placed on trial, charged with the murder of Joe Kutler. A mistrial resulted, the jury failed to agree, and the action was continued for the term. The state complains of the introduction of evidence on behalf of the defendants and of an instruction given to the jury.

[1] 1. At the outset this court is met with an application on the part of the defendants to dismiss the appeal. Section 283 of the Code of Criminal Procedure reads:

"Appeals to the Supreme Court may be taken by the state in the following cases, and no other: First, upon a judgment for the defendant on quashing or setting aside an indictment or information; second, upon an order of the court arresting the judgment; third, upon a question reserved by the state."

The appeal is taken under the third subdivision of section 283 on "a question reserved by the state." This expression has received attention in *Junction City v. Keffe*, 40 Kan. 275, 19 Pac. 735; *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186; *State v. Bland*, 91 Kan. 160, 136 Pac. 947; *State v. Railway Co.*, 96 Kan. 609, 628, 152 Pac. 777, Ann. Cas. 1917A, 612. But the discussion there found does not materially assist in the solution of the problem now presented.

No order that this court may now make can have any effect on the trial out of which this appeal has arisen. No judgment has been rendered that can be affirmed, modified, or reversed. This court has repeatedly refused to consider questions where the matter complained of has been adjusted, or where any order made by the court would not have any effect.

"A court will not make an order which in the nature of things cannot be obeyed." *Crouse v. Nixon*, 65 Kan. 843, 845, 70 Pac. 886, 886.

"The judgment of the court below having been complied with, nothing is left to litigate in this court." *Waters v. Garvin*, 67 Kan. 855, 73 Pac. 902.

"The rule applied that this court will not consider and decide questions when it appears that any judgment it might render would be unavailing." *Jenal v. Felber*, 77 Kan. 771, 95 Pac. 403.

"The court is not required to give judgments that are not effective. *Stebbins v. Telegraph Co.*, 69 Kan. 845, 76 Pac. 1130. When ques-

tions become moot, judicial action will cease." *State ex rel. v. Insurance Co.*, 88 Kan. 9, 10, 127 Pac. 761, 762.

See, also, *City of Kansas City v. State*, 66 Kan. 779, 780, 71 Pac. 1127; *Bonnewell v. Lowe*, 80 Kan. 769, 104 Pac. 853; *Duggan v. City of Emporia*, 84 Kan. 429, 114 Pac. 235, Ann. Cas. 1912A, 719; *City of Ottawa v. Barnes*, 87 Kan. 768, 125 Pac. 14.

It has been repeatedly held that an appeal by the state cannot be prosecuted after the defendant has been tried and acquitted. *State of Kansas v. Carmichael*, 3 Kan. 102; *City of Oswego v. Belt*, 16 Kan. 480; *State v. Crosby*, 17 Kan. 396; *State v. Phillips*, 33 Kan. 100, 5 Pac. 436; *State v. Moon*, 45 Kan. 145, 25 Pac. 614; *State v. Lee*, 49 Kan. 570, 31 Pac. 147; *State v. Hickerson*, 55 Kan. 133, 39 Pac. 1045; *City of Lyons v. Wellman*, 56 Kan. 285, 43 Pac. 267. Appeals have been acted on under the first and second subdivisions of the statute. *State v. Brandon*, 7 Kan. 106; *Junction City v. Keffe*, 40 Kan. 275, 19 Pac. 735; *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186; *State v. Bowles*, 70 Kan. 821, 79 Pac. 726, 69 L. R. A. 176; *State v. Campbell*, 70 Kan. 899, 900, 79 Pac. 1133; *State v. Buis*, 83 Kan. 273, 111 Pac. 189; *State v. Lumber Co.*, 83 Kan. 399, 111 Pac. 484; *State v. Railway Co.*, 96 Kan. 609, 628, 152 Pac. 777, Ann. Cas. 1917A, 612. Appeals by the state have been sustained where judgment for costs has been assessed against the county and the name of the prosecutor has been stated in the verdict, and the jury has found that the prosecution has been instituted without probable cause and from malicious motives (*State v. Zimmerman*, 31 Kan. 85, 1 Pac. 257), and from a judgment in a liquor case refusing to award an attorney's fee as costs (*State v. Bland*, 91 Kan. 160, 165, 136 Pac. 947). One reason given for refusing to entertain an appeal where the defendant has been acquitted has been that, having been acquitted, he was once in jeopardy, and cannot be again placed on trial for the same offense. *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186.

Section 3 of article 3 of the Constitution of this state provides:

"The Supreme Court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus; and such appellate jurisdiction as may be provided by law."

The statute under consideration provides for appeals "upon a question reserved by the state." The question presented is a question reserved by the state, and comes within the language of the statute. Questions reserved by the state, where there has been a verdict of not guilty, would likewise come within the language of the statute, but such appeals have not been entertained probably for three reasons: First, if a judg-

ment of acquittal were reversed, and the defendant again placed on trial he would be twice in jeopardy in violation of section 10 of the Bill of Rights of the Constitution of this state; second, because the defendant had been discharged and the court no longer had any jurisdiction over him; third, because no order that the court could make would have any effect. The second and third reasons, when reduced to their final analysis, will be found to be based on the fact that any order to be effective would place the defendant twice in jeopardy. Bearing some analogy to the second reason, and showing in a degree that it is not good, is the practice that obtains in the federal courts of certifying a question to a higher court for determination while the action is still pending in the court from which the question is certified. During the time that the question is pending in the higher court the trial court retains jurisdiction of the action, and goes ahead with the trial after the question has been answered. A somewhat similar practice exists in a number of states. 3 C. J. 989-1000. Even after a verdict of not guilty has been returned, the defendant has been discharged, and the judgment has been reversed, if it can be reversed, there is no reason why the court cannot again obtain jurisdiction of the defendant by causing him to be rearrested, but there is no reason for rearresting him if he cannot be tried. Jeopardy is the fact that prevents further proceedings, but jeopardy does not deprive this court of the power to hear and determine the present appeal, for the reason that the defendant is yet to be tried on the charge against him, and on that trial a plea of former jeopardy cannot be successfully interposed.

The Civil Code provides that the court may in advance of the trial of the facts pass upon questions of law "not raised by motion or demurrer but appearing to be involved in the case under the allegations of the pleadings," such questions and rulings to be stated in writing and filed as a part of the record. Gen. Stat. 1915, § 7178 (Code Civ. Proc. § 278). Under that provision a decision might be made the effect of which would be to declare that when that stage of the trial should be reached the jury should be instructed as to the legal effect of certain facts if found. The statute does not at the present time allow an appeal from such a ruling or declaration, but no reason is apparent why it might not be permitted. The situation here presented is essentially similar. It has been developed by a ruling already made that the trial court entertains an erroneous view of the law on a vital point involved which, unless corrected, is likely to bring about an acquittal through the jury's mistaken conception of the defendant's rights. If this court may not interpose to prevent such a result a grave miscarriage of justice may take

place, because the remedy provided by the statute is unavailable, not on account of any practical evil consequences that might be apprehended, but by reason of a somewhat extreme application of an abstract theory. There is a real need for the practice here invoked in order that the interests of the state may be protected, for a verdict of not guilty is necessarily final. The defendant requires no such protection because if convicted he may obtain a new trial upon a showing that error was committed against him.

In *State v. Roderick*, 77 Ohio St. 301, 82 N. E. 1082, 14 L. R. A. (N. S.) 704, the Supreme Court of Ohio sustained exceptions taken by the state in a murder trial. The Constitution of Ohio then provided that the Supreme Court should have "such appellate jurisdiction as may be provided by law," and that no person shall "be twice put in jeopardy for the same offense." The statutes provided for bills of exceptions being prepared by the prosecuting attorney or Attorney General and being signed by the trial court and presented to the Supreme Court, and further provided that the judgment in the action in which the bill of exceptions was taken should not be reversed nor affected by the decision of the Supreme Court, but the decision should determine the law to govern in a similar case.

The application to dismiss the appeal is denied.

[2] 2. The defendants introduced evidence which tended to show that they had acted in self-defense, and which tended to show that Joe Kutler had made threats of violence against them. Albert P. Allen, one of the defendants, testified as follows:

"Q. Mr. Allen, what had you heard about his being a quarrelsome and vicious man? A. I heard that he beat Mr. Horning up and gouged his eyes nearly out. I have heard that he tried to kill his wife and some of his children, and I have also heard that summer that I was up there that he had broken her arm and knocked the youngest boy, Buford, down with the bridle bit, and I have also heard that he killed a man and his wife and child for a mule team, wagon, and harness.

"Q. When did you learn of these before or after you went over there that morning? A. Before.

"Q. Did you hear of any other acts that you have not detailed? A. Yes, sir.

"Q. What? A. Well, I have heard that he chewed several other fellows up.

"Q. Well, if you have any other things that you heard, just tell them to the jury, Mr. Allen. A. I don't believe there is any more that I remember of now.

"Q. That is all the acts that you remember of that you heard? A. Yes, sir.

"Q. I will ask you if you heard these generally discussed in the neighborhood and vicinity? A. Well, I hardly ever went any place where Mr. Kutler was spoken of but what some

one could tell me something of that kind he had done. That he was into trouble always."

That evidence was objected to by the state, and the objection was overruled by the court. Of that the state complains.

Under a charge of murder, where self-defense is pleaded and evidence has been introduced sufficient to raise a doubt concerning the defendant's having acted in self-defense, evidence may be introduced to show the general character of the deceased for ferocity and brutality. *Wise v. State*, 2 Kan. 419, 85 Am. Dec. 595; *State v. Riddle*, 20 Kan. 711; *State v. Scott*, 24 Kan. 68; *State v. Keefe*, 54 Kan. 197, 38 Pac. 302; *State v. Spangler*, 64 Kan. 661, 68 Pac. 39. But that does not answer the complaint of the state. Its complaint is that the defendant should not have been permitted to prove particular instances of violence or viciousness on the part of the deceased toward other persons, which did not concern the defendant, at which he was not present, and of which he had no personal knowledge. On this question the defendant cites *State v. Burton*, 63 Kan. 602, 66 Pac. 633, and the state cites *State v. Long*, 103 Kan. 307, 175 Pac. 145. In *State v. Burton*, this court used the following language:

"Information conveyed before the killing to a party on trial for murder, who justifies on the ground of self-defense, that the deceased was a violent and turbulent man and accustomed to go about armed, is admissible, whether the informant gained his knowledge from general reputation of the deceased or from personal observation of his specific acts. The rule that bad character in the respect mentioned can be established only by general reputation of the deceased in the community has no application to the admission of such testimony. It is competent for the purpose of determining the state of mind of the accused at the time of the homicide, and whether he was induced to believe, in good faith, that he was in imminent danger of death or great bodily harm at the hands of the person killed." *Syl. 8.*

In *State v. Long*, *supra*, this language is found:

"The defendant complains that he was not permitted to show specific acts of personal violence on the part of Lockridge, nor to show that knowledge of these acts had been previously communicated to the defendant. Evidence was introduced on rebuttal which tended to show that Lockridge was a quarrelsome, turbulent, and dangerous man. This was done by showing his general reputation. 'Where character evidence is offered in support of the contention that the deceased was the aggressor or to characterize and explain his acts, the defense is restricted to proof of general reputation in the community where the deceased lived, and may not show particular acts or conduct at specified times. It may not be shown that the deceased had engaged in frequent fights, in

which he used deadly weapons, and therewith made deadly assaults on his antagonists.' 13 R. C. L. 919. See, also, 6 Ency. of Ev. 780; 1 Wigmore on Evidence, §§ 63, 246.

"The defendant was not permitted to answer the following question: 'Q. I will ask if you had heard conversations, by persons round in that community, with reference to his being a turbulent and quarrelsome and dangerous man?' The question was a proper one, and should have been answered. *State v. Burton*, 63 Kan. 602, 66 Pac. 633; note, L. R. A. 1916A, 1245."

These decisions determine that the evidence complained of was admissible for the purpose of showing the state of mind of the defendants at the time of the homicide.

[3] 3. The state complains of the following instruction given by the trial court:

"You are instructed that if you find from the evidence that the deceased had made threats against the defendant, which, if carried into execution, would endanger his life or subject him to great bodily harm, and that defendant in good faith feared, or had reason to fear, that such threats were liable to be carried into execution; or, if you find from the evidence, that deceased was a quarrelsome, dangerous man, and defendant had knowledge of such fact, and in good faith feared that an attack might be made upon him by deceased should he assert a claim of ownership to the mule in the possession of deceased, then the defendant might lawfully arm himself with a deadly weapon, either in anticipation of such threats being carried into execution, or on account of the dangerous character of the deceased he was liable, for the reasons stated, to be forced to repel a deadly and dangerous assault at the hands of the deceased, which had not been intentionally provoked or brought on by the defendant."

The record discloses that the difficulty between the deceased and the defendants arose over the disputed ownership of a mule that was in the possession of the deceased; that on May 18, 1918, the sheriff of Greeley county, the county in which the homicide occurred, defendant Albert Allen, and Joe Kutler together examined the mule, and that Allen and Kutler each claimed it. The record further discloses that on the day Joe Kutler was killed, May 25, 1918, the defendants armed themselves and went to the home of Joe Kutler to talk with him and try to get the mule without any trouble. The fault with the instruction is that according to it the defendants had a right to arm themselves and go to Kutler's home to get the mule when the evidence tended to prove that they had reason to believe that an interview with Kutler would bring on an altercation and a possible necessity for killing him in self-defense. The Allens had a right to obtain possession of the mule, if it was theirs, if they could do so without committing a trespass or a breach of the peace. In 3 Blackstone's Commentaries, page 4, this rule is stated as follows:

"Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens, when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant, in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious, since it may frequently happen that the owner may have this only opportunity of doing himself justice, his goods may be afterwards conveyed away or destroyed, and his wife, children, or servants concealed or 'carried out of his reach, if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property, and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law."

The evidence of the defendants tended to show that Kutler was a violent man; that he had made threats against the defendants; that they had information concerning those threats; that they armed themselves; that they went to Kutler's home; that they got into an altercation with him; that an encounter ensued, which resulted in Kutler's death; that they had reason to believe that their visit to Kutler's home would result in an altercation and a possible encounter, in which it might be necessary for them, in self-defense, to take Kutler's life. They had no right to go to Kutler's home in that manner under those circumstances. *Clark's Criminal Law*, 168; *Wallace v. United States*, 162 U. S. 466, 472, 16 Sup. Ct. 859, 40 L. Ed. 1039; *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795.

In the opinion of the court the instruction was erroneous. The appeal is sustained.

JOHNSTON, C. J., and MASON, WEST, and DAWSON, JJ., concurring.

BURCH, J., dissenting.

PORTER, J. (dissenting). The decision is made to rest upon the provision of the Constitution that the Supreme Court shall have, in addition to the original jurisdiction con-

ferred upon it, "such additional appellate jurisdiction as may be provided by law," and the literal words of the statute, which says that the state may appeal "upon a question reserved." The decision ignores the meaning of appellate jurisdiction as used in the constitutional provision.

In an early case, *Auditor of State v. Atchison, T. & S. F. R. Co.*, 6 Kan. 505, 7 Am. Rep. 575, this court had under consideration what the words "appellate jurisdiction" as used in the Constitution mean. In the opinion it was said:

"In this search we are not left entirely to our own reason for guidance. The Constitution of the United States contains a clause of similar import, which has been the subject of comment and decision by the Supreme Court of the United States, and the substance of their decision is thus stated by Judge Story in his *Commentaries on the Constitution*, § 1761: 'The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted, and acted upon by some other court, whose judgment or proceedings are to be revised. The appellate jurisdiction may be exercised in a variety of forms, and indeed in any form which the Legislature may choose to prescribe; but still, the substance must exist before the form can be applied to it.'

\* \* \* This construction of the term represents, as well the general views of men, as the decisions of courts, and must have been in the minds of those who made it a part of our fundamental law, and must be held by this court as authoritative and binding. See the case of *Crane v. Giles*, 3 Kan. 54; *Ex parte Logan Branch Bank*, 1 Ohio St. 432."

In the recent edition of *Bouvier's Law Dictionary* (3d Rev.) vol. 1, p. 208 (Appeal and Error), it is said:

"The appellate jurisdiction 'is exercised by revising the action of the inferior court, and remanding the cause for the rendition and execution of the proper judgment.' *Dodds v. Duncan*, 12 Lea (Tenn.) 731, 734. It 'implies a resort from an inferior tribunal of justice to a superior, for the purpose of revising the judgments' of the former. *Smith v. Carr*, Hard. (Ky.) 305. And it was said in *Marbury v. Madison* that its essential criterion is 'that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.' 1 Cra. (U. S.) 137, 175, 2 L. Ed. 60; *Auditor of State v. R. Co.*, 6 Kan. 500, 505, 7 Am. Rep. 575; *Sto. Const.* § 1761; *Tierney v. Dodge*, 9 Minn. 166 (Gil. 153)."

In the case of *State v. Roderick*, 77 Ohio St. 301, 82 N. E. 1082, 14 L. R. A. (N. S.) 704, cited in the majority opinion, the question of what is appellate jurisdiction is not referred to. The point was not raised nor considered. Exceptions of the state to certain rulings were sustained. What the sta-

tus of the case was at the time the exceptions were considered does not appear from the opinion.

I find no analogy to be drawn from the federal procedure of certifying to a higher court questions for determination while a suit is pending below. The same thing occurs in civil cases under our practice where there is an appeal from a demurrer to a pleading, and the case remains in abeyance while the appeal is pending. Besides, it is held that a federal court has no authority to certify a case to the Supreme Court except upon questions or propositions concerning which it desires the instruction of that court for its proper decision of the case. *German Ins. Co. v. Hearne*, 118 Fed. 134, 55 C. C. A. 84. In an article on Appeal and Error, in 3 C. J. 1001, it is said:

"And a proposition which is merely abstract or hypothetical will not be considered"—citing *Pelham v. Rose*, 9 Wall. 103, 19 L. Ed. 602; *Havemeyer v. Iowa County*, 3 Wall. 294, 18 L. Ed. 38; *Ward v. Chamberlain*, 2 Black, 430, 17 L. Ed. 319; *Ogilvie v. Knox Ins. Co.*, 18 How. 577, 15 L. Ed. 490.

It is further said:

"The Supreme Court will not decide a question certified where the decision will avail nothing" (citing *U. S. v. Buzzo*, 18 Wall. 125, 21 L. Ed. 812). 3 C. J. 1001, 1002.

An attempted appeal which does not bring to the court a justifiable controversy requiring the court to revise, affirm, modify, or reverse some ruling made by the trial court is not within the definition of appellate jurisdiction.

I think, too, there is an obvious fault in the reasoning and logic of the opinion. It attempts to state three reasons why the court has heretofore uniformly declined to entertain such appeals. These three reasons are stated to be: First, if a judgment of acquittal were reversed, and the defendant again placed on trial, he would be twice in jeopardy in violation of section 10 of the Bill of Rights; second, because the defendant had been discharged, and the court no longer had any jurisdiction over him; and, third, because no order the court could make can have any effect.

The fact is the court has uniformly declined to entertain appeals of this kind solely on the ground that no order the court could make would have any effect. In one class of cases it could make no effective order, because the defendant, having been acquitted, could not be twice placed in jeopardy; in another class of cases, the defendant had been discharged and the court no longer had jurisdiction over him, and for that reason no order this court could make would be effective. The reason has always remained the same. The court declined to entertain

the appeal because the court could make no effective order. The question presented was therefore regarded as moot. It was moot because no order could be made that would affect the rights of any person or could be carried into effect.

The majority opinion, however, after classifying the reasons into three, makes this statement:

"The second and third reasons, when reduced to their final analysis, will be found to be based on the fact that any order to be effective would place the defendant twice in jeopardy."

On the contrary, I insist that the first and second so-called reasons, when reduced to their final analysis, will be found to be based on the fact that no order the court could make would have any effect. The reason was well stated in general language in *Jenal v. Felber*, 77 Kan. 771, 95 Pac. 403, cited in the majority opinion. The syllabus there reads:

"The rule applied that this court will not consider and decide questions when it appears that any judgment it might render would be unavailing."

In the majority opinion, after quoting the constitutional provision and the statute, it is said:

"The question presented is a question reserved by the state, and comes within the language of the statute."

It is true the state has attempted to appeal on a question reserved, and I concede that the literal language of the statute authorizes such an appeal, but I deny the power of the Legislature to confer upon the Supreme Court any jurisdiction whatever, save and except appellate jurisdiction under the constitutional provision.

No decision is rendered except to express an opinion that a certain instruction given in a case where there has been a mistrial was erroneous, and that certain evidence which the court admitted on the same trial was proper evidence. There is an opinion, but no judgment. No order is made, and the court merely decides purely academic questions. The opinion, therefore, is pure dictum. I admit that it contains a statement of good law, and that the instruction discussed in the opinion was bad. I am perfectly willing to concede that if the case is ever tried again and the same questions arise as to evidence and instructions, the trial court would doubtless follow the opinion, and that no harm in that case would result. My objection to the opinion is that it establishes a bad precedent, opens the door to a practice sure to result in appeals which merely require the Supreme Court to express its opinion upon abstract questions of law, which is not appellate jurisdiction, and which the Legislature is powerless to confer upon the court. The appeal should be dismissed.

(107 Kan. 193)

**WATSON v. WATSON et al. (No. 22021.)**

(Supreme Court of Kansas. July 10, 1920.)

Appeal from District Court, Sedgwick County.

On motion for rehearing. Opinion modified.

For former opinion see 106 Kan. 693, 189 Pac. 949.

See, also, former opinions 104 Kan. 578, 180 Pac. 242, and 104 Kan. 578, 182 Pac. 643.

**WEST, J.** An extended motion for a rehearing filed by the defendants criticizes the opinion modifying the one first filed, in respect to the homestead question.

Upon full consideration, the only change deemed requisite is the elimination of the statement in the last opinion that since the 105th Illinois, *McMahill v. McMahon*, has been the law and rule of property in that state. Counsel have discovered that, after having followed that decision until 1907, the Illinois Supreme Court departed from it in *Colbert v. Rings*, 231 Ill. 404, 83 N. E. 274. But, aside from this, under our peculiar constitutional and statutory homestead provisions, the rule established by our former decisions and set forth in the last opinion herein is one from which we do not feel justified in departing. The statement referred to may be considered withdrawn.

The motion is denied.

All the Justices concurring.

(107 Kan. 390)

**SHANK et al. v. FRANKLIN COAL CO. (No. 22791.)**

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

**Mines and minerals** §55(4) — Contract for sale of coal held grant of limited estate of 20 years' duration, defeasible as to coal not mined.

Where the owners sold and conveyed the coal in place underlying a farm, and granted surface trackage rights, also rights of ingress and egress, and the right to construct mining facilities "for such a period of time as the grantee may require to remove the coal under said land," and gave the grantee the right to remove all mining equipment "whenever said coal is mined, or at the expiration of this agreement," and the contract concluded with the further stipulation: "It is further agreed by and between the parties hereto their heirs and assigns that this contract shall cease and be determined, and all of the rights of the said second parties their heirs or assigns thereunder or hereby acquired, shall terminate and determine at the expiration of twenty years from the date hereof. That said second par-

ties their heirs or assigns shall give quiet and peaceable possession of said premises and every part thereof at the expiration of the time herein stated unto the said first parties their heirs or assigns"—it is *held* that the sale and conveyance of the coal was a grant of a limited estate of 20 years' duration, defeasible as to any coal not mined within the time limit fixed by the contract.

Appeal from District Court, Crawford County.

Action by W. C. Shank, administrator and another against the Franklin Coal Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

J. J. Campbell and John P. Curran, both of Pittsburg, for appellants.

Arthur Fuller and W. J. True, both of Pittsburg, for appellee.

**DAWSON, J.** This lawsuit involves the rights of senior and junior grantees of sub-surface estates in coal lands in Crawford county.

In 1895, the owners of the fee sold and conveyed the coal in place under their farm to plaintiff's original assignor. The contract of the parties recited that the grantors had sold to the grantee all the coal underlying the land in question. It recited the consideration, \$1,900; detailed the terms of payment; provided for retention of title until payment was completed, and provided for a forfeiture for failure of payment. It provided for surface trackage rights, also rights of ingress and egress, and the right to construct mining facilities on the land "for such period of time as he (grantee) may require to remove the coal from under said land." It also provided that the grantee, his heirs and assigns, were privileged to remove all the mining equipment "whenever said coal is mined, or at the expiration of this agreement." It recited also that the grantee "shall properly prop and leave sufficient pillars in said mine which shall be left standing at the expiration of this contract, to protect the surface of said land from caving." The concluding paragraph of the contract reads:

"It is further agreed by and between the parties hereto their heirs and assigns that this contract shall cease and be determined, and all of the rights of the said second parties their heirs or assigns thereunder or hereby acquired, shall terminate and determine at the expiration of twenty years from the date hereof. That said second parties their heirs or assigns shall give quiet and peaceable possession of said premises and every part thereof at the expiration of the time herein stated unto the said first parties their heirs or assigns."

Some time after the expiration of the 20 years specified in the contract, the defend-

ant bought the property from the heirs of the original owners, and for about 2 years has been taking coal from under this land.

Plaintiffs brought this action, alleging trespass and damages, and also prayed for an injunction. On the joining of issues, the trial court permitted evidence (over objection and with rulings reserved) to show that the oral understanding of the parties was that if the grantees of the contract of 1895 should not complete the work of mining the coal in 20 years, they would have to take it out thereafter by a shaft or "some other way than by going on the property," and that the stipulation that the contract should terminate in 20 years referred to the use of the real estate in taking out the coal, and that the grantee or his assigns should vacate all surface occupancy at the end of 20 years.

The trial court made a general finding for the defendant, and entered judgment accordingly.

The written contract of 1895 was not ambiguous, and in no need of oral evidence to clarify its meaning. The written contract of the parties defined the extent and duration of the estate acquired by plaintiffs' grantor. It is true that a separate subsurface estate was carved out of the original fee, but it was a determinable and not an unlimited estate. It was an estate for years, and the contract clearly and repeatedly specified the maximum duration of the estate conveyed to the grantees. True, also, there was a specific sale of the coal, but the whole contract has to be read and construed together; and it is clearly implied from all its terms that the coal thus sold was to be removed in 20 years; and all rights conferred by the contract—not merely the surface rights of occupancy, access, etc.—but the contract, in all its parts, "shall cease and be determined, and all of the rights of the said second parties, their heirs or assigns, thereunder or hereby acquired, shall terminate and determine at the expiration of twenty years." In other words, there was a conveyance of a present estate in all the coal in place, but defeasible as to any coal not mined within the time limit fixed by the contract.

Appellant cites more or less analogous cases which seem to hold that where coal in place or standing timber is sold and a term of years is specified in which such coal or timber is to be removed, the lapse of the specified time does not terminate the grantee's right to the coal or timber, but only cuts off the right of access thereto, leaving the matter of further access to future negotiations or to the grantor's right to damages for trespass and the like. Appellee cites a line of cases more in harmony with our view, although our judgment is based upon our interpretation of the particular contract before us, rather than by precedent and analogy. Some of the cases which by analogy support our conclusions are: Butler

v. McGorrick, 114 Fed. 300, 52 C. C. A. 212; Morgan v. Perkins, 94 Ga. 353, 21 S. E. 574; McRae v. Stillwell, Millen & Co., 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 525-531, and note; Howard v. Lincoln, 13 Me. 122; King v. Merriman, 38 Minn. 47, 35 N. W. 570; Hawkins v. Lumber Co., 139 N. C. 160, 51 S. E. 851; Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300, 6 L. R. A. (N. S.) 468; Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278 and note; Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862; Saltonstall v. Little, 90 Pa. 422, 35 Am. Rep. 683; Rich v. Zellsdorff, 22 Wis. 544, 99 Am. Dec. 81; Strasson v. Montgomery, 32 Wis. 52.

In Austin v. Huntsville Coal & Mining Co., 72 Mo. 535, 37 Am. Rep. 446, where the grantor conveyed all the coal under his land for 20 years, the court said:

"If the parties had intended an absolute grant of 'all the coal' under the land described, the time during which the coal should be dug would not have been limited. For by thus limiting the time during which mining operations were to be carried on, it is equivalent to saying that the party of the second part is to have all the coal it can mine on the premises before the lapse of 20 years." 72 Mo. 541.

In Barringer & Adams' *The Law of Mines and Mining in the United States*, vol. 1, pp. 36, 37, it is said:

"The form of the conveyance is unimportant. It makes no difference that it is called a lease, and that its terms are those for leasing real estate. If it shows an intention to convey all of the specified mineral in the particular land, it effects a sale or absolute conveyance thereof.

"If the instrument shows such an intent, it is none the less a sale because a term of years is prescribed within which the mineral must be taken out. Nor is the nature of the grantee's estate changed by the fact that he fails to mine during that term. There is in such case a sale to him, not a lease; but a reversion takes place at the end of the term to the grantor.

"The fact also that the purchase money depends upon the amount of coal mined is of no moment in determining the nature of the estate. The question is whether all the coal is conveyed; if so, there is a sale thereof.

"The rather paradoxical result of the above statement—that the nature of the estate is unaffected by the limitation of the privileges to a term of years—is apparently a fee-simple estate for a term of years. This seems to have deterred some courts from following in terms the rule as laid down in Pennsylvania. It seems, nevertheless, that that position is a necessary one, however it is worked out, and it may be theoretically justified on either of two lines of reasoning: \* \* \* First, the limitation to a term of years may be regarded as a limitation, not upon the estate, but upon the appurtenant rights without which the estate will be of no value; second, the failure to take out all the mineral within the specified term may be treated as a forfeiture of the estate."

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 404)

**STATE ex rel. BECK, County Atty., v.  
BOARD OF COM'RS OF KIOWA  
COUNTY et al. (No. 22903.)\***

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

Schools and school districts ~~§~~42(2)—Existence of county high school duly established not affected by increase in population above statutory limits.

By the enactment of chapter 180, Laws 1897 (Gen. St. 1915, §§ 9805 to 9810), and section 1 of that chapter as amended by chapter 433, Laws 1908 the Legislature provided for the establishment of permanent county high schools in counties having a population of less than 6,000, and, where a county high school has been duly established under the statute, its existence is not affected by an increase in the population of the county above the limit named in the statute.

Original proceedings in mandamus by the State, on relation of John D. Beck, County Attorney of Kiowa County, against the Board of County Commissioners of Kiowa County and others. Peremptory writ issued.

John D. Beck, of Greensburg, for plaintiff.  
Carl Van Riper, of Dodge City, for defendants.

PORTER, J. This is an original proceeding in mandamus to compel the defendants to employ teachers and to provide a building, equipment, and supplies for conducting the Kiowa County High School.

In November, 1904, an election was held at which there was a majority of the votes in favor of establishing a county high school under chapter 180, Laws of 1897, as amended by chapter 433, Laws of 1903, and in July, 1905, the board of county commissioners made a contract with the school board of district No. 1 at Greensburg, the county seat, for the use of the school building belonging to the district in which to conduct the county high school. The contract for the use of the building was made for 15 years and expires in July of the present year. From the time of its establishment the school has had a steady growth in the number of pupils, and during the school year just closed seven teachers were employed. The school has maintained the usual scientific and literary courses of study for preparing pupils for entrance to the freshman class of the state university, and meets the requirements of the state board of education entitling it to be included in the high schools of class A. It is conceded that ample funds have been raised from the general levy of the county each year to pay all the expenses of the school, and that in order to provide for its continuance for the ensuing year it was necessary for the de-

fendants to enter into contracts with a principal and other instructors, and to make arrangements with school district No. 1 at Greensburg for the use of a building in which to conduct the school. Instead of providing for the expenses of the school during the ensuing year at the March, 1920, meeting of the board, two of the defendants, I. Sneed and H. W. Fromme, declined to consider new contracts on the ground that the high school has no longer any legal existence.

Their contentions are that there was only a temporary establishment of a county high school in the first place; that its continuance depended upon the ability of the board and the school district at the county seat to agree upon the terms of a contract for the establishment of a county high school, and that, upon the expiration of the contract between the board and the school district, the county high school would cease to exist; that the authority of the board to enter into a contract expired when it was exercised in 1905, and that in order to authorize the board to negotiate with the school district for another contract requires the submission of the question again to the voters at an election called for that purpose.

The act under which the high school was established applied to counties having a population of less than 6,000, and one of the main contentions of the defendants is that, because Kiowa county has now more than that number, no legal authority for the further continuance of the county high school exists. When the school was established, the county had less than 6,000. In 1911 the number had increased, and by 1917 had reached 6,948; since 1917 it has gradually declined, but it is conceded that at present the population is 6016.

We are unable to discover the semblance of merit in any of these contentions. When the act was passed, the Legislature contemplated that counties having less than 6,000 population would increase in numbers. There was no intention that when the population of the county should exceed the limit placed in the act a school established thereunder should cease to exist. A county high school, once established, becomes a permanent organization until some legislative authority authorizes its disestablishment. It has been decided that the acts of 1897, 1903, and 1907 were intended to form a complete and independent plan for the establishment of county high schools in counties having less than 6,000 population. *Greeley County v. Davis*, 99 Kan. 1, 160 Pac. 581. Manifestly, the intention was to authorize the establishment of such high schools in all counties falling within that class at the time the statute was invoked. The permanency of a county high school, once established, is not affected by an

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied July 28, 1920.



increase in the population of the county in the absence of a statutory provision to that effect.

By the act of 1897, c. 180, § 1, as amended by Laws 1903, c. 433, § 1 (Gen. St. 1915, § 9305), it became the duty of the board of county commissioners to make a contract with the school district at the county seat for the establishment of a county high school. The authority conferred by these acts upon the board to enter into such contract was not exhausted by the making of a contract for a term of years; it was a continuing authority and mandate; so long as the act under which the county high school was established remains in force, the duty of providing for the expenses of the school and for suitable buildings in which to conduct it rests upon the board.

The peremptory writ will issue.  
All the Justices concurring.

(107 Kan. 190)

DAVIES v. LUTZ et al. (No. 22316.)\*

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Appeal and error — [042(2)—Pleading — 363—Striking averments in pleading not prejudicial where enough left to present claim or defense; striking out unnecessary averments within discretion of court.

The striking out or retaining of profuse and unnecessary averments in a pleading is largely within the discretion of the court, and where an order to strike is made, which leaves in the pleading sufficient to enable a party to present all of its claims or defenses, no prejudicial error is committed.

## 2. Striking out pleadings.

Under the rule stated, it is held, that the striking out of portions of defendants' answer and cross-petition furnishes no ground for a reversal.

Appeal from District Court, Harper County.

Suit by Theodosia Davies, administratrix, against Norman Lutz and others. From a ruling striking out parts of answer and cross-petition, defendants appeal. Affirmed.

Geo. E. McMahon, of Anthony, for appellants.

E. C. Wilcox, of Anthony, and T. A. Moxcey, of Atchison, for appellee.

JOHNSTON, C. J. This was a foreclosure proceeding, and an appeal is taken from a ruling striking out parts of an answer and cross-petition filed by the defendants Norman Lutz and Louise Lutz.

In a former appeal in the case, questions as to the validity of a service upon additional parties brought into the case were determined. *Davies v. Lutz*, 105 Kan. 531, 185 Pac. 45. After the remand of the case and upon a motion of plaintiff, the court struck out averments in the second and third defenses set up in the answer and cross-petition. The defendants insist that material averments essential to their defenses were stricken from the second count, and they complain especially of the elimination of statements relating to the lack of consideration for the assignment of the note and mortgage to the plaintiff. There is nothing substantial in this contention, as it appears that the averment that the assignment was without consideration was not stricken from the pleading. That which was stricken was largely argumentative in character, and, besides, there still remained in the count averments to the effect that the assignment was colorable and fraudulent and made without consideration. As full proof may be produced by the defendant upon the pruned count as if the elimination had not been made.

[1, 2] In respect to the third and sixth defenses, it may be said that the matter stricken from them consisted mainly of argumentative statements, evidentiary matters, legal conclusions, and averments immaterial to the questions involved. The pleading is prolix and contains much more than might have been stricken without weakening the pleading or hampering the defendants in their proof. Some of the statements stricken are only elaborations of other facts pleaded, and no error would have been committed if these had been left in the pleading; but doubtless they were stricken because they were interwoven with irrelevant and unnecessary matters. An examination of the pleading discloses that enough is left in it to enable the defendants to offer any competent proof they may have of fraud or invalidity in the transfer of the paper. The striking out or retaining of profuse and superfluous averments is largely within the discretion of the trial court. *Sramek v. Sklenar*, 73 Kan. 450, 85 Pac. 566. It has been held that an order striking parts of an answer, but which leaves sufficient to present all proper defenses and counterclaims, is not prejudicially erroneous. *Stroupe v. Hewitt*, 90 Kan. 200, 133 Pac. 562. In defendants' pleading there is left sufficient to admit of all the defenses they are seeking to make, and, under the rule of the case last cited, no prejudicial error was committed in striking out portions of the answer and cross-petition.

Judgment affirmed.

All the Justices concurring.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 29, 1920.

(107 Kan. 229)

**ATKINSON et al. v. DARLING.**  
(No. 22474.)\*

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Reformation of Instruments  $\S$  19(1), 45  
(1)—Mutual mistake ground for reformation; mutual mistake may be established, though party to contract testifies against it.

An instrument in writing which admittedly did not correctly recite all the terms of the contract of the parties may be reformed for mutual mistake, and such mutual mistake may be satisfactorily established by competent, preponderating evidence, although one of the parties who resisted its reformation testified that there had been no mutual mistake and that he understood the contract to be as it was set down in the written instrument.

2. Appeal and error  $\S$  977(3)—When reversible error cannot be based on granting of new trial stated.

Ordinarily, no reversible error can be based upon the granting of a new trial, unless the trial court indicates the exclusive and specific ground upon which the new trial is granted, and unless that ground happens to be one which the Supreme Court is in as good a position to consider and determine as the trial court.

Appeal from District Court, Saline County.

Suit by Paige Atkinson and another against J. A. Darling for reformation of a lease and for an injunction, with cross-claim by defendant. Defendant's motion for judgment on the pleadings and verdict was denied, plaintiffs' motion for new trial was granted, and defendant appeals. Affirmed.

Wilson & Wilson, of Salina, for appellant.

Z. C. Millikin, of Salina, for appellees.

DAWSON, J. This was a suit to reform a written lease and to enjoin the tenant from entering upon some lands which by mistake had been included in the lease.

The plaintiffs held a public auction at which they offered 100 acres of land for sale, and as an inducement to its sale they offered to give the purchaser a lease for five years on some adjacent arable land and on 60 acres of pasture land. The plaintiff's pasture contained about 100 acres, but they intended to reserve 40 acres of the pasture for the purpose of breaking it and putting it into crops themselves. The defendant was the successful bidder for the land offered for sale. When the lease was prepared, no reservation of the 40 acres of the pasture land which plaintiffs intended to break and farm themselves was inserted in the lease. During the first year covered by the lease, however, the plaintiffs did retain possession of the 40 acres, and did break it and farm it. Next year the tenant attempted to com-

mence farming operations. Plaintiffs objected, and he advised them to read the lease. They did, and this lawsuit followed. The defendant's answer denied the pertinent matters pleaded by plaintiffs; 'alleged that the 40 acres was only withheld from the lease for one year so as to enable plaintiffs to break it and prepare it for tillage by the tenant for the remainder of the five-year term. Defendant also cross-claimed for damages for his exclusion from the 40 acres during the second year of the lease.

A jury was called to advise the trial court on the equitable issues and to determine the issue of damages. The special findings, and a verdict for \$1 as damages, were in favor of defendant. Defendant's motion for judgment on the findings and verdict was denied, and plaintiffs' motion for a new trial was granted.

[1] Defendant appeals. He contends that a contract cannot be reformed for the mistake of one party only, that he fully understood the contract, and that there was no mutual mistake. But the trial court may have thought he was not telling the truth about the matter. Perhaps the trial court did not fully believe the testimony for either party. We cannot tell what prompted the trial court to grant a new trial. The plaintiffs' evidence was sufficient to prove a mutual mistake, if the trial court gave it full credence. Perhaps the court did believe it; perhaps the trial court heartily disagreed with the findings of its advisory jury. One thing is certain; the written contract did not express the terms of the parties. It did not cover the reservation of the 40 acres even for the one year which defendant admits to have been reserved. There was to be a reservation of that 40 acres, whether for the full term of the lease or for one year only, and to that extent there was a mutual mistake. Moreover, no written instrument which fails to truly recite the bargain of the parties could ever be reformed for mutual mistake if the one who resists its reformation could defeat its correction by his mere self-serving avowal that there was no mistake on his part. While the evidence to justify a reformation of a written instrument on the ground of mutual mistake must be clear, decisive, and convincing, yet it may be so proved, and usually has to be, without the evidence of the party who resists and seeks to profit by the alleged mutual mistake. Furthermore, if indeed the 40 acres was to be reserved for the full duration of the lease, and the defendant noticed the mistake of the scrivener at the time the lease was executed, and if he purposely or thoughtlessly kept silent about it, the want of mutuality in the matter of the mistake would not stay the hand of a court of equity to correct the writing, as the attitude of defendant in such

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\*Rehearing denied September 29, 1920.

case would be treated as a constructive fraud on his part. *Cox v. Beard*, 75 Kan. 369, 80 Pac. 671; *Simpson Plumbing & Heating Co. v. Gerschke*, 76 N. J. Eq. 475, 79 Atl. 427.

[2] The other matters urged by defendant need no discussion now. If the trial court, for any reason covered by the Code (Civ. Code, §§ 305-308 [Gen. St. 1915, §§ 7205-7210]), was dissatisfied with the jury's verdict, it was its duty to set that verdict aside and to grant a new trial. Ordinarily, it is only when the trial court indicates the exclusive and specific ground upon which a new trial is granted, and that ground happens to be one which this court is in as good a position to consider and determine as the trial court, that reversible error can be effectively based upon the granting of a new trial. *Ryan v. Topeka Bridge Co.*, 7 Kan. 207; *Howell v. Pugh*, 25 Kan. 96; *City of Sedan v. Church*, 29 Kan. 190; *Sanders v. Wakefield*, 41 Kan. 11, 14 Pac. 518; *Marion Mfg. Co. v. Bowers*, 71 Kan. 280, 80 Pac. 565; *Goehenour v. Construction Co.*, 104 Kan. 808, 810, 180 Pac. 776; *Moffatt v. Fouts*, 105 Kan. 58, 181 Pac. 557.

Affirmed.

All the Justices concurring.

(197 Kan. 339)

**BRIGGS et al. v. HAVANA STATE BANK.**  
(No. 22736.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

Appeal and error  $\S$ 979(2)—When judgment granting new trial will not be reversed stated.

A judgment granting a new trial will not be reversed where error in granting it is not shown, and there is nothing to indicate that the new trial may not have been granted because the court was unable to approve the decision of the jury on a disputed question of fact.

Appeal from District Court, Montgomery County.

Action by W. A. Briggs and others against the Havana State Bank. Judgment for defendant granting a new trial, and plaintiffs appeal. Affirmed.

Sullivan Lomax, of Cherryvale, for appellants.

S. H. Piper, of Independence, for appellee.

**MARSHALL, J.** The plaintiffs appeal from a judgment granting a new trial. The action was commenced by the plaintiffs to recover a real estate agent's commission for selling land. Verdict was rendered in their favor, and judgment was immediately rendered thereon. Within proper time there-

after a motion for a new trial was filed, and that motion was sustained and a new trial granted. No reason was given for granting the motion for a new trial, although the plaintiffs filed a motion asking the court to give his reasons therefor. For anything that appears in the record the court may have granted the new trial because he was not able to approve the decision of the jury on a disputed question of fact. This court has repeatedly declared that a judgment granting a new trial will not be reversed unless error is made apparent. *Atkinson v. Darling*, 191 Pac. 486.

Under that rule the judgment must be affirmed.

All the Justices concurring.

(107 Kan. 391)

**KUHN et al. v. KUHN et al.** (No. 22798.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Frauds, statute of  $\S$ 129(9), 149 — Rule that improvements do not take out of statute oral agreement for acquiring full title by owner of undivided interest not absolute; petition held to justify enforcement of oral contract because of permanent improvements.

The rule that an oral agreement for acquiring the full title to a tract of land by one who already owns an undivided interest in it cannot be taken out of the operation of the statute of frauds by reason of his improvements, because his possession must be regarded as that of a cotenant under his original right, is not absolute. His occupancy may be exclusive, and for that reason referable to the contract; and it is held that in the present case the petition showed possession under such circumstances as to justify the enforcement of an oral contract on account of permanent improvements having been made in reliance upon it.

2. Pleading  $\S$ 34(5) — Allegations of petition construed.

Allegations that a deed was executed after an agreement concerning the land described had been made, and that it conveyed the grantor's title, are held to be qualified by a further averment that it was executed in pursuance of the contract.

3. Specific performance  $\S$ 114(4) — Petition for enforcing contract to divide land held not fatally defective.

A petition for the enforcement of a contract for the division of land held not to be fatally defective in failing to allege the making of payments accruing after its taking effect.

Appeal from District Court, Trego County.

Suit by Maggie Kuhn and another against Barbara Kuhn and others to quiet title. A demurrer to the petition was overruled, and defendants appeal. Affirmed.

Herman Long, of Wakeeney, for appellants.  
E. A. Rea, of Hays, for appellees.

MASON, J. Maggie Kuhn and Elmer Kuhn, the widow and only child of John Kuhn, Jr., brought this action against his mother and two brothers; the purpose being to quiet the title of the plaintiffs to land which they claimed to own by virtue of an oral agreement between John Kuhn, Jr., and the defendants, which had been partly performed. The suit may perhaps be regarded as in the nature of one for the specific performance of the contract. A demurrer to the petition was overruled, and the defendants appeal; the principal question involved being whether it sufficiently appears that the contract, although not in writing, was rendered enforceable by part performance.

The allegations of the petition may be thus summarized: John Kuhn, Sr., died owning a quarter section of land in Trego county, worth \$1,720, and two quarters in Ellis county, worth respectively \$5,620 and \$5,120. His will devised 240 acres to his wife, Barbara, to be selected by her, and 80 acres to each of his three sons, John, Jr., Frank, and Joseph, to be divided as the widow should deem best. She selected as her allotment the quarter in Ellis county, referred to as worth \$5,620, and the north half of the Trego county quarter. The remaining 240 acres not being capable of convenient division into three parts of approximately equal value, an agreement was entered into between the widow and three sons to this effect: Of the three 80's left after the widow's selection for her own share had been made, the two in Ellis county were to be owned by Frank and Joseph. John, Jr., was to have the one in Trego county, and in addition thereto the 80 in that county which had previously been selected by his mother, and an additional adjoining 80 to be purchased by her and Frank and Joseph. During her life the legal title to all this Trego county land was to be in the mother, and she was to receive one-fourth of the crop raised on the newly acquired 80. In pursuance of this agreement the additional 80 was purchased, the legal title being taken in the mother. John, Jr., went into possession of the Trego county land, expending \$3,000 in lasting and valuable improvements thereon; and he joined with his brothers in a quitclaim deed to his mother, covering all the land referred to in both counties. On the death of John, Jr., the plaintiffs succeeded to his rights. His mother denies that they have any interest in any of the land.

[1] 1. A partial performance, which includes the making of permanent improvements, may take an oral agreement out of the operation of the statute forbidding the parol creation of a trust in lands (Gen. Stat. 1915, § 11874), as well as of that requir-

ing contracts for the sale of realty to be in writing (Gen. Stat. 1915, § 4889). *Goff v. Goff*, 98 Kan. 201, 158 Pac. 26; *Oberlander v. Butcher*, 67 Neb. 410, 93 N. W. 764. The defendants do not question this, but argue that improvements made upon land by one who was already the owner of an undivided interest therein cannot affect the operation of either statute, because they must necessarily be referred to his pre-existing ownership of a part, and not to an oral arrangement for his becoming the owner of the remainder, and that this principle controls here, because John Kuhn, Jr., was a tenant in common of the Trego county land, which his father had owned, and the improvements were made upon that tract.

The general rule stated by the defendant finds at least apparent support in a part of the opinion in *Nay v. Mognrain*, 24 Kan. 75. In that case a mother and her three minor children had owned a tract of land, each having an undivided one-fourth interest. It had passed into the possession of other persons. The mother brought action for her one-fourth. The defendants claimed full title under a deed from the children and an oral purchase from the mother, supported by possession and improvements. The trial court found for the plaintiff, and, as there was no special finding to the contrary, this, if necessary to uphold the judgment, implied a decision against the defendants upon the issue of fact as to whether the improvements had been made in reliance upon an oral contract for the mother's share. The judgment was affirmed; the court indicating that the defendants were foreclosed by the decision against them on the facts, but discussing also the rule already referred to as applied to the situation there presented. The portion of the opinion relating to this phase of the matter reads:

"The fact that no other deeds were given makes strongly against their [the defendants'] claim of a purchase of plaintiff's interest in the land; and evidence to sustain a parol purchase of land must be clear and positive. \* \* \* But, conceding their understanding of the purchase to be correct, the statute of frauds interposes against them. They bought and paid; they took possession and improved; but payment will not take a parol purchase out of the statute of frauds, and possession and improvement must be referred to and will be upheld under the written title they accepted. As purchasers of the minors' interests, they had a right to the possession, and might lawfully enter and improve. They became tenants in common with plaintiff, with equal right to enter. No action of trespass would lie against them. *Edwards v. Fry*, 9 Kan. 417. 'What, then, it may be asked,' said Woodward, J., in *Workman v. Guthrie*, 29 Pa. St. 495, 'can there be no sale of land by parol among tenants in common where all are in possession? Certainly not, because the statute of frauds and perjuries forbids, and there cannot be such part performance as would take it out of the operation of

that wise and salutary rule of titles.' \* \* \* So, where a party enters upon land under a written instrument purporting to convey the title of certain joint owners, he may not, upon a failure of the title thus conveyed, uphold a parol purchase from another joint owner by his entry and improvements. That which he does as an owner must be referred to that which apparently made him an owner. Part performance, to uphold a parol purchase, must be exclusive—must be referable solely to such purchase. \* \* \* We think it would be going much beyond established limits to enforce a parol purchase of an undivided interest in land upon the strength of part performance, when there was a written conveyance intended as a conveyance of the larger interests in the land, under which possession was in fact taken and improvements made. The melioration of the estate will be presumed to have been made on the faith of the title apparently conveyed. Acts which presume a conveyance will be referred to the conveyance, and that irrespective of the validity of that conveyance. We conclude, then, that both upon the findings and the testimony the judgment of the district court was right." *Nay v. Morgain*, 24 Kan. 75, 78-80.

It will be observed that the controversy as to whether the improvements were made in reliance on the oral contract was essentially one of fact; the decision being made on that basis. If the language used be regarded as supporting the view that improvements made by the owner of an undivided interest may never be referred to an oral contract for title to the remainder, it is out of harmony with the weight of authority. 36 Cyc. 686; 2 Reed on the Statute of Frauds, § 583; 5 Pomeroy's Equity Jurisprudence, § 2241, p. 5008, note 16. See, also, *Savage v. Lee*, 101 Ind. 514. In two of the texts cited the doctrine of the impossibility of part performance of a parol sale by one cotenant to another is referred to as peculiar to Pennsylvania. As is pointed out in *Emery v. Dana*, 76 N. H. 483, 84 Atl. 976, inasmuch as one cotenant may take possession to the exclusion of the others, so that his holding becomes adverse as to them, such an occupancy, accompanied by permanent improvements, should be sufficient to take an oral contract out of the statute of frauds. Here the petition alleged that, pursuant to the agreement referred to, John Kuhn, Jr., with his family, moved upon the Trego county land in 1915, and placed the improvements thereon. The allegation is to be liberally construed, and must be deemed to indicate that his possession was exclusive. Moreover, his relations to the property left by his father were quite different from those of an ordinary cotenant. After his mother had selected her own share, he no longer had any interest in the north half of the quarter section in Trego county. His rights with respect to the quarter section in Ellis county, which she had not taken, were qualified by the power given her to

determine the apportionment among her three sons. In these circumstances the moving upon the Trego county land by John, Jr., implying its treatment as a single tract, suggested a readjustment of the interests of the devisees—the distribution of his father's land upon a different basis from that provided in the will.

We conclude that the allegations of the petition were sufficient to render the oral agreement enforceable on the theory of a part performance. The allegations of the petition bring the case fully within the reasons of the rule permitting contracts otherwise unenforceable, because not in writing, to be given effect by reason of having been partially performed. If the plaintiffs' predecessor in interest gave up his claims to the Ellis county land, and in lieu thereof accepted the 320 acres of cheaper land in a body in Trego county, and in reliance on the agreement spent \$3,000 in permanent improvements, it would be a fraud upon their rights to deny them relief because no writing had been signed. The contract alleged is obviously entire, and improvements upon any part of the 240 acres might afford a basis for its enforcement.

The defendants argue that the statement of the petition that, during the lifetime of his mother, John, Jr., was to pay her one-fourth of the crop raised on the additional 80-acre tract, shows that his occupancy was that of a tenant. If that would be the inference from this allegation, standing alone, it must yield to express averments to the contrary found in the pleading.

[2] 2. It is also contended that the petition is defective in not alleging that the fourth part of the crop on the additional 80 has been paid to the testator's widow as required by the agreement pleaded. This payment was not of a part of the price to be paid for the land at the time of its purchase, in such sense as to bring it within the rule making it a condition precedent to the enforcement of the contract.

[3] 3. The petition referred to the quitclaim deed to his mother as having been executed by John Kuhn, Jr., after the improvements had been made, and as conveying all his interest in the land. The defendants seek to give this an interpretation indicating an actual transfer of the title, independent of and subsequent to the contract. The deed is pleaded as having been executed in pursuance of the oral agreement, and no forced construction is required to interpret the petition as meaning that the agreement included a provision for the giving of this deed, to be effective as though made at once, in order to lodge formal title in the grantee for the purposes indicated.

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 209)

**EMICK v. SWAFFORD et al.** (No. 22418.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)***1. Reformation of Instruments** §30—**Chattel mortgage may be reformed in replevin suit.**

In a suitable case a chattel mortgage may be reformed for mutual mistake, in an action of replevin based thereon.

**2. Reformation of Instruments** §28—**Duplicate instrument may be reformed as to execution creditors.**

When a chattel mortgage is executed in duplicate, the mortgagor signing both papers, one being filed with the register of deeds, the other, which is retained by the mortgagee, may be reformed by the restoration of words printed in the blank form, through which a line had inadvertently been drawn, such reformation being made effective as to execution creditors as well as to the mortgagor.

**3. Chattel mortgages** §41—**Each copy of mortgage executed in duplicate is original.**

In the situation stated each paper is an original, and the instrument filed with the register could be enforced without a formal correction of the other.

**4. Chattel mortgages** §47—**Description of property held sufficient.**

A chattel mortgage is not void for want of a more definite description, which describes the property covered as all the personalty of every kind owned by the mortgagor, and shows that it is in his possession and in a certain county.

**5. Appeal and error** §843(2)—**Right to return of property in replevin not considered, where demurrer to petition erroneously sustained.**

Inasmuch as the sustaining of a demurrer to the petition in a replevin case is held to have been erroneous, there is no occasion for reviewing the refusal of the court thereupon to inquire into the right of the defendants to a return of the property.

**Appeal from District Court, Cloud County.**

Action by C. E. Emick against J. W. Swafford and others. From a judgment sustaining a demurrer to the petition, plaintiff and defendant John Ferguson appeal. Reversed and remanded, with directions.

Kennett, Hunter & Kennett, of Concordia, for appellant.

Pulsifer, Hunt & Short, of Concordia, for appellees and cross-appellant.

**MASON, J.** An execution against John Ferguson was levied upon three mares and a colt as his property. C. E. Emick brought replevin against the sheriff, claiming to be entitled to the property under a chattel mortgage. Later the mortgagor and the execution creditor were also made defendants. The plaintiff obtained possession, and no re-

delivery bond was given. The execution of the mortgage was denied under oath. The trial of the case was begun, and the plaintiff offered in evidence an instrument, partly printed and partly typewritten, signed by Ferguson, and corresponding to the one pleaded, except that a pencil line drawn through a part of the printed matter which was not appropriate to the purpose had been extended so as to cover the words "do hereby sell and mortgage unto." An objection to its admission on account of this defect was sustained. The plaintiff after an interval asked and was given five days in which to amend his petition; the jury being discharged. An amended petition was duly filed, to which a demurrer for want of facts and for misjoinder was sustained, and the plaintiff and the mortgagor appeal; the appeal being resisted by the sheriff and execution creditor.

The amended answer asked for a reformation of the mortgage, based upon these allegations with reference to its execution:

"That in executing the same a piece of carbon paper was inserted between two blank printed forms of a mortgage in which were blanks to be filled in, and that the data as to the notes secured, and other data was filled in said mortgage, and that in attempting to make said printed form conform to the contract of parties a lead pencil line was inadvertently and by mutual mistake and the mistake of the scrivener drawn through the words 'do sell and mortgage unto' printed on said form, said lead pencil line partially obscuring said printed words on the outside copy of said mortgage. That said mortgage was executed in duplicate originals by the use of said carbon paper, and the impressions on both papers were made at the same time. That on the inside copy on which the carbon impression was made the lead pencil line was drawn just above the edge of the words 'do sell and mortgage unto' printed on said form. That said carbon impression was duly signed by said Ferguson at the same time said outside copy was signed, and was also witnessed by Adelbert Buckley, and that the first duplicate original of said mortgage was retained by plaintiff and the other duplicate original, that is the one with the carbon impression on was filed for record in the office and was duly recorded in the office of the register of deeds. \* \* \* That plaintiff did not discover until on or about the 28th day of September, 1918 (the day the trial was begun), that said lead pencil line obscured the said words on said outside or exposed duplicate original. That said defendant Ferguson and plaintiff mutually intended to execute a chattel mortgage in which said words were not stricken out, and that said mortgage was duly signed while both parties thereto were under the impression and understood that said words had not been obscured."

[1] 1. Although the reformation of a chattel mortgage in what was otherwise a purely legal action for its enforcement was allowed

in *Stewart v. Falkenberg*, 82 Kan. 576, 109 Pac. 170, the appellees question the propriety of such a proceeding, and suggest that in that case the question of misjoinder of a suit in equity with a law action based on tort was not considered or discussed. We see no basis for an objection to the procedure followed, nor any way in which the rights of the defendants could be prejudiced thereby. The statute permits the joinder of legal and equitable causes of action and defenses. Gen. Stat. 1915, §§ 6979, 6989 (Code Civ. Proc. §§ 88, 97). In code states the practice of reforming an instrument in the same action in which its enforcement is sought by a legal remedy has been specifically recognized. 34 Cyc. 364; *Taylor State Bank v. Baumgartner*, 27 N. D. 606, 147 N. W. 385; *Delaware Ins. Co. v. Hill* (Tex. Civ. App.) 127 S. W. 283. See, also, 23 R. C. L. 356, note 16.

[2] 2. The contention is made that, even if the mortgage might properly be reformed as between the mortgagor and mortgagee, the reformation should not be given any force as to the appellees because their rights had accrued while the instrument was defective. There is no possible way, however, in which the appellees could have been misled to their disadvantage by the defect, because the record showed a complete mortgage. By reason of that situation it was competent for the court to permit the reformation to be made effective as to them. It is true that the position of a creditor who seeks to seize mortgaged chattels in satisfaction of his claim is different from that of a purchaser, in that his rights as against an unrecorded mortgage are not affected by his having actual notice of its existence. Here, however, there was no want of record—the document on file gave the creditor legal notice of the plaintiff's claim, whether or not he had any other information concerning it.

[3] 3. Moreover, while it is doubtless proper that the inadvertent striking out of the words in the document retained by the mortgagee should be recognized and corrected, such action is a mere matter of form. Inasmuch as the mortgage was prepared and signed in duplicate there were two originals, and the document filed with the register of deeds could be treated as the mortgage and enforced as such. "It is well settled that, where a writing is executed in duplicate or multiplicate, each of the parts is the writing which is to be proved, because by the acts of the parties each is made as much the legal act as the other." *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 266, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626, 11 Ann. Cas. 107. See, also, *Enright v. Railway Co.*, 96 Kan. 546, 152 Pac. 629; 2 *Wigmore on Evidence*, § 1232; 17 Cyc. 517; *First National Bank v. Jamieson*, 63 Or. 594, 128 Pac. 433. In the case in which the

language just quoted was used the writing, including the signature, was produced in duplicate throughout by the use of carbon paper, but this was not true of the cases cited in its support. The situation here presented is not that of a contract supposed to be prepared in duplicate, in which the two versions turn out to be dissimilar in respect to some material item, such as a number or amount. The extending of the pencil mark through the words "do hereby sell and mortgage unto," in the paper retained by the mortgagee could perhaps be disregarded as an obvious inadvertence; the real purpose of the instrument being readily ascertainable from the language that remained. At all events the instrument as it stood was either a good chattel mortgage of the same effect as that on file, or it was of no legal force whatever; it was not a completed contract of a different import.

[4] 4. An objection is made to the validity of the mortgage as against the appellees on the ground that the property intended to be covered is not so described as to make the instrument enforceable as to them. The description, which follows a recital that the property was in the possession of the mortgagor, reads: "All my personal property of every kind and nature." A provision follows as to the effect of an attempt to remove it from Cloud county, carrying a necessary implication that it was then located there, so that the mortgage by its terms covered all the personal property owned by Ferguson, and showed that it was in his possession and in that county. *Crisfeld v. Neal*, 36 Kan. 278, 13 Pac. 272. If the description had read, "Three mares and a colt," and Ferguson had owned no other animals to which that description could apply, it would have been sufficient under the decision just cited, and under *Brown v. Holmes*, 13 Kan. 482, 492. There the conclusion reached was rested largely upon the fact that this court, in holding the description, "one hundred and twenty-four head of mules, now in the territory of Kansas," to be insufficient, had said that if the property had been described as all the mules the mortgagor had in the territory, or as the same then in the care of H. C. Branch, in Leavenworth county, Kan., "third persons might \* \* \* have been able to identify the property, aided by inquiries which the mortgage itself would, in that case, have indicated and directed." *Golden v. Cockril*, 1 Kan. 259, 266 (81 Am. Dec. 510). "A mortgage of all the grantor's property of a certain kind in a specified locality is sufficient." 11 C. J. 461. That the property referred to belongs to the mortgagor is an element in its description. That he owns no other property with which that intended might be confused aids in its identification. A description of the mortgaged property as all the horses a

man owned could be applied with more ease and certainty than if it covered only all over a certain age. That the mortgage covers all the mortgagor's personality of every sort makes it easier rather than harder to determine whether a particular piece of property is included. If it belongs to him it is subject to the lien. Any limitation imposes the need for applying some further test. We conclude that the mortgage was not void for want of a more definite description.

[5] 5. The appellants by way of cross-appeal complain of the refusal of the court upon the sustaining of the demurrer to the amended petition to proceed to inquire into their right to the possession of the property taken, in accordance with the statute. Gen. Stat. 1915, § 7076 (Code Civ. Proc. § 184). As one reason for refusing to enter into the inquiry the court stated that during the five days allowed the plaintiff to amend his petition the jurymen had been discharged from attendance, and no jury was present. In any event, inasmuch as the amended petition is held not to be demurrable, there can be no occasion for directing such an inquiry now.

The judgment is reversed, and the cause is remanded, with directions to overrule the demurrer.

All the Justices concurring.

(107 Kan. 383)

### MILLER v. KYLE. (No. 22797.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

Principal and agent  $\S$  23(1)—Trusts  $\S$  17, 18(5), 96—Evidence insufficient to show that defendant agreed to purchase land at sheriff's sale and hold it for plaintiff; no action maintainable for breach of oral agreement to hold land purchased at sheriff's sale for owner.

The proceedings examined, and held, there was no evidence to sustain allegations of the petition that the defendant agreed to attend a sheriff's sale of the plaintiff's land and bid in the land as the plaintiff's agent. Held, further, no action is maintainable for breach of an oral agreement on the part of the defendant that, if the defendant bid in the land, she would hold it for the plaintiff, and transfer it to him on being reimbursed.

Appeal from District Court, Kiowa County.

Action by R. H. Miller against Esther Kyle. Demurrer to plaintiff's evidence was sustained, and he appeals. Affirmed.

C. H. Bissett, of Greensburg, and William Barrett, of Pratt, for appellant.

O. G. Underwood, of Greensburg, for appellee.

BURCH, J. The action was one to recoup the loss sustained on account of breach of an oral agreement to hold land purchased at sheriff's sale until the owner could reimburse the purchaser, and thereby obtain the land. A demurrer to the plaintiff's evidence was sustained, and he appeals.

The land was situated in Oklahoma. The plaintiff permitted foreclosure of a lien and sale of the land, in order to bar an adverse claim. The defendant was interested in protecting an inferior lien. She went to Oklahoma, bought in the land, and then sold it. At the time the plaintiff was in the army, and his interests were in charge of an agent, Wacker. Pertinent allegations of the petition follow:

"It was agreed by and between this defendant and H. W. Wacker, agent for plaintiff, that this defendant, Esther Kyle, would go to Guymon, Okl., as the agent and representative of this plaintiff, and in his place and in his stead, and in the place of H. W. Wacker, plaintiff's agent, and bid above-described land in at the sale to be held at that place; that this defendant would hold the certificate of purchase, as agent for plaintiff, until defendant was paid the amount of her bid, and upon the payment of the amount of the judgment against said land this defendant would assign her certificate of purchase or bid to this plaintiff, so that deed would issue to plaintiff.

"That according to said agreement and understanding, the defendant was to go to Guymon, Okl., and bid said land in for plaintiff; this defendant did go to Guymon, Okl., as the agent of the plaintiff, R. H. Miller, and bid said land in at a sale there held; that this plaintiff relied and acted upon such agreement, and believed and trusted this defendant to carry out the terms of the contract as his agent. \* \* \*

"That this defendant, as agent for plaintiff, in violation of her agreement as such agent, on her return from Guymon, Okl., stopped off at Hooker, Okl., and sold above-described land as her own, and now unlawfully refuses and neglects to comply with her contract with this plaintiff. \* \* \*

"Plaintiff says that defendant had no intention of complying with her contract from the beginning; that she made such agreement and accepted the agency of plaintiff to look after bidding such land in for the purpose of getting title to above-described land and selling it at a profit. \* \* \*

"Plaintiff further says that it was understood and agreed that defendant was to bid, as agent for plaintiff, the amount of above-mentioned liens, costs, and taxes against said land."

Wacker testified for the plaintiff as follows:

"Q. What did she say about going down there to represent Mr. Miller—what did she say? A. She was going down there to represent, of course, herself in this matter.

"Q. What did you say to her then? A. I asked her, 'If you would buy the land in, will



you give Mr. Miller six months to redeem it in?"

"Q. What did she say? A. Said she would.

"Q. Who were you representing there? Mr. Miller had asked you to represent him? A. Yes.

"Q. You did tell Mrs. Kyle, however, that you wanted her to bid that land in, and you wanted her to hold it for six months for Mr. Miller? That was understood, wasn't it? A. Yes.

"Q. And she agreed to do that? A. Yes.

"Q. And if during the six months she was paid back the amount that was due her, that she would deed it over to Mr. Miller? A. Yes.

"Q. That was understood there? A. Yes.

"Q. And, further, you told her that if she would go down there that you would not go down; that you would depend upon that now, didn't you? A. No; I don't think I said that, Mr. Barrett.

"Q. Did you tell her that you would not go down now? A. Yes; it was understood that I was not going. \* \* \*

"Q. You thought there was six months' redemption period that Dr. Miller had on that? A. Yes.

"Q. You also thought the sale would not be valid anyway? A. Yes.

"Q. You answered counsel a moment ago that Mrs. Kyle was going down there to represent herself in buying this land? A. Yes, sir.

"Q. It was understood she was going there to protect her own interests in this sale? A. Yes; and the bank.

"Q. Protect herself and the bank in this sale? A. Yes, sir.

"Q. And she was not going there to represent Mr. Miller? A. No; I think not. I would not consider it that way."

There was other testimony for the plaintiff that it was believed the sale would not be valid, because the plaintiff was in the army; that it was useless for anybody to attend the sale, because it would not be valid; and that Wacker could not attend the sale, because he had threshing to look after on the day of the sale.

The allegation of agency not only was not proved, but was disproved. Wacker himself admitted the defendant did not go to the sale to bid in the land as agent for the plaintiff, and, with the subject of agency, the subject of fraudulently making a contract of agency went out of the case.

Wacker did not refrain from attending the sale because the defendant was going. Counsel on his side of the case pressed him to give an affirmative answer to a leading question, which would have shown he gave up going because he was depending on the defendant, and he declined to give the desired answer. There is no evidence whatever that any other purpose or plan to protect the plaintiff at the sale was relinquished or frustrated because the defendant decided to attend the sale. On the other hand, the proof was that attendance at the sale was not considered important.

The evidence reduced the transaction to this: The defendant was going to Oklahoma to represent herself at the sale. Wacker was not going. He asked the defendant, if she bid in the land, if she would hold it for the plaintiff, and transfer it to the plaintiff, provided within six months she were repaid. The defendant said she would. This constituted the oral agreement relating to land, void under the statute of frauds, and not capable of sustaining an action for its breach.

The doctrine of trusts is invoked. The trust concerned land, was not created by writing signed by the defendant, and so was void as an express trust, under section 1 of the trust statute. Gen. Stat. 1915, § 11674.

The defendant was not the plaintiff's agent, and no other confidential relation existed between them. The defendant represented herself, Wacker represented the plaintiff, and they dealt with each other as any owner and prospective purchaser might deal in respect to land about to be sold at sheriff's sale. Sections 6 and 8 of the trust statute obviously do not apply, and the only ground for declaring a trust by implication of law is that the defendant violated the oral agreement, which is not sufficient. *Silvers v. Howard*, 106 Kan. 762, 190 Pac. 1, and cases cited in the opinion.

The judgment of the district court is affirmed.

All the Justices concurring.

(107 Kan. 250)

FULLER v. PRESTON et al. (No. 22584.)\*

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Brokers  $\S$ 49(2)—Purchaser's contract, reserving right to decline to complete, held sale justifying commission.

Where a broker who has been employed to find a purchaser for real estate produces a prospect with whom the owner enters into a contract which otherwise would amount to one for a sale, its character as such is not necessarily lost, and the right to a commission defeated, by the mere fact that it reserves to the proposed buyer the right to decline to complete the purchase, the owner in that event to retain part payments already made.

2. Brokers  $\S$ 86(1)—Alleged option contract held, under evidence, contract for sale authorizing commissions.

The evidence is held to show prima facie that a written contract, entered into by the owner of real property and a prospective buyer, was one for a sale, notwithstanding it described itself as an option agreement, contained no promise on the part of the prospective buyer to complete the purchase, and enabled him, after an occupancy of three years,

to escape further liability by turning back the property, the owner to retain all payments that had been made. Among other circumstances regarded as justifying this view are these: The contract included an assumption by the buyer (unqualified unless by inference) of an existing mortgage, and of the payment of taxes and insurance; this mortgage was given to raise money to erect a building suitable to the buyer's needs; the buyer took possession, installed expensive machinery, and kept up the payments at least until the time of the trial, such payments being considerably in excess of the rental value.

**3. Brokers — 69—Effect of existing and future mortgages on amount of commissions on sale stated.**

Where property is listed with a real estate broker for sale for a stated amount, which includes an existing mortgage, the commission unless for some special reason to the contrary should be based on a sale for that amount. But where in order to promote the sale money for improving the property is raised by a mortgage executed by the owner and guaranteed by the buyer, who assumes its payment, the commission should not be increased on that account, unless an agreement to that effect may be implied from other circumstances.

Appeal from District Court, Sedgwick County.

Action by Wilbert H. Fuller, doing business as the Fuller Real Estate Exchange, against Charles A. Preston and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

O. A. Keach, of Wichita, for appellant.  
E. L. Foulke, of Wichita, for appellees.

MASON, J. Wilbert H. Fuller sued Charles A. and Lillian B. Preston for a real estate broker's commission of \$325.87, claimed to have been earned by his having found them a purchaser for property listed with him for that purpose. A demurrer to his evidence was sustained, and he appeals.

It was sufficiently shown that he was employed to find a buyer, and that through his procurement negotiations were entered into between the defendants and the Coca-Cola Bottling Company, a corporation, which culminated in a written agreement in relation to the property. The vital controversy is whether the contract was one for a sale, as contended by the plaintiff, or was a mere grant to the corporation of an option to purchase, coupled with a lease for not more than three years, as the defendants assert.

The defendants suggest that the plaintiff did not try to negotiate a sale—that his efforts were directed wholly to the leasing of the property. Some of the evidence perhaps had a tendency to sustain this view. But although no testimony was introduced except in behalf of the plaintiff, he was not absolutely bound by any of it, excepting

that of the agent who represented him in the transaction. This agent testified: That the secretary of the corporation first talked with him about buying the property. That "the negotiations were dependent upon his buying the property. They were not leasing the property then. \* \* \* About the second or third conversation between him [the secretary] and the witness they talked about buying defendants' property." It appeared that in order to render the premises suitable for the use of the corporation a considerable sum would have to be expended in completing a building thereon. The abstract shows this evidence of the plaintiff's agent:

"The witness talked with the Coca-Cola Bottling Company about the \$12,500 price as a price that they would be willing to pay, provided they could get satisfactory terms for payment, and they said the price would be satisfactory, provided the building was finished to meet their requirements and suitable terms (for payment) could be arranged.

"Mr. Jeffords (the secretary) stated in this connection that they were not in position at that time to pay a suitable amount of cash, nor would they be for several years; that they were putting in a large amount of machinery in the building, which would take a lot of money to clear up, and they could only meet good, substantial monthly payments and the final payment at the end of three or four years. The amount of this final payment would be dependent entirely on the amount of the loan obtained. Actual figures could not be given by Mr. Jeffords because the loan might eventually be \$6,500.00 or \$7,500.00, or might be \$8,500.00."

To take care of an existing mortgage of \$1,000 and to provide a fund for completing the building referred to the defendants borrowed \$8,325 from a building and loan association, which was used for that purpose, the Coca-Cola Company guaranteeing the payment of the note. The defendants executed a warranty deed for the property to the Coca-Cola Company, and deposited it with the building and loan association, together with the written contract already referred to, the deed to be delivered upon the payment of the \$3,500 mentioned in the contract, which read as follows:

**"Option Agreement.**

"Lillian B. Preston & Wf. to Coca-Cola Bottling Company.

"For and in consideration of the sum of three hundred and no/100 dollars (\$300.00) to us paid, receipt of which is hereby acknowledged, we Lillian B. Preston and Charles A. Preston, wife and husband, hereby grant unto the Coca-Cola Bottling Company, of Wichita, Kansas, a corporation organized and existing under the laws of said state, an option to purchase the following described real estate situated in Sedgwick county, state of Kansas, to wit: Lots ten and twelve on Washington avenue, in block B, English's subdivision to the city of Wichita,

upon the following terms: Thirty-five hundred dollars (\$3,500) in cash, on or before the first day of May, A. D. 1921, together with interest thereon at the rate of six per cent. per annum from this date and the payment of all taxes and insurance on said premises as the same mature.

"If the said sum of thirty-five hundred dollars (\$3,500) together with interest, taxes and insurance, as aforesaid, is paid by said the Coca-Cola Bottling Co., Inc., of Wichita, Kansas, the undersigned will deliver to the said Coca-Cola Bottling Company a warranty deed to said property, properly executed, furnishing at that time an abstract showing good merchantable title except as herein provided, which deed shall be executed as of this date, by the undersigned, and deposited with this contract in escrow in the Wichita Perpetual Building & Loan Association to be delivered to said the Coca-Cola Bottling Company, upon the payment of said thirty-five hundred dollars as aforesaid.

"It is expressly understood and agreed that time is the essence of this option, and should the said the Coca-Cola Bottling Company fail for the period of sixty (60) days to comply with the terms of this option at the time and in the manner specified herein, then said option shall cease and determine.

"It is expressly understood, as a part of this option agreement and coincident thereto, that said Lillian B. Preston and her husband are to borrow the sum of eight thousand two hundred thirty five dollars (\$8,235) from the Wichita Perpetual Building & Loan Association, of Wichita, Kansas, on a mortgage to be executed by them against said premises, one thousand dollars of the same to be used to retire an existing mortgage against said premises in favor of one W. H. Good, and the balance to be used in completing improvements on said property in accordance with the present agreement of the parties hereto, according to plans and specifications drawn up by J. R. Rutledge, architect and builder, Wichita, Kansas, said improvements to cost the sum of seven thousand two hundred thirty-five dollars (\$7,235).

"It is further agreed by said the Coca-Cola Bottling Company that it shall assume and pay all payments due to the Wichita Perpetual Building & Loan Association for said moneys borrowed from said association by said grantors for the purpose above provided, and when such payments with dividends and interest thereon aggregate the sum of eight thousand two hundred thirty-five dollars (\$8,235) the said Lillian B. Preston hereby agrees that same shall be credited on said mortgage to the Wichita Perpetual Building & Loan Association and that said mortgage is thereupon to be released of record leaving title to said premises in the Coca-Cola Bottling Company, Inc., of Wichita, Kansas.

"Insurance shall be so made as to protect the interests of the parties hereto.

"Dated this 1st day of March, A. D. 1918."

The Coca-Cola Company took possession of the property, installing expensive machinery in the building, and at the time of the trial, March 31, 1919, had made all the payments on the mortgage as they matured.

[1] 1. The defendants rely upon the rule laid down in many decisions that a commis-

sion for finding a purchaser for property on certain terms is not earned by the broker's production of a customer with whom the owner enters into a contract giving an option to buy it on such terms (*Aigler v. Land Co.*, 51 Kan. 718, 33 Pac. 593), even where part payments are made which are to be retained by the owner in case the customer concludes not to buy. 4 R. C. L. p. 815, § 53; 9 C. J. 604, note 72, and corresponding text; *James on Option Contracts*, § 105. See, also, 9 C. J. 576, note 32. To this general doctrine we take no exception, but we think some qualification is required to the statement that has sometimes been made in the course of discussions of the subject to the effect that a contract cannot be regarded as one for a sale, as distinguished from an option, unless the owner can absolutely require the proposed buyer to take the property, or at all events to pay for it in full. While a plausible argument can be made in support of the literal and technical accuracy of that test, we do not think that as a practical matter it should be accepted as infallible. If a broker is employed to find a purchaser for property and produces a prospect with whom the owner enters into a contract which otherwise would amount to one for a sale, it is the view of this court that his right to his full commission would not necessarily be defeated by the mere fact that there is reserved to the proposed buyer the privilege to decline to complete the purchase the owner in that event to be compensated by the retention of the portion of the purchase price already paid. This view was announced and applied in *Davis v. Roseberry*, 95 Kan. 411, 148 Pac. 629, 3 A. L. R. 564.

[2] 2. We regard the reasoning of that decision as requiring us to hold that the contract now under consideration was such as to entitle the plaintiff to his commission. On its face—with respect to its phraseology—that contract lent itself more readily than this to interpretation as an agreement for a sale, but here there are a number of special circumstances favoring such construction. The fact that in the title and body of the contract it is described as an agreement for an option might in a doubtful case be of some aid in its interpretation, but is not conclusive as to its real nature, which must be determined by the character of the legal rights of the parties which result from their entering into it. The record of the proceedings of a meeting of the directors of the Coca-Cola Company on February 20, 1918, included an entry as follows:

"Thereupon the meeting was advised that the officers of the company had entered into negotiations with Charles A. Preston for the erection and purchasing of property for the use of the company; and that suitable property could be purchased upon payments of approximately one hundred and forty (\$140.00) dol-

lars per month, such payments to be arranged by the guaranteeing to the Wichita Perpetual Building & Loan Association of a mortgage on this property in the sum of eight thousand two hundred thirty-five (\$8,235.00) dollars, it being understood that this amount would take care of the cost of the improvements upon the property, and the price which would be paid for the lots could be taken care of by an option contract due in about twenty-seven (27) months. After due consideration the following resolution was unanimously adopted:

"Resolved, that the officers of the company are hereby authorized and directed to enter into a contract with Chas. A. Preston & wife for the purchase of the property described as lots 10 and 12 on South Washington avenue, English's subdivision of the city of Wichita, Kansas. As a part of the plan of purchase, the officers of the company are hereby authorized and directed to guarantee the payment of the first mortgage in the amount of eight thousand two hundred thirty-five (\$8,235.00) dollars which is to be placed against the above-described property, the terms of such guaranty and the manner of the carrying out of the same to be in such form as the Wichita Perpetual Building & Loan Association requires.

"The officers of the company for the protection of this company are to obtain an option contract with the said Charles A. Preston and his wife, Lillian B. Preston, by which the company is to have the right to obtain title to this property subject to this first mortgage by the payment of the sum of thirty-five hundred (\$3,500.00) dollars with interest at 6% payable any time within twenty-seven months from the date of the execution of the contract."

Of course the language authorizing a purchase is not controlling, but it gives room for an inference that the word "option" was used as a convenient term to signify a reservation by the company of the privilege of declining to complete the purchase after the contract had been partly carried out.

The hypothesis that the contract was regarded as one for a sale, with the reservation of a right in the buyer to decline to complete it, finds further support in its provisions that the company should "assume and pay all payments due to the building and loan association," this not being limited to the three-year period or conditional upon the exercise of the so-called option to buy, and that "when such payments with dividends and interest thereon aggregate the sum of eight thousand two hundred thirty-five dollars (\$8,235.00) the said Lillian B. Preston hereby agrees that same shall be credited on said mortgage to the Wichita Perpetual Building & Loan Association and that said mortgage is thereupon to be released of record leaving title to said premises in the Coca-Cola Bottling Company, Inc., of Wichita, Kansas."

The defendants advance the theory that the payments on the building and loan company's mortgage must be regarded as rent. This is untenable because there was evidence

that when a lease had been under discussion a rental of \$90 a month had been agreed upon, while the payments on the mortgage amounted to \$31.85 a week—a difference too large to be disregarded.

The contract requires some interpretation. It does not expressly refer to an occupancy of the property by the Coca-Cola Company prior to the delivery of the deed, but that was obviously contemplated. Although the agreement of the company to make payments to the building and loan association until the mortgage was satisfied was not in terms restricted, there is room to imply that if at the end of three years it elected to surrender the property it would be released from further liability, and would have no claim for the return of any money; that will be assumed to be the meaning. The evidence then was sufficient to warrant a finding that the contract amounted to this: The company was to occupy the property for three years, paying in that time \$31.85 a week, in all \$4,965.60, or \$1,725.60 more than the rent would be worth. It was also to pay the taxes and insurance. At any time within the three years it could obtain the deed by paying \$3,500, remaining responsible for the mortgage. At the end of that period it could, if it saw fit, relieve itself of further liability by vacating the property, thereby losing what it had put into it in excess of the value of the rent. We regard such a contract as essentially similar to that passed upon in *Davis v. Roseberry*, 95 Kan. 411, 148 Pac. 629, 8 A. L. R. 564, already cited. There the prospective buyer formally agreed to take the property at the stated price, but with a distinct reservation of the right to be released from this obligation by forfeiting the sum of \$500, which he had deposited as a part payment. This proviso was characterized as an attempt to liquidate the owner's damages in case the buyer should not complete the purchase—an agreement in advance as to the equivalent he was willing to accept. Inasmuch as the assumption of the obligation to buy and the right to be relieved thereof by sacrificing the \$500 paid were contained in the same instrument, there was no actual breach of the contract—the buyer in effect bound himself to do one or the other of two things which the owner had agreed to treat as of equal value—complete the payment of the stipulated price, or forfeit what he had already paid. In the present case the buyer was likewise bound to do one of two things within three years—either complete the purchase of the property by paying \$3,500 or lose all that he had put into it in excess of rent, such loss including about \$575 a year besides taxes and interest. There were here present, moreover, the circumstances to which reference has already been made—the change of possession,

the installation of machinery, the payment of taxes and insurance, the purposes of the buyer as expressed in its record—indicating that the transaction for practical purposes constituted a sale on time, with a right in the buyer to be relieved from further liability by turning the property back.

In an elaborate note entitled "Instrument for Purchase of Land as a Contract or an Option" (3 A. L. R. 576) the difficulty of classifying every agreement according to some hard and fast rule is recognized in these words:

"Although the distinguishing characteristics of contracts for the sale of land, and contracts creating merely an option to purchase, are well known, \* \* \* it is unfortunately true that in a great number of cases there are no earmarks by which the type of contract can be immediately recognized, and the presence of such characteristics cannot be definitely determined until the contract has received judicial construction."

Of the many cases collected and classified in the note few seem based upon facts sufficiently like those here involved to make their citation desirable. In *Moss & Raley v. Wren*, 102 Tex. 587, rehearing 589, 113 S. W. 739, 120 S. W. 847, the court reached a conclusion contrary to that arrived at in the Kansas case, already discussed, of *Davis v. Roseberry*, 95 Kan. 411, 148 Pac. 629, 3 A. L. R. 564. *Wright v. Suydam*, 72 Wash. 587, 131 Pac. 239, contains language tending to support the views expressed in the *Davis-Roseberry* Case, but there the controversy was not whether an agent was entitled to a commission but whether the vendee could enforce specific performance.

[3] 3. The amount of the plaintiff's compensation under the evidence was to be (in accordance with custom) 5 per cent. of the first \$1,000 of the price and 2½ on the remainder. He asks a recovery on the basis of a sale for \$12,035. His evidence was that the property was placed in his hands for sale for \$4,500, which price included the \$1,000 mortgage. It is said that—

"Commissions must be estimated on the whole value of the property without regard to incumbrances, in the absence of a specific agreement to the contrary." 9 C. J. 582.

Whether or not that rule is accepted, we think the commission should be computed on \$4,500. The listing here appears to have been for a sale of the property clear, for that amount, and not for its sale for \$3,500, subject to the \$1,000 mortgage. We regard the sale contracted for as one substantially for \$4,500, the old mortgage having been paid off out of the proceeds of the new one. We do not think, however, the building and loan mortgage (in excess of the thousand dollars) should be included in the amount

on which a commission should be computed. That mortgage was given as a part of the means by which the sale was to be effected—it was for the benefit of the purchasing company rather than of the seller, except as it helped to promote the sale.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

(97 Or. 176)

### ROCKHILL v. BENSON et al.

(Supreme Court of Oregon. July 20, 1920.)

1. Statutes  $\S$ 97(2)—Acts relating to state highway commission not special laws.

Laws 1917, p. 447, and Laws 1919, p. 241, creating a highway commission, and empowering it to create a new road as the Pacific Highway, despite the existence of a county road and highway in the same territory and roughly in the same route, held not special and local, in conflict with Const. art. 4, § 23, providing that the Legislature shall not pass special or local laws for opening highways.

2. Highways  $\S$ 21 — Statutes creating state commission empowered it to open new roads.

Laws 1917, p. 447, art. 2, §§ 8, 5-7, 9, 10, and Laws 1919, p. 241, supplementing it, empowered the state commission to lay out and create new roads as part of the state highways, whenever necessary to secure a good alignment or the best possible grade.

3. Statutes  $\S$ 206—Construed by four corners to effectuate intent.

A statute doubtful in meaning must be construed by its four corners, and so as to carry out the obvious intent of the Legislature.

4. Highways  $\S$ 107(1) — Map approved by state commission did not adopt particular road.

Map of highways of the state, prepared by engineer and approved conditionally by the highway commission, held not to have adopted a road passing by the town of Riddle as the Pacific Highway.

5. Highways  $\S$ 107(1)—Agreement between court and member of state commission not binding on commission.

An agreement between the county court and a member of the state highway commission as to the location of a highway, not being with the commission, but with the member alone, was not binding on the commission, whether by estoppel or otherwise.

6. Counties  $\S$ 106(3) — State commission's proceeding to grade highway cannot be enjoined for failure to obtain rights of way.

Proceeding of state highway commission to grade a highway cannot be enjoined by a taxpayer of the county on account of the failure of the commission to obtain some of the rights of way before the grading contract was let; the provision of Laws 1917, p. 447, that right of way shall be acquired before any contract

shall be let, not being mandatory or prohibitory, so that a taxpayer can take advantage of it.

**7. Highways §107(1)—Choice of route discretionary with commission.**

Where the route for a state highway adopted by the highway commission would be shorter than those afforded it by the existing county roads, and the maximum elevation would be considerably less, there was room for exercise of discretion by the commission in adopting such route, and its judgment was conclusive.

**8. Evidence §83(1)—Presumption that conclusion of commission as to location of way was honestly applied.**

In the absence of evidence to the contrary, the Supreme Court must assume that the conclusion of the highway commission as to the route for a highway was honestly and conscientiously applied to the facts in the case.

**In Banc.**

Appeal from Circuit Court, Douglas County; G. F. Skipworth, Judge.

Suit by S. H. Rockhill against S. Benson, E. E. Kiddle, and R. A. Booth, constituting the State Highway Commission, and others. From judgment for plaintiff, defendants appeal. Reversed, and suit dismissed.

Plaintiff, a taxpayer in Douglas county, brings this suit against the state highway commission, H. J. Hildeburn, a contractor, and other nominal defendants, to enjoin the location of the Pacific Highway as the commission is attempting to construct the same from Myrtle Creek, in said Douglas county, south toward Canyonville. It seems that, prior to the creation of the highway commission, there were two public roads leading from Myrtle Creek to Canyonville, both of which had been in existence as public highways for some considerable length of time. Both of these roads follow the general course of the valley of the South Umpqua river. One of them, however, diverged from the other and crossed the river a few miles south of Myrtle Creek, and continued on the west side of the river, through Riddle and across Cow creek, to Canyonville. The other road kept to the east side of the river until about opposite Canyonville, and then crossed to that place. The latter road was known as the "old stage road."

The Pacific Highway, as the highway commission is now attempting to construct the same, does not exactly follow either of these roads, but keeps along the old stage road, or near its general course, after leaving the point of divergence between the two old roads, and finally leaves that road and crosses the Umpqua river to the west side, some three or four miles nearer to Canyonville, and then continues up to that place on the west side of the river. This new route is generally known as the "cut-off," and is

something over two miles shorter than the route by way of Riddle. It also seems from the evidence to have considerably less elevation to overcome and to have fewer "ups and downs." It is claimed on behalf of the highway commission that it is shorter and considerably cheaper in its ultimate construction and completion as a paved road, and that it has a better grade. On the other hand, it is claimed on behalf of the plaintiff that the Riddle road will cost less to grade, will save the expense of building one new bridge, and will accommodate a greater number of local people.

The original highway commission was created by the Legislature in 1913. It appears from the evidence that shortly thereafter a truck, loaded with highway signs, went through Douglas county and placed some of these signs at different points along the road passing through Riddle, and thereafter the road through Riddle seems to have been known, locally at least, as the "Pacific Highway." There is no competent evidence, however, as to under what authority the persons putting up the signs and locating them acted, or that the placing of the signs was authorized by the commission. It is conceded in the brief of respondent that there was no other official action designating the Pacific Highway through Douglas county by the old original highway commission.

In 1917 the Legislature (chapter 237) repealed the act of 1913 (chapter 330) and created a new commission. Afterwards the highway engineer prepared a rough general map of the highways of the state and their locations. This map showed the Pacific Highway as running through Riddle. Afterwards this map was approved by the highway commission as a general map, with certain reservations. The resolution approving the same was as follows:

"A map showing the state highways, together with descriptions showing their terminal points and important places touched along the line, was presented to the commission for approval. After some suggested changes the map was approved as outlined; it being understood, however, that the definite selection of a number of highways shown on the map will not be determined upon until after location surveys have been completed."

Prior to this time, and in the year 1915, the highway engineer under the old commission had made two surveys of this part of the route; one running along the "cut-off" line, and the other along the road running through Riddle. These surveys were known as the "Peters surveys." Finally in 1919 the commission definitely adopted the "cut-off" route, leaving Riddle to one side, and proceeded to let a contract to the defendant Hildeburn for the grading of the same.

Prior to this time there had been some

negotiations and perhaps some bickering between the county court of Douglas county and Mr. Benson, chairman of the highway commission, as to the location of the route, and it is claimed on behalf of the plaintiff that there was an understanding between the county court and Benson that the road should be routed by way of Riddle, and that the county court of Douglas county expended considerable sums of money in improving portions of said highway and preparing it for permanent paving by the highway commission upon that understanding.

It is claimed on behalf of the plaintiff that the cut-off route is largely a new road, and that the highway commission has no authority to lay out or create new roads where county roads already exist, but are confined to the selection of existing roads; that the Riddle road was definitely designated as the Pacific Highway by the act of the Legislature; that the highway commission is estopped from routing the Pacific Highway on any road except through Riddle, by the understanding between the county court and Mr. Benson, the chairman of the commission; that the contract for grading the road is void, because the rights of way had not been obtained at the time of letting the contract; and, finally, that there was an abuse of discretion upon the part of the highway commission in attempting to locate the road over the "cut-off" route.

J. M. Devers, of Salem, and Jay Bowerman, of Portland (Geo. M. Brown, Atty. Gen., and O. P. Coshaw, of Roseburg, on the brief), for appellants.

Rice & Orcutt, of Roseburg (Ira Riddle, of Roseburg, on the brief), for respondent.

John W. Kaste, of Portland, *amicus curiæ*.

BENNETT, J. (after stating the facts as above). The main contention on the part of the plaintiff and respondent, and the one upon which the court below rested its decision in plaintiff's favor, is that the highway commission has no authority to create or lay out a new road, but that that authority is vested exclusively in the county courts, and the highway commission can only designate or adopt roads which are already county roads and public highways, as a part of the state system of roads.

In its conclusion that the highway commission had no power to designate or lay out a road for a state highway, where there was no public road before, we think the court below erred. The contention of respondent in this regard is based upon two grounds:

First. That any attempt on the part of the Legislature to grant such power to the highway commission to create or establish a new road would make the law special and local, and be in conflict with section 23, article 4, of the Constitution of the state of Ore-

gon, which provides that the legislative assembly—

"shall not pass special or local laws \* \* \* for laying out, opening, and working on highways, and for the election or appointment of supervisors."

Second. That the Legislature did not, by the act of 1917, and the succeeding act of 1919, attempt or intend to confer any such power to create new highways or portions of new highways upon the highway commission.

[1] As to the first proposition, we do not think that the act of the Legislature in question was in conflict with the constitutional provision in question. It is now well settled that all power of legislation belonging to the people is vested in the Legislature, unless such power is restricted and limited by some constitutional provision. Of course, it follows that in the first instance the power to create roads, and to regulate and control them, to lay them out, or change or vacate them, is vested in the Legislature, and it may do any of these things fully and freely, and in any manner it may see fit to adopt, unless restricted by the Constitution itself.

It will also be noticed that the constitutional provision in question does not in any way restrict or limit the general power of the Legislature in relation to roads and highways, but is only directed toward the manner in which that power shall be exercised. The Constitution does not say that the Legislature cannot create highways, or change highways, or lay out highways, or that such power shall be vested in the county courts, or in any other tribunal. It only provides that the Legislature shall not take such action by special or local laws.

In this case we think that both the provisions and the purpose of the laws in question were general, and not local or special. The act of 1917 provides for a general system of state highways, consisting of trunk roads along the main routes of travel and commerce, with branch lines extending out into every portion of the state. It provides for a highway commission, whose power, authority, and duty are not confined to any one person or thing, or to any one county or place, but are general and extend to every hamlet and neighborhood in the state. The fund to provide for this highway system is also general, and is raised by general taxation and general license provisions.

The courts have found much difficulty sometimes, in close cases, in distinguishing between general laws on the one hand, and local and special ones upon the other; but here the act is so broad in its scope, so general in its nature, that there is little, if any, room for questioning its character as a general law. The respondent depends upon *Sears v. Steele*, 55 Or. 544, 107 Pac. 3, to support its conten-

tion. However, the question at bar was not passed upon in that case, but was especially reserved; the court saying:

"Whether the state, by general laws, may enter upon the construction of public highways, to be built, owned, and managed by the state, is not before us for decision, and upon that subject we express no opinion."

In that case the act provided for the construction of two local roads—one in Jackson county, from Medford to Crater Lake, and one in Klamath county, from Klamath Falls to Crater Lake—and the act was so framed that either of them could be proceeded with, without the other. There was no provision for a general system of roads over the entire state, or for a permanent commission with authority to create and designate such roads. It was upon the ground that the roads in question in that case were local in their character and nature that the court distinguished that case from the previous case of *Allen v. Hirsch*, 8 Or. 412:

"But it is urged that the road proposed in the act now under consideration is a state road, intended, when completed, to extend entirely across the state and to unite remote sections thereof. It is true that the title so indicates, but by the body of the act no provision is made for the laying out, opening, or working of any road, except through the counties of Jackson and Klamath, or, in case both of these counties do not see fit to accept the overtures of the state and appropriate the required \$50,000, then through Jackson county alone; and it is provided that such road shall be a county road, not a state road. Section 4 of the act is as follows: 'That such money shall be expended only upon a county road legally established.'

"The local character of the act is further indicated by the provision that, as soon as Jackson county has made its appropriation of \$30,000 to aid in the construction of a road from Medford, Jackson county, to a point on the west line of the Cascade Forest Reserve, on the route to Crater Lake, the Governor shall appoint a commission and thereupon 25 per cent. of the sum appropriated shall become available for use in Jackson county and \$12,500 each year for three years thereafter, and upon Klamath county making a like appropriation the same amounts become available in like manner. Each county stands alone. If Jackson county appropriates \$50,000, and Klamath county does not, Jackson county, at the end of three years, has a county road, the beginning and terminus of which is selected by the state, and practically designated by the act itself; and there the road ends, as it begins, entirely within the confines of one county, and is a county road."

We think the act in question here is clearly in its main features a general and not a special or local act, and was in this regard within the power of the Legislature. Whether there are any minor provisions of the act, not involved in this proceeding, which

are special and local, and therefore not constitutional, is a question not necessary to decide at this time; but, so far as the act confers authority upon the commission to lay out and create highways, we hold it is general in its character.

[2] Upon the second branch of the contention, that the Legislature, by the acts in question, did not in fact confer power upon the highway commission to lay out and create new roads, as a part of the state highway, whenever it may be necessary to secure a good alignment or the best possible grade, we think that question, also, must be decided in favor of the contention of appellants. It is true that the act does not say in express words that the commission may "lay out and create new roads." But we think that power is implied quite clearly by many of the provisions of the act, which make the intention to grant the power as plain as if it were conveyed by express words.

Section 3 of article 2 of the act of 1917, creating the highway commission (chapter 237) provides:

"Upon the selection of state highways hereinafter provided for, the decision of the commission must be unanimous."

Section 5, *Id.*, contains this provision:

"Said commission shall designate, construct or cause to be constructed a system of state highways within the state of Oregon, which highways shall be designated by number, and by the point of beginning and terminus thereof."

Section 6, providing for the duties of the highway engineer, has the following:

"On all state highways and on county roads constructed under his supervision a simple but adequate accounting system shall be installed in order that all expenditures and costs may be classified as the work progresses."

Section 7 provides:

"Whenever any county desires to construct or improve any part of a state road lying within such county, the county court of such county may make application to the state highway commission for the definite location and grade for such road, and the state highway engineer shall cause such road, or portion thereof, to be definitely located and the grade thereof established."

Section 9 provides for the obtaining of the right of way by the counties in the first instance, but it also provides:

"In case of neglect or refusal to so acquire said right of way, the state shall have the power, through the commission, to acquire said right-of-way either by donation, purchase, agreement, condemnation, or through the exercise of the power of eminent domain in the same manner as is provided by law for acquiring property for other public uses."



Section 10 again makes the same distinction between county roads and state roads:

"All moneys raised by counties for road purposes, and expended or to be expended upon roads within such counties other than state highways, shall be under the exclusive control of the county court of such counties."

The bonding act of 1917 (chapter 423) provides:

"No description of any highway provided for herein shall be construed to prevent the state highway commission from making such local changes in the location thereof as they may deem proper.

"The state highway commission is also authorized to adopt such other roads or routes connecting portions of the state and to provide for the construction of post roads or forest roads over such routes and the improvement and maintenance thereof, and to pay for the same from the fund created by House Bill No. 21 referred to by title in section 8 hereof."

Section 10 of the act of 1919 (chapter 173) provides:

"No description of any highway provided for herein shall be construed to prevent the state highway commission from making such local changes in the location thereof as the commission may deem proper; and the state highway commission is authorized and empowered to designate and define as state highways other and additional roads as from time to time they may deem of sufficient public importance, and may improve, better or pave the same."

It seems perfectly plain, from all of these provisions, that it was the intention of the Legislature that the highway commission should have power to lay out, designate, and improve roads where there had previously been no highways. Otherwise, why would there have been any provision for acquiring rights of way, and why any provisions as to local changes, and why the distinction between state and county roads, and the provision for the definite location of roads by the state engineer?

If this were not the right construction, it would be impossible for the commission to work out any complete system of connecting roads. The commission would be entirely at the mercy of the county courts, and would have to follow the roads, as designated by the county courts, however difficult or impossible the grades and alignment might be. It would entirely prevent the commission from taking advantage of any cut-offs, or new alignments, however much better the new route might be than the old one.

It is a well-known fact that many of the public roads designated by the Highway Act, or portions thereof, were not in existence at all at the time of the passage of the act. The purpose of the act could not, therefore, in such cases be carried out by the highway commission, unless it had the power to design-

nate and lay out new roads. In some cases one county might desire to have the highway running to the county line between two counties in one place, and the adjoining county might elect to have the highway through its county, commence on the same county line at an entirely different place. There could be no system of highways, as contemplated and called for by the act, if the county courts controlled the location, nor unless the commission, whose duty it is to provide such system, had authority to designate the route of the road.

[3] We do not think the construction of this act is doubtful in this regard. But, if it were, we would be bound to construe it by its four corners and in such a way as to carry out and effectuate the obvious intent of the Legislature. In some cases the legislative act designates particular towns and cities through which the highway must pass, and such designation is, of course, controlling upon the commission, but in other respects the location is left to the commission.

[4] Neither do we think there is anything in the other objections, to the construction of this piece of road, which would justify the court in enjoining the same and holding up the work. We do not think that the road by Riddle was officially and definitely located as the Pacific Highway, prior to the act of 1917, or at any time thereafter. The road map, which is claimed to have adopted that road as the highway, was prepared and adopted long after the passage of chapter 237 of the Laws of 1917. It was a general map on a very small scale, and we hold that it did not, and was not intended to definitely locate the highways referred to. Many of the roads shown thereon had not even been surveyed at the time of the preparation of the map, and the commission, in its resolution adopting the map, carefully pointed out that it was subject to change and was not a definite location.

[5] The agreement between the county court and Mr. Benson (if there was such an agreement) was not with the commission, but with Mr. Benson alone, and it was not in any way binding upon the commission. It was not in any sense an official act, so there could be no estoppel of the commission thereby, even if the doctrines of estoppel would otherwise apply.

[6] Neither do we think the proceeding can be enjoined by a taxpayer of the county, on account of the failure of the commission to obtain some of the rights of way before the contract was let. The commission can always obtain a right of way by condemnation, if that shall become necessary, and we do not think that the provision of the act that "the rights of way for state highways, and roads improved or otherwise constructed under this act, shall be acquired by the counties in which the highways are situated

by either donation, purchase, agreement, condemnation, or through the exercise of the power of eminent domain by the county before any contract shall be let," is mandatory upon the commission, or prohibitory of the letting of a contract, prior to obtaining the right of way, in such a sense that the contract for the grading work can be enjoined by a taxpayer because some part of the right of way has not yet been obtained.

As to the claim that the commission did not use sound discretion in adopting the cut-off, we do not think the evidence sustains the contention of the respondent. The most that can be claimed in that regard from the evidence, it seems to us, is that there is some room for question as to whether the location fixed by the commission was preferable to the other route. The very concession that there is discretion in the matter involves the right of the commission to weigh the arguments in favor of the different routes and decide thereon, and as long as there is reasonable room for contention as to which was the better and cheaper and generally more satisfactory route, its judgment in relation to the matter would be conclusive.

[7, 8] Here, as we have seen, the evidence discloses that the route adopted by the commission would be shorter, that the maximum elevation would be considerably less, and there is a question, and room for the exercise of judgment, as to whether it will not ultimately be the cheaper route. Under these conditions, we would not be justified in interfering with the conclusion of the commission, which we must assume, in the absence of evidence to the contrary, was honestly and conscientiously applied to the facts in the case.

The judgment of the court below will be reversed, and the plaintiff's suit dismissed.

(97 Or. 242)

### BARNETT v. PHELPS.

(Supreme Court of Oregon. July 27, 1920.)

#### 1. Libel and slander §6(1) — Classification of words "actionable per se."

Words "actionable per se" are usually divided into four classes, words which impute a charge which if true will subject the party charged to an indictment for crime involving moral turpitude; words which impute that a party is infected with some contagious disease which would exclude him from society; words which impute to the party unfitness to perform the duties of an office, or employment of profit, etc.; and words which would prejudice a person in his profession or trade.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actionable Per Se.]

#### 2. Libel and slander §7(16)—Incontinence not offense at common law.

At common law, private acts of incontinence were cognizable only in the ecclesiastical courts, and repeated acts of fornication or adultery constituted no crime, though committed with many persons.

#### 3. Libel and slander §7(19)—Not slanderous per se to call unmarried woman "whore."

In the absence of statute, it is not slanderous per se to call an unmarried woman a whore; that is, a person given to promiscuous intercourse.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Whore.]

#### 4. Libel and slander §7(19)—Calling married woman prostitute slanderous per se.

As adultery is a statutory crime in Oregon, to speak of a married woman as a prostitute is to charge the commission of an offense, and such language would be actionable per se.

#### 5. Libel and slander §86(1)—Innuendo can only serve to explain some matter already expressed.

Innuendoes cannot extend the meaning of words asserted to be slanderous beyond their natural import, and can only serve to explain some matter already expressed.

#### 6. Libel and slander §7(16) — Mere incontinence not offense at common law, but public indecency was.

At common law, mere cohabitation of a man and woman though unmarried was not criminal, unless there was something publicly indecent, nor were fornication or adultery criminal unless accompanied by circumstances such as publicly to render them a nuisance, though acts of gross and open lewdness were punishable.

#### 7. Libel and slander §7(19)—To charge unmarried woman with being a prostitute is not slanderous per se.

Despite L. O. L. § 2087, to charge an unmarried woman with being a prostitute or whore is not slanderous per se, for neither the acts nor condition are necessarily criminal, and in such case for a woman to recover she must show and prove special damage.

#### Department 1.

Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Action by Ida Barnett against Florence Phelps. From an involuntary judgment of nonsuit, plaintiff appeals. Affirmed.

Ida Barnett, an unmarried woman, sued Florence Phelps for damages, alleging that on one occasion in the presence of Mrs. Harry Mitchell the defendant spoke of the plaintiff as a "whore," and that on another occasion, and in the presence of George H. Benson, the defendant characterized the plaintiff as a "prostitute." The evidence concerning the first occasion strictly conformed with the allegation; and although the evidence as to the second occasion did

not exactly agree with the language of the complaint, we shall assume that the evidence was sufficient to sustain the charge that the defendant spoke of the plaintiff as a prostitute.

There was neither allegation nor proof of special damage. At the close of the plaintiff's case, the trial court, upon the motion of the defendant, granted an involuntary judgment of nonsuit. The plaintiff appealed.

Oliver M. Hickey, of Portland (H. T. Potts, of Tillamook, on the brief), for appellant.

S. S. Johnson, of Tillamook (Johnson & Handley, of Tillamook, on the brief), for respondent.

**HARRIS, J.** The only question for decision is whether the court erred in entering an involuntary judgment of nonsuit. If the words employed by the defendant are not actionable per se in this jurisdiction, then the inescapable conclusion is that the trial court ruled correctly.

Spoken words are either actionable or not actionable. Actionable words are divided into two classes: (1) Those which are actionable in themselves, or per se; and (2) those which are actionable only upon allegation and proof of special damage, or per quod. Defamatory words, where spoken, may or may not be actionable per se, depending upon whether or not they may properly be assigned to one or more of the several classes of cases which the rules of the common law have designated as actionable per se. If defamatory words are not actionable per se the complainant must allege and prove special damage. Words of both classes are actionable on the same ground and for the same reason. 17 R. C. L. 264. "The material element," this court has said, "which lies at the foundation of the action of slander is social disgrace, or damages to character in the opinion of other men." *Quigley v. McKee*, 12 Or. 22, 5 Pac. 347, 53 Am. Rep. 320.

[1] Both classes of words are the natural and proximate causes of pecuniary damage. Words actionable per se are classified as such on the theory that their injurious character is admitted by all men; and that on that account they are conclusively presumed to result in damage; but other words are actionable only upon allegation and proof of their injurious effect. Words actionable per se are usually divided into four classes, as follows: (1) Words which impute a charge which, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment; (2) words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; (3) defamatory words,

falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment; and (4) defamatory words, falsely spoken of a party which prejudice such party in his or her profession or trade. *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308; *Williams v. Riddle*, 145 Ky. 459, 140 S. W. 661, 36 L. R. A. (N. S.) 974, Ann. Cas. 1913B, 1151.

[2, 3] Obviously, the words spoken by the defendant cannot be assigned to any of the four classes, unless it be to the first one mentioned; hence we shall seek to discover whether the words uttered by the defendant are in the present state of the law in this jurisdiction, included in the first class of cases. It is apparent that this classification made of actionable words is based upon an arbitrary rule rather than upon the result of inquiries concerning proximate cause and natural effect, because if the rule were framed and governed by considerations of cause and effect it would necessarily include many cases now excluded. *Quigley v. McKee*, 12 Or. 22, 5 Pac. 347, 53 Am. Rep. 320; *Williams v. Riddle*, 145 Ky. 459, 140 S. W. 661, 36 L. R. A. (N. S.) 974, Ann. Cas. 1913B, 1151.

An examination of the authorities will disclose the fact, as illustrated in *State v. Conklin*, 47 Or. 509, 516, 84 Pac. 482, that statements may be found to the effect that spoken words are actionable per se if they impute the commission of an offense liable to indictment and punishment, without any qualifying expressions concerning the element of moral turpitude, or the character of the penalty prescribed for the crime. The precedent last mentioned must, however, be read in the light of the facts there under investigation, and, when so read, it becomes manifest that the court was not called upon to decide, and did not attempt to decide, whether words were actionable per se if imputing a crime for which an indictment would lie, regardless of the presence or absence of moral turpitude, and regardless of the nature of the prescribed punishment. Perhaps it is not now important, except in the interest of accuracy, to determine whether the single fact that the imputed offense is indictable is alone sufficient, without the presence of either the element of moral turpitude or the element of infamous punishment; for the reason that although it may be difficult to phrase a satisfactory definition of moral turpitude (*Ex parte Mason*, 29 Or. 18, 22, 43 Pac. 651, 54 Am. St. Rep. 772) the words uttered by the defendant impute a charge which, if true and constituting a crime, unquestionably involve moral turpitude. *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308. In *Brooker v. Coffin*, 5 Johns. (N. Y.) 188, 4 Am. Dec. 337, the following rule was given as the test:

"In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable."

This test has been so often applied that it may be accepted as a correct statement of the law. *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308; *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140; *Clark v. Morrison*, 80 Or. 240, 244, 158 Pac. 429.

Under the custom of London a whore was "carted," and on that account to characterize a woman as such was actionable per se in London; but with this exception a private act of incontinence, whether fornication or adultery, was cognizable only in the ecclesiastical courts. 1 *Bishop's New Cr. Law*, §§ 38, 501; *State v. Moore*, 1 *Swan* (Tenn.) 136; *State v. Smith*, 32 *Tex.* 167; 2 *Wharton Cr. Law* (10th Ed.) §§ 117, 1741; 1 *A. & E. Ency. Law* (2d Ed.) 747; 13 *A. & E. Ency. of Law* (2d Ed.) 1119. Nor did repeated acts of fornication or adultery constitute a crime, even though committed with many persons. 1 *Bishop's New Cr. Law*, § 501; *State v. Evans*, 27 *N. C.* 603; *Reg. v. Pierson*, 1 *Salk*, 382.

"A 'whore' is a woman given to promiscuous commerce with men, usually for hire." *Bishop on Statutory Crimes* (2d Ed.) § 715; 40 *Cyc.* 983.

A prostitute is often defined as a female given to indiscriminate lewdness for gain (*Davis v. Sladden*, 17 Or. 259, 264, 21 Pac. 140; *Bishop on Statutory Crimes*, section 641), although it has been held that gain is not necessary (32 *Cyc.* 732). The word "prostitution" has no common-law meaning (*People v. Cummons*, 56 *Mich.* 544, 23 *N. W.* 215), and to be a common prostitute was not at common law indictable as a distinct and substantive offense (32 *Cyc.* 732).

It makes no difference then whether we construe the words used by the defendant to mean the acts of incontinence, or the condition produced by those acts; for in neither event do the words import a crime at common law, since neither a private act of incontinence, even though repeated with many men, nor the condition of being a prostitute, constitutes a crime; and therefore under the common law to say of a woman she is a whore, or a prostitute, or by other language to impute unchastity to her, was not actionable per se. *Boyd v. Brent*, 3 *Brev.* 241; *Underhill v. Welton*, 32 *Vt.* 40; *Linney v. Maton*, 13 *Tex.* 449; *Reg. v. Pierson*, 1 *Salk*, 382; *Douglas v. Douglas*, 4 *Idaho*, 293, 38 *Pac.* 934; *Battles v. Tyson*, 77 *Neb.* 563, 110 *N. W.* 299, 24 *L. R. A.* (N. S.) 577, 15 *Ann. Cas.* 1241; *Pollard v. Lyon*, 91 U. S. 225, 23 *L. Ed.* 308; *Davis v. Sladden*, 17 Or. 259, 261, 21 *Pac.* 140; 17 *R. C. L.* 281.

This rule of the common law that spoken words imputing unchastity to a female are

not actionable per se, because not imputing a crime, is gradually, but surely, undergoing a change. This change is being brought about both by statute and by judicial decision. In England a change was wrought by the *Slander of Women Act*, 1891, St. 54 & 55 *Vict. c. 51*, which enacts that words imputing unchastity or adultery to a woman or girl shall be actionable without proof of special damage. In America similar statutes have been passed in a number of the states, while in other states the courts, declaring the old rule to be a reproach upon the law, have repudiated the arbitrary and harsh rule of the common law, and held that words imputing unchastity to a female are actionable per se, even though not involving a criminal offense. If the question were res integra, the writer would take the view that this court should adopt the better and by far the more logical rule that words imputing unchastity are actionable per se, even though they do not involve a criminal offense; but in this jurisdiction the question is foreclosed by the holding in *Davis v. Sladden*, 17 Or. 259, 21 *Pac.* 140, where it was squarely decided that the common-law rule controlled; and consequently relief from the harsh rule now governing in this jurisdiction must come, and, as it seems to the writer, should come, from the Legislature.

In many and probably most of the states of the Union an act of incontinence in some or many of its different forms is made punishable criminally, with the result that in such jurisdictions words imputing unchastity are in many instances actionable per se, for the reason that in such instances they impute a crime involving moral turpitude. In some American jurisdictions the common law has been followed without objection; but in others, although adhering to the old rule the courts have not done so without protesting loudly and bitterly. *Williams v. Riddle*, 145 *Ky.* 459, 140 *S. W.* 661, 36 *L. R. A.* (N. S.) 974, *Ann. Cas.* 1913B, 1151; *Linney v. Maton*, 13 *Tex.* 449; *Battles v. Tyson*, 77 *Neb.* 563, 110 *N. W.* 299, 24 *L. R. A.* (N. S.) 577, 15 *Ann. Cas.* 1241; *Jones v. Herne*, 2 *Wils.* 87; *Lynch v. Knight*, 9 *H. L. Cas.* 577, 8 *Jur. N. S.* 724, 5 *L. T.* 291, 8 *Eng. Rul. Cas.* 382; *Smith v. Silence*, 4 *Iowa*, 321, 66 *Am. Dec.* 137; *Landerback v. Moore*, *Tappan* (Ohio) 349, *Appendix A*; 17 *R. C. L.* 280, 282.

[4] In this state the act of fornication is not made a substantive offense punishable criminally; and an act of incontinence becomes a crime only when there is some accompanying element; as, for example marriage of one of the parties. In this state adultery is a crime, and therefore to speak of a married woman as a prostitute is to charge the commission of a crime. *Davis v. Sladden*, 17 Or. 259, 21 *Pac.* 140. In the instant case, however, the plaintiff is an unmarried woman.

The defendant argues that the words

spoken by the defendant impute a violation of section 2087, L. O. L., which reads thus:

"If any person shall willfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, such person, if no punishment is expressly prescribed therefor by this Code, upon conviction thereof, shall be punished. \* \* \*

This statute was designed to cover offenses against the public peace, the public health, and the public morals, not elsewhere made punishable by the Code, and which were known at common law as "indictable nuisances." *State v. Waymire*, 52 Or. 281, 285, 97 Pac. 46, 21 L. R. A. (N. S.) 56, 132 Am. St. Rep. 699. We must therefore look to the common law to ascertain what acts openly outrage the public decency and are injurious to public morals. 29 Cyc. 1279.

[5-7] Before inquiring about the nature of acts which were indictable nuisances under the common law, we should remind ourselves that the words used by the defendant are to be taken in their ordinary sense, and as they would naturally be understood by those to whom they were addressed; and it must also be remembered that innuendoes cannot extend the meaning of words beyond their natural import. An innuendo can only serve to explain some matter already expressed. It may show the application, but it cannot add to, or enlarge, or change the sense of words. *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140; *Battles v. Tyson*, 77 Neb. 563, 110 N. W. 299, 24 L. R. A. (N. S.) 577, 15 Ann. Cas. 1241; 17 R. C. L. 312; *Feast v. Auer*, 90 S. W. 564, 28 Ky. Law Rep. 794, 4 L. R. A. (N. S.) 560; *State v. Conklin*, 47 Or. 509, 516, 84 Pac. 482. With these rules of construction in mind we may again turn to section 2087, L. O. L.

Although at common law a single act of private incontinence was not indictable, one in a public place and witnessed by people was indictable (*Bishop on Statutory Crimes* [2d. Ed.] § 711), and although at common law the mere cohabitation of a man and woman between whom the bond of marriage did not exist was not a crime, yet it was a crime if something publicly indecent existed in the manner of association. 20 R. C. L. 406; *Adams v. Com.*, 162 Ky. 76, 171 S. W. 1006, L. R. A. 1916C, 651. In the absence of legislation, fornication and adultery were not crimes under the common law, unless accompanied by such circumstances as per se constituted a misdemeanor, as, for example when it was open or notorious amounting to a public nuisance. 1 *Bishop's New Cr. Law*, 38; 1 R. C. L. 632; *Richey v. State*, 172 Ind. 134, 87 N. E. 1032, 139 Am. St. Rep. 362, 19 Ann. Cas. 654. Generally all acts of

gross and open lewdness are indictable at common law. 1 *Bishop, New Cr. Law*, § 500; 2 *Wharton's Cr. Law* (10th Ed.) § 1432. Again noticing section 2087, L. O. L., it will be observed that, as said in *State v. Nease*, 46 Or. 423, 443, 80 Pac. 897, 899, the Legislature embodied "in the statute, as a description of the offenses prohibited, the essential ingredients of a common-law nuisance."

To say of an unmarried woman that she is a prostitute, or a whore, is merely to ascribe to her a condition brought about by acts of incontinence without regard to whether there was or was not, in any one or more of the acts of incontinence producing the result or condition of being a prostitute or a whore, any accompanying element, as for example, marriage of one of the parties making the act adultery in this state, or blood relationship of the parties within a certain degree, making the act incest. The statute makes it an offense to use profane language upon any grounds used as a watering place outside of any incorporated city; and yet to say of a man that he is profane would not ordinarily be understood to mean that he used profane language at the place prohibited by law. It is true that it is unlawful to keep a bawdyhouse, but it is also true that the condition ascribed to the plaintiff by the defendant does not necessarily imply the keeping of a bawdyhouse; nor indeed does it necessarily imply that the plaintiff was an inmate of such a house. A female may gain for herself the condition named by the defendant by performing the acts privately and in as many different places as there are acts. The words used by the defendant do not imply public and open acts of incontinence any more than they imply private acts of incontinence. The words do imply acts of incontinence for hire, but no more. In brief, an act of incontinence, or repeated acts of incontinence may or may not be punishable criminally, depending upon the accompanying circumstances. There are different circumstances, which, if accompanying an act of incontinence, make the act a crime; and there are as many different classes of sexual offenses as there are different classes of circumstances producing criminality. When, therefore, words, such as those used by the defendants, are spoken of a person, one can only conjecture whether there was or was not an accompanying element of criminality.

The words spoken by the defendant, when given the meaning which they are ordinarily understood to carry, cannot be said to impute the commission of a crime, and therefore are not actionable per se; and although the words uttered by the defendant do impute unchastity to the plaintiff, that circumstance does not render them actionable per se, but the plaintiff must, before she

can recover, allege and prove special damage. The plaintiff did not allege, nor did she attempt to prove, special damage, and therefore the judgment must be affirmed.

MCBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

(97 Or. 1)

**SCHOOL DIST. NO. 24 OF MARION COUNTY v. SMITH, County School Superintendent.**

(Supreme Court of Oregon. July 6, 1920.)

**1. Mandamus  $\S$ 165 — Demurrer to pleading admits truth of material statements.**

A demurrer to petition in mandamus admits the truth of all material statements in pleading against the sufficiency of which it is directed.

**2. Taxation  $\S$ 300 — Levy mandatory only where statute required tax to be levied for a definite purpose.**

Where the Legislature has specifically required the levy of any tax by the county court for a definite purpose, the law is mandatory, and such tax must be levied, but where the court is authorized, but not directed, to raise a tax for a given purpose, the levy is discretionary.

**3. Taxation  $\S$ 300 — Mandatory taxes to be first levied to keep within constitutional limit.**

In order that Const. art. 11,  $\S$  11 (see Laws 1917, p. 12), limiting amount to be raised by tax levy to amount levied during preceding year, plus 6 per cent., the levy of any discretionary tax should be postponed until all mandatory taxes have been levied in full.

**4. Schools and school districts  $\S$ 99—Levy of \$10 per capita school tax mandatory.**

The levy of a \$10 school tax per capita for all school children in county under Laws 1919, p. 213, held mandatory.

**5. Taxation  $\S$ 913(1)—Taxes levied for school purposes cannot be used for county purposes, and vice versa.**

Taxes levied for school purposes cannot, when collected, be used for county purposes, nor can taxes levied for county purposes be used for school purposes, the county court's authority ceasing with the making of the levy, and the money, when collected, becoming automatically the money of the school districts according to their proportionate rights, where tax was levied as a school tax, and becoming county funds when levied for county purposes.

**6. Evidence  $\S$ 17—Court will take judicial notice when taxes are paid and county expenses audited.**

Court will take judicial notice of the time when taxes are paid, and that the current expenses of the county are audited and allowed each month.

**7. Mandamus  $\S$ 151(2)—School district's remedy on insufficient levy of taxation not mandamus against county superintendent.**

Where the \$10 per capita school tax was not levied in full within the constitutional limitation on taxation under Const. art. 9,  $\S$  3, article 11,  $\S$  10, and article 11,  $\S$  11 (see Laws 1917, p. 12), as required by Laws 1919, p. 213, mandamus will not lie in action in which county superintendent is only defendant, to compel him to apportion to a school district the share of money to which it would have been entitled if the full tax had been levied.

**8. Injunction  $\S$ 212—Injunction against county superintendent no defense in subsequent mandamus proceeding by school district not party to injunction suit.**

Injunction restraining county school superintendent from apportioning certain funds to school district, granted in action to which the district was not a party, is no defense in mandamus by the district to compel apportionment of such funds, the district not being bound by the decree in the injunction suit, even though it could have, but did not, intervene therein.

**Department 2.**

Original petition for mandamus by School District No. 24 of Marion County against W. M. Smith, County School Superintendent. Petition dismissed.

The plaintiff is an organized school district of Marion county, embracing the corporate limits of the city of Salem. The defendant is the duly elected, qualified, and acting county school superintendent of Marion county.

This is an original proceeding in mandamus, in which it is alleged that, according to the school census of the plaintiff, there are 4,208 individuals between the ages of 4 and 20 years who on October 25, 1919, were actual residents of the district; and that on November 28, 1919, after the census was taken, the clerk of the plaintiff forwarded a certified copy thereof to the defendant, who examined and found it to be correct, and in December following filed a report with the county clerk of Marion county, certifying that fact. It is then alleged that at its December term in 1919 the county court of Marion county levied a tax for school purposes upon all of the taxable property within the county, sufficient to produce at least \$10 per capita for all of said children; that thereafter the county assessor made a certificate in duplicate of the amount to be assessed for school and other purposes, and secured from the county clerk a warrant in the name of the state of Oregon, authorizing the collection of the tax for school and other purposes by the sheriff of said county as tax collector; and that the assessor attached the warrant to the assessment roll, and delivered the same to the sheriff in January, 1920.

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It is said that by virtue of this assessment and warrant the sheriff has collected a sufficient amount of taxes from the tax roll of 1919 to pay each school district within the county, including the plaintiff, its full amount of \$10 per capita; that in May, 1920, the defendant exercised his option and right to divide said county school fund among the several school districts, and apportioned the amount of \$7,552.80 to the plaintiff; that he made an order, directing the county treasurer of Marion county to pay that sum to the plaintiff, but that the defendant fails, neglects, and refuses to apportion to the plaintiff the entire amount of the school fund to which it is entitled, to wit, \$15,944.80, although demands therefor have been made by the plaintiff; that by reason of the failure and neglect of the defendant to apportion the plaintiff's share so collected the latter has been deprived of the use and benefit of \$8,392, which failure on the part of the defendant is without any right or justification; and that it became and now is the right and duty of the defendant to apportion the whole amount of the fund to the several school districts of Marion county.

The petition states that in November, 1919, the plaintiff formulated an itemized budget showing its estimated receipts and expenditures for the current year, including money which it would receive from the tax to be so levied and collected by the county; that it duly and regularly submitted such budget for approval or rejection to its legal voters at a special school election duly called and held December 8, 1919, at which time it was approved and accepted by a majority of the voters; that the district is without funds, and has been compelled to borrow a large amount of money to carry on its schools; that the money so due is required to enable it to defray its expenses for the remainder of the current year; that it has no plain, speedy, or adequate remedy at law; and that the defendant cannot give any valid or legal excuse for not performing the duty enjoined upon him by law. The petition prays for an alternative writ, requiring the defendant to apportion unto the plaintiff the further sum of \$8,392 as its share of said fund.

Answering, the defendant admits that at its December term in 1919 the county court pretended to levy for school purposes a tax of at least \$10 per capita for each of the school children within such county, but that such levy was a violation of section 11 of article 11 of the state Constitution (see Laws 1917, p. 12), commonly known as the 6 per cent. limitation law; that by reason thereof and because of a writ of injunction issued out of the circuit court of Marion county in a suit wherein Ed. A. Jory was plaintiff and Marion county, a municipal corporation, its sheriff, school superintendent, judge, and

commissioners only were defendants, the collection of said pretended levy was and is permanently enjoined in so far as it is in excess of \$8.25 per capita for each of such school children; that no other or greater amount has been collected; that \$8.25 per capita is all that will be available to the various school districts from said pretended levy on the 1919 tax roll; that the amount levied on the 1918 tax roll for school purposes, plus 6 per cent. thereof, is \$108,648.46; that such sum only was lawfully levied, is now being collected, and amounts to \$8.25 per capita and no more; that the gross amount to which plaintiff will be entitled is \$34,716; and that when all of the 1919 taxes have been collected the plaintiff will be entitled to an additional amount of \$14,164.13 and no more, which the defendant offers and agrees to apportion as such funds are collected. The defendant declares that he now refuses, and will continue to refuse, to apportion to the plaintiff the additional sum of \$7,634, or \$1.75 per capita, for the reason that he has been permanently enjoined and restrained from doing so by the decree in the Jory suit. Copies of the complaint, demurrer thereto, and decree rendered therein are attached to and made a part of the answer here. It is further alleged that the sum of \$7,634 claimed by the plaintiff is included in and made a part of the injunction granted in that suit, whereby the defendant was restrained and enjoined from disbursing the same or any part thereof; and that by reason of such litigation and the constitutional limitation the plaintiff is estopped from making or maintaining any of the allegations in its writ or petition.

It appears from the pleadings in the Jory suit that after the county court of Marion county had prepared its budget for the current year, providing for the levy of taxes to the full amount of the 6 per cent. constitutional limitation, "in order to raise the amounts required by the said acts of the said Legislature" (particularly chapter 156, Laws 1919), it became "necessary to levy a tax on all the taxable property within Marion county in the sum of \$25,470.08, over and above the taxes hereinbefore levied for the current year, and over and above the amount of tax levied for the preceding year for common school purposes plus 6 per cent. thereof," and that it was therefore "ordered, adjudged, determined, and declared that in compliance with the said acts of the said Legislature a tax in the sum of \$25,470.08 be, and the same is hereby, levied upon all of the taxable property within Marion county, Or., for common and county school purposes in addition to the amount of \$106,139.92 hereinbefore levied and over and above the 6 per cent. limitation provided by the Constitution of this state." The order recites "that the said tax

provided by the said Legislature is in addition to the 6 per cent. limitation provided by law, and that it is necessary, in order to comply with the various laws above referred to, to levy the same." Like orders were made for the levying of other taxes under similar provisions of other laws, the additional taxes amounting in all to \$48,623.28.

A copy of the budget, showing the specific items and amounts for which all taxes were levied, pleaded in the Jory suit, is attached to and made a part of the defendant's answer in the instant case.

The demurrer of the defendants in the Jory suit was overruled, and the defendants decline to plead further. For want of an answer the circuit court rendered a decree to the effect that all taxes levied in excess of the 6 per cent. limitation, including the \$1.75 per capita school tax, were null and void; that the defendants should be restrained from collecting, or attempting to collect, such excess taxes, and that the disbursing, expending, or apportioning of any of the funds of the county in carrying out the directions contained in chapter 156, Laws 1919, as they might exceed the 6 per cent. limitation of levy for common school purposes, should be enjoined; in legal effect holding that by the levy which the county court made the plaintiff was entitled to only \$8.25 per capita for each child of school age, instead of \$10, which should have been raised by taxation under the law of 1919. Although the Jory suit was brought under the name of that plaintiff only, as a taxpayer, it is alleged in the complaint that it was instituted "in behalf of himself and all other persons similarly situated." The defendant here was made a defendant there, but the plaintiff school district was not a party, and did not intervene. It is now seeking to compel the defendant to do what the decree in the Jory suit enjoined him from doing.

The plaintiff demurred to the defendant's answer for the reason that the same did not "state facts sufficient to constitute an answer and defense to said alternative writ of mandamus," the merit of which is the vital question here.

W. C. Winslow and W. E. Keyes, both of Salem, for plaintiff.

Max Gehlhar, of Salem, for defendant.

JOHNS, J. (after stating the facts as above). [1] It is elementary that a demurrer admits the truth of all material statements in the pleading against the sufficiency of which it is directed. Hence it must be assumed that the county court made the levy for county purposes and the two different levies for school purposes at the time and in the manner and form hereinafter set out. Chapter 156, Laws 1919, provides:

"For the purpose of creating a county school fund, the county courts of the several counties of this state are hereby required to levy at the same time other taxes are levied, a tax for school purposes upon all the taxable property of the county, which aggregates an amount which shall produce at least \$10 per capita for each and all of the children within the county between the ages of four and twenty years, as shown by the then preceding school census, which said taxes shall be collected at the same time, in the same manner, and by the same officers as other taxes are collected; provided, that the per capita amount so levied in any county shall not be less than the per capita amount of the school tax levied in the county for the year 1910."

This statute is direct and positive, and by its terms it was the legal duty of the county court to make a sufficient levy to raise \$10 per capita for all school children in the county. Section 8 of article 9 of the Oregon Constitution provides:

"No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

Section 10 of article 11 originally read:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion; but the debts of any county at the time this Constitution takes effect shall be disregarded in estimating the sum to which such county is limited."

This section was construed by this court in *Grant County v. Lake County*, 17 Or. 453, 21 Pac. 447, and *Municipal Security Co. v. Baker County*, 33 Or. 338, 54 Pac. 174, where it was held that in the administration of its affairs debts of a certain class were thrust upon the county by operation of law, and were not within the constitutional limitation, such as salaries, and fees of witnesses and jurors, and that the \$5,000 limitation applied only to voluntary indebtedness. By an initiative measure approved December 5, 1916, article 11 was amended by the addition thereto of section 11, reading as follows:

"Unless specifically authorized by a majority of the legal voters voting upon the question neither the state nor any county, municipality, district or body to which the power to levy a tax shall have been delegated shall in any year so exercise that power as to raise a greater amount of revenue for purposes other than the payment of bonded indebtedness or interest thereon than the total amount levied by it in the year immediately preceding for purposes other than the payment of bonded indebtedness or interest thereon plus six per centum thereof; provided, whenever any new county, municipality or other taxing district shall be created and shall include in whole or in part property



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theretofore included in another county, like municipality or other taxing district, no greater amount of taxes shall be levied in the first year by either the old or the new county, municipality or other taxing district upon any property included therein than the amount levied thereon in the preceding year by the county, municipality or district in which it was then included plus six per centum thereof; provided further, that the amount of any increase in levy specifically authorized by the legal voters of the state, or of a county, municipality, or other district, shall be excluded in determining the amount of taxes which may be levied in any subsequent year.

"The prohibition against the creation of debts by counties prescribed in section 10 of article 11 of this Constitution shall apply and extend to debts hereafter created in the performance of any duties or obligations imposed upon counties by the Constitution or laws of the state, and any indebtedness created by any county in violation of such prohibition and any warrants for or other evidences of any such indebtedness and any part of any levy of taxes made by the state or any county, municipality, or other taxing district or body which shall exceed the limitations fixed hereby shall be void."

Except by a vote of the people, as above stated, the effect of this amendment was to place a 6 per cent. limitation instead of the existing restriction upon all revenues derived from taxation for the current year, to nullify the force of the above decisions as to a distinction or priority of debts of any class or character, and to bring all kinds of indebtedness within the constitutional limitation.

The original levy by the county court of Marion county was based upon a budget for the estimated expenses of the county, including courts, jurors, witnesses, bailiffs, and reporters, also the following items: Scalp bounties, \$150; advertising, \$600; expenses of exhibit at state fair, \$800; indemnity for diseased cattle slaughtered, \$500; fire protection, \$375; fees under dog tax law, \$800; "improvement, maintenance and construction of roads, bridges and ferries, and salaries of deputy road masters, patrolmen and assistants," \$156,784.63; under provision of market road law, chapter 431, Laws 1919, \$52,300; interest on county road bonds, \$9,000. A total of \$327,630.60 was levied for county purposes, \$189,610.85 for state purposes and \$107,456.02 for county school and library purposes, making a grand total of \$624,697.47, which equals the amount of the tax roll of the preceding year, plus six per cent. thereof.

[2, 3] Where the Legislature has specifically required the levy of any tax by the county court for a definite purpose, the law is mandatory, and such tax must be levied. However, when the county court is authorized, but not directed, to raise a tax for a given purpose, such levy is discretionary. The 6 per cent. limitation must be respected and enforced; and when the Legislature has

directed the levy of a special tax, all taxes of that class should first be levied and included within the constitutional limitation. The levy of any discretionary tax within the limitation specified, by any board or county court, should be postponed until all mandatory taxes have been levied in full; that is to say, the right of the county court to levy and collect a discretionary tax is subject and inferior to the power of the Legislature to direct the levy and collection of a mandatory tax.

[4] As stated, the levy of the \$10 per capita tax was mandatory. An examination of the different statutes under which the county court acted in making its primary levy shows that in many instances the items were not mandatory, but only discretionary. For this reason such levies should have been postponed until the \$10 per capita school tax was levied in full. Although that is the law, yet the fact remains that the county court did not originally levy the full amount of the school tax, but included in its own budget items of discretionary taxes which were subject and inferior to the levy in full of the \$10 per capita tax. For example, the primary levy for county purposes includes an item of \$52,300 for market roads, and another of \$156,784.63 for improvement, maintenance, and construction of roads, bridges, and ferries, salaries of roadmasters, etc. Although the Legislature has empowered the county court to make a levy for such purposes, it has never directed it to do so, but has simply vested such discretionary power in the county court. Whatever may be said in favor of good roads, it was never the purpose or intent of the Legislature that county roads should be constructed and maintained at the expense of the public schools. For the one, it has said that the county court *may* levy a tax, and for the other that it *must* do so. The same is true as to all similar items. The legal effect of what the county court did was pro tanto to nullify a mandatory act of the Legislature through the exercise of discretionary power vested in it by other legislative acts. Authority to levy taxes is primarily vested in the Legislature, and it cannot be presumed that it was ever the intent of that body to delegate that power to another or inferior board in such a manner as to defeat or impair its original right. If the county court has a discretionary power to reduce the amount of the school fund which has been authorized by a mandatory law of the Legislature, it must follow that it would have the legal right to ignore the law in toto, and to refuse to levy any tax whatever for school purposes. Within the constitutional limitation it would have the authority to take all money which the Legislature intended for school purposes, and divert it to other uses within its discretion. That is

not the law. We hold that as to the constitutional limitation the power of the county court to levy a discretionary tax is subordinate to its mandatory duty to levy a tax under a specific act of the Legislature.

The levy as made was a matter of public record, and at the time the plaintiff had a legal right to compel the county court to make it in the manner and form provided by law. Although the school district was not a party to the Jory suit, it had a right to intervene, and there litigate the questions which are now at issue. In effect, the plaintiff seeks in the instant proceeding to have this court set aside the action of the county court and the restraining order issued against the defendant in the Jory suit. After the levy was made and the money was collected it was placed in special funds, the amount of which corresponds to the items in the different budgets. For this reason the defendant contends that there is no fund to apportion or upon which a warrant can be drawn to meet the plaintiff's demand, and that under the existing facts the attempted apportioning of any larger fund would be a vain act. With the county school superintendent as the sole defendant in the instant action, we do not know how any money in a county fund could be taken therefrom and placed in a school fund for the use and benefit of the plaintiff.

[5] Although the county court is authorized and directed by the Legislature to make such a levy for school purposes, when made it is for the sole use and benefit of the various school districts of the county. The authority of the county court then ceases. When the tax is collected it automatically becomes the money of the school districts according to their proportionate rights, and thereafter the county court has no interest whatever in the fund. For the same reason, when a tax is levied for county purposes and is collected it becomes and is a county fund, to be used and expended for county purposes only, and no authority is anywhere given to transfer county money to the school fund, or school money to the county. Whatever may have been the legal duty of the county court, the fact remains that within the six per cent. limitation it levied a school tax of \$8.25 per capita only, and that to provide for the deficiency it undertook to make an additional levy of \$1.75 per capita over and above the 6 per cent. limitation. Each of such levies is certain, separate, and distinct from the other.

The order of the county court in which the \$8.25 per capita school tax is levied recites that, on December 31, 1919, after a fully itemized estimate was duly made and published, "together with notice of the time and place at which same might be discussed with the county court," and accompanied by a

published statement, "showing the total of all taxes for the ensuing year levied by any road or school district, city, town, municipality, port, or other tax levying authorities within," the jurisdiction of the county court:

"This being the time and place fixed by the court for a hearing on said budget, said court met pursuant to said notice in the county courtroom in the courthouse in the city of Salem, Or., to hear any argument of any taxpayer subject to said tax levy in favor of or against any proposed tax levies, and whereas several taxpayers appeared for a discussion of said levies, and no objections being made or filed to any portion of said estimate, or the levying of any taxes described in the same, and it further appearing that the amounts hereinafter stated are necessary and proper for the conduct of the respective branches of the county government and for the respective purposes indicated herein, it is therefore ordered, and it is hereby determined and declared, that the following amounts of taxes be levied upon the current assessment roll, and that said amounts be levied for the purposes as hereinafter set forth."

An itemized list of such taxes follows. It is further ordered that in order to raise said amounts and those certified by the state tax commission, the county assessor levy the following: For state purposes, \$189,610.85; for county school and library purposes, \$107,456.02; and for county purposes, \$327,630.60, totaling \$624,697.47. This is the order by which the county court made the levy of \$8.25 per capita for school purposes. Thereafter, and on the same day, the county court made the following order:

"Now on this 31st day of December, 1919, it appearing that pursuant to section 4042 of Lord's Oregon Laws as amended by chapter 84 of the General Laws of Oregon for the year 1911 as amended by chapter 64 of the General Laws of Oregon for 1917, as amended by chapter 156 of the General Laws of Oregon for the year 1919, that in order to raise the amounts required by said acts of said Legislatures it is necessary to levy a tax on all the taxable property within Marion county in the sum of \$25,470.08, over and above the taxes hereinbefore levied for the current year, and over and above the amount of tax levied for the preceding year for common school purposes plus 6 per cent. thereof (the said acts of the said Legislatures having increased the amounts required for the above purpose in the amount of 25 per cent. over and above the amount levied for the said purpose in the preceding year, in addition to the increased amounts required to take care of the additional number of children of legal school age as appears by the school census). It is therefore ordered, adjudged, determined, and declared that in compliance with the said acts of the said Legislature a tax in the sum of \$25,470.08 be, and the same is hereby, levied upon all of the taxable property within Marion county, Or., for common and county school purposes in addition to the amount of \$106,-

139.92 hereinbefore levied, and over and above the 6 per cent. limitation provided by the Constitution of this state."

Similar levies for different purposes, made in the same manner, are included therein, making a total of \$48,623.28. By this order the county court levied the \$1.75 per capita school tax. The collection of all of such levies is enjoined in the Jory suit.

[6] The order providing for the \$8.25 per capita tax recites that several taxpayers appeared for discussion of the levy, that no objections were made to any item of the estimate or the levy of any tax therefor, and that the amounts thereof are necessary and proper for the conduct of county affairs and the purposes indicated; that is to say, prior to the making of the original levy by the county court all parties, including the plaintiff, had legal notice of the items and amounts thereof for which the levy was made, and no remonstrance was entered. Speaking from the record, the plaintiff had knowledge of and acquiesced in what the county court did from December 31, 1919, to May 10, 1920, when this proceeding was commenced. This court will take judicial notice of the time when taxes are paid, and that the current expenses of the county are audited and allowed each month. It is fair to assume that at least half of such taxes have been collected to date, and that something near half of that amount has been expended for county purposes.

[7] As stated, the county school superintendent is the only defendant in this action. That official has nothing whatever to do with the levying of taxes for any purpose, and has no authority over county funds. His sole duty in this matter is confined to certifying the number of children of school age in the various districts of the county, and apportioning the school fund to the districts when the tax has been collected. It appears from his answer that he has apportioned, and will continue to apportion as collected, all of the school tax which was levied by the county court within the 6 per cent. limitation, and that the county and its officers, including the defendant, are enjoined from collecting or paying out any moneys received from the tax levied by the county court over and above that limitation. Assuming that the plaintiff once had a prior right to have its tax levied by the county court in preference to a discretionary tax for a number of items, there is nothing before this court from which it can be determined how much of such discretionary tax has been collected or paid out, or to whom it has been paid. The defendant does not have any knowledge of such facts, or any control over the fund, and he has no authority to make a transfer of moneys from one fund to another.

[8] Assuming that in the ordinary course

of business a large percentage of such tax has been collected and expended, that portion thereof, at least, has passed beyond the jurisdiction of this court, and the part remaining could not be ascertained or determined without an accounting with all of the necessary parties in court, which could not be had in this kind of a case. The county and the county treasurer would be necessary parties in any such proceeding. Under the authorities, even though the plaintiff did not intervene, it is not bound by the decree in the Jory suit. Neither is the fact that the defendant was enjoined there a defense to the present action. Yet many of the facts alleged in the answer and admitted by the demurrer are material and important to this decision.

After the two separate levies were made, as above stated, the tax rolls were extended, showing the amounts of the levies, the purposes for which made, and to whom the money collected should be paid. The plaintiff has acquiesced in and permitted such acts to be done and the moneys to be collected and paid over to the county as its own, without any objection prior to the filing of its petition in this court on May 10, 1920. The time has long since passed for making another or different levy or revising or correcting the one which was made.

The answer alleged and the demurrer admits that there is no school fund which the defendant can now apportion or upon which a warrant can be drawn for the payment of \$1.75 per capita for each pupil to the various school districts. This court has held that a county school superintendent cannot be compelled by mandamus to make an apportionment of the school fund among the several districts unless it is made to appear that there is some fund in the treasury available for that purpose. *State ex rel. Booth v. Bryan*, 26 Or. 502, 38 Pac. 618. There is no available school fund to meet the plaintiff's demand in this action. Both parties cite and rely upon *State ex rel. v. Stannard*, 84 Or. 450, 165 Pac. 566, 571. That was a proceeding in mandamus by the state on the relation of the Governor, in which Stannard as county clerk, the sheriff, county judge, and commissioners were defendants, to compel them to give the necessary notices for a special election and to make provision therefor. That case was brought direct against the county officers who had the power and whose duty it was to prepare notices and provide for the election. They had refused to perform a duty enjoined upon them by law. The instant proceeding was commenced against the county school superintendent only, to compel him to apportion a school fund which is not shown to exist. A large portion of the tax had been collected and placed in the funds of the county, and

was subject to the control of the county only. In the ordinary course of business a considerable part of it has been paid out, and the unexpended remainder is in the control and possession of the county, mingled with its other moneys, over which the county school superintendent, the only defendant in this action, has no authority.

Under the facts shown to exist here it was the legal duty of the county court to make a levy for school purposes sufficient to raise at least \$10 per capita for all children of school age within the county, and to have

made it all within the 6 per cent. limitation. As at present advised, we do not know what remedy, if any, the plaintiff may now have. But in any proceeding all necessary parties should be made defendants, all material facts should be alleged, and the court should have jurisdiction of the subject-matter and of the fund sought to be reached.

For the reasons above stated the petition is dismissed.

HARRIS, BEAN, and BENNETT, JJ., concur.

(36 N. M. 291)

CRAWFORD et al. v. DILLARD. (No. 2351.)

(Supreme Court of New Mexico. March 24, 1920. On Motion for Rehearing, July 2, 1920. Second Motion for Rehearing Denied Aug. 9, 1920.)

*(Syllabus by the Court.)*1. Appeal and error  $\S$  1079—Assignments not properly argued are abandoned.

Where argument of counsel is not germane to the proposition stated in the assignment, the effect is the same as though the assignment was not argued. Assignments not argued are abandoned.

## On Motion for Rehearing.

2. Appeal and error  $\S$  835(2)—Fundamental error, although presented for the first time on rehearing, considered.

Where a judgment is inherently and fundamentally erroneous, this court has the power to consider the error, although presented for the first time on motion for rehearing.

3. Taxation  $\S$  696—Statute authorizing redemption from tax sale held retrospective in operation.

Chapter 84, Laws 1913, held to have retrospective operation, and to award to the taxpayer the right to redeem from a tax sale had in 1912, for taxes of 1910, at any time within three years from the recording of the tax sale certificate.

4. Taxation  $\S$  696, 749—Redemption statute held prospective; tax deed held void.

Chapter 78, Laws 1915, and chapter 80, Laws 1917, interpreted, and held to have prospective operation only, and consequently to have no effect upon the right of redemption under chapter 84, Laws 1913. Held, further, that a tax deed, issued in October, 1918, in pursuance of a tax sale certificate issued and recorded at the same time, for a tax sale had in 1912, for taxes in 1910, was unauthorized by any law of the state, and was void; the taxpayer, at that time, under those circumstances, having three years from said date within which to redeem.

Appeal from District Court, Eddy County; Richardson, Judge.

Action to quiet title by Mrs. W. K. Dillard against A. J. Crawford and another. Judgment for plaintiff, and defendants appeal. Reversed on rehearing.

Chas. H. Jones, of Carlsbad (Renehan & Gilbert, of Santa Fe, on rehearing), for appellants.

J. M. Dillard, of Carlsbad, for appellee.

PARKER, O. J. This is an appeal from the district court of Eddy county by A. J. Crawford and Minnie M. Crawford from a judgment quieting title to certain land in the appellee, who is styled in the pleadings as "Mrs. W. K. Dillard." The complaint alleged in substance that the appellee was the owner of the northeast quarter of section 14, township 23 south, range 27 east N. M. P. M.,

by virtue of the following tax proceedings:

(1) Sale of property for delinquent taxes of 1910, made November 18, 1912; (2) certificate of sale issued October 11, 1918; (3) assignment of certificate of sale to appellee on last-mentioned date; (4) recording of such certificate on the last-mentioned date; and (5) tax deed from the county on October 11, 1918. From the complaint it appears that the sale was made in 1912 for the 1910 taxes, but the certificate of sale was not issued by the officer making the sale, but by his successor six years afterwards. Not one word is mentioned in the complaint as to the assessment of the property for taxation for the year 1910, as to whether the assessment was in the name of the rightful owner, unknown owners, or otherwise.

The appellants, by way of answer, denied appellee's ownership of the property; admitted delivery of a tax deed to the appellee, but alleged that the same was executed without authority; denied a sale of the property for delinquent taxes; and alleged that the certificate of sale mentioned in the complaint was made without the authority of law. By way of new matter the appellants alleged the following:

That they are the owners of said property and *are and have been since 1911 in the possession thereof*; that *since 1911 the property has been assessed in the name of A. J. Crawford, who has paid all taxes and charges thereon since that time*; that *the property was assessed in the name of "unknown owners" in 1910*; that on February 28, 1912, the southeast and the southwest quarters of said quarter section were sold by the county for delinquent taxes of 1910, certificates issued to the county therefor, and recorded October 1, 1913; that said certificates were assigned to A. J. Crawford on October 14, 1918, and recorded on the same day; that A. J. Crawford, on October 14, 1918, paid the taxes delinquent for the year 1910 upon the northeast and northwest quarters of said quarter section; that *in 1910 the said quarter section of land was assessed in the name of B. D. McKenzie (spl.)*; that *the taxes for said year amounted to more than \$25*; that *said property was sold by McKenzie to O. M. Richards in 1909, and McKenzie at the time of the assessment was without title to said property*; that *in fact there was no sale made of said property for the year 1910, and no certificates of sale issued or any record of sales made*; that *no order or judgment for the sale of said property was made for the year 1910*; that *Richards, the owner of said property, in June, 1909, applied to the United States, through the Department of the Interior, for a water right upon said land, which application was granted in said year*; that Richards failed to pay the assessment levied by the Department of the Interior, and on

June 22, 1910, the land was sold at public auction to the Pecos Water Users' Association, for the use and benefit of the United States, the title to such land being vested in the United States from May 16, 1911, when the certificate was assigned to A. J. Crawford; that said property was not redeemed by Richards, and the property was sold and deeded to A. J. Crawford by the United States, through the said water association; that by reason of such certificate and sale the title to the property was in the United States in 1910, and was therefore not subject to taxation; and that the taxes levied and assessed against the property in 1910 were illegal and void.

The appellee demurred to such parts of the said answer by way of new matter as appear italicized herein on three grounds, viz.: (1) That the allegations were insufficient and do not constitute a defense to the action; (2) that said allegations were insufficient, because they did not plead that the property was not subject to taxation, or that the taxes had been paid, the only two defenses permitted under section 25 of chapter 22, Laws 1899; and (3) that no fraud is charged against the treasurer in the execution of the tax deed to plaintiff. At the close of the case the demurrer was sustained by the court, but upon what ground the record does not show.

[1] The appellants' counsel argues here that the court erred in sustaining the demurrer to the paragraphs of the answer by way of new matter which are italicized above, and that is the only proposition before the court, because the remainder of the assignments of error depend upon the bill of exceptions, which has been stricken, or are abandoned because not argued.

The argument of counsel for appellants that the court erred in sustaining the demurrer is not germane to the subject. The argument, in effect, is that appellee's tax deed was void, because it appears in the deed that it was based upon a certificate of sale issued in 1918 for a sale held in 1912 for delinquent taxes of 1910; that no certificate was issued by the treasurer who made the sale, and no book of sales was kept, and the certificate of sale was not offered for sale as required by chapter 134, Laws 1905. Counsel says that the successor of the treasurer who made the sale was without power to issue a tax sale certificate evidencing the sale of 1912 for the 1910 taxes. Whether that be true or not, it has no bearing upon the action of the court in sustaining the demurrer to appellant's answer by way of new matter. Where argument of counsel under an assignment is not germane to the proposition stated in the assignment, the effect is the same as though the assignment was not argued. Assignments not argued are considered as abandoned.

Consequently there is nothing before the

court, and the judgment of the district court will be affirmed; and it is so ordered.

ROBERTS and RAYNOLDS, JJ., concur.

On Motion for Rehearing.

PARKER, C. J. 1. The former opinion of the court in this case disposed of it upon a question of practice. The bill of exceptions having been stricken out, the facts of the case were not before us, except as they appeared from the findings of fact. Many errors assigned and argued by the appellants were dependent upon the facts in the bill of exceptions. The only error of any importance argued by appellants we held was abandoned because the argument was not germane to the assignments.

Since the filing of the opinion a motion for rehearing has been filed, which presents the proposition that the judgment of the trial court is inherently defective and erroneous, and we are asked to consider the proposition, although it was not raised in the first instance. The power of the court to consider such questions, under circumstances like the present, was settled by the cases of *State v. Garcia*, 19 N. M. 421, 143 Pac. 1012, and *De Baca v. Perea*, 25 N. M. 442, 446, 184 Pac. 482, and we deem this case one calling for the exercise of that power by the court. The former opinion as before stated, was based entirely upon a practice question, and was correct. It is a question upon the merits which is now presented in the motion for rehearing, which we will proceed to discuss.

[2] 2. The case was to quiet title to 160 acres of land. The tract was patented to E. D. McKenzie, in 1909, and in the same year sold to C. M. Richards, whose right of property therein continued until 1919, when any right he may have had therein became vested in A. J. Crawford, one of the appellants. In 1910 the property was doubly assessed for taxation. One assessment was made in the name of McKenzie, the former owner, and one in the name of "unknown owners." The last-mentioned assessment described and assessed the land in four separate tracts of 40 acres each. The taxes on both assessments became delinquent, and in February, 1912, the south half of the tract was sold at a tax sale to the county, under the assessment of "unknown owners." The certificate was issued to the county. In November, 1912, under the assessment to McKenzie, the entire tract was sold and stricken off to the county. Thus matters stood until October, 1918, when the appellee paid to the county the taxes, etc., due under the assessment to McKenzie, and the county treasurer then in office, who was not the same person in office when the 1912 sale was made, executed a certificate of sale to the county, assigned the same to appellee, and issued to her a deed for the premises, after the certificate of sale had been recorded. Query: Did the collector have any power to issue the tax certificate under the circum-

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stances? See *Pace v. Wight*, 25 N. M. 276, 181 Pac. 430. It is under these facts that the appellee claims title.

The assessment was made in 1910, the sale in 1912, and the certificate to the county and the tax deed in October, 1918. When, under such circumstances, does the period of redemption expire? The appellants contend that the period does not expire until 1921, and upon that premise it is contended that the treasurer was without power to issue the deed. The law governing redemption from tax sales, as it existed in 1910 and 1912, provided that the owner had three years from date of sale in which to redeem. Section 23, chapter 22, Laws 1899. Under that law the period of redemption would have expired in November, 1915; but, while the certificate of sale was owned by the county, the state extended the time by section 38 of chapter 84, Laws 1913 (section 5502, Code 1915), to three years from the date of recording the certificate of sale. In *Pace v. Wight*, 25 N. M. 276, 181 Pac. 430, and *State v. Romero*, 25 N. M. 290, 181 Pac. 435, we considered this statute, and it was held to have a retrospective operation in all cases where the certificates were held by the county at the date the act went into effect. Therefore, unless changed by subsequent legislation, the period of redemption in the case at bar does not expire until October, 1921, because the certificate of sale was not recorded until October, 1918.

[3, 4] 3. By chapter 78, Laws 1915, a slight change was made in the law. The act amended section 38 of chapter 84, Laws 1913, "so as to read as follows." This is the same section 38 heretofore mentioned, and of course it was repealed by the later act. The change made is merely to the effect that when a tax sale is made a certificate shall be issued to the purchaser, and when such certificate is afterwards sold, a duplicate certificate shall be issued to the purchaser thereof, and that in each case the owner may redeem within three years from the date of the certificate. The date of recording is eliminated entirely as an element to start time within which redemption may be made. Certain other provisions are added to the section, some of which were considered by us in *State v. Romero*, 22 N. M. 325, 181 Pac. 1103, but none of them have any application to the facts in this case. The provisions of this act are clearly prospective only in their operation. The act simply provides that, where property is sold for taxes, a certificate shall be issued to the purchaser, and the owner may redeem in three years from the date of such certificate, and when a tax certificate is sold a duplicate certificate shall be issued to the purchaser thereof, and the owner of the land may likewise redeem within three years from the date of such certificate. There is no subject-matter upon which the statute could operate, according to its terms, except tax sales or sales of tax certificates thereafter to be made. Nor is there any indication in the

act of any legislative intent to have the same operate retrospectively, except those provisions heretofore mentioned, which extend to the taxpayers some concessions by way of remission of interest, costs, etc., if the taxes were paid within a certain time. These provisions, however, have no bearing in this case, as the parties took no advantage of them. The status, then, of the taxpayers, appellants, was undisturbed by any provisions of the act of 1915.

In 1917, by chapter 80, Laws 1917, the Legislature adopted a new and complete system, more nearly conforming to the act of 1899, for the collection of delinquent taxes. Among other things, it is provided, in section 10, that at the time of sale a certificate of sale shall be issued and delivered to the purchaser, and that the owner may redeem within three years from the date of sale, and the county is declared to be a purchaser, within the meaning of the act. In case the county becomes a purchaser, the treasurer may sell the certificate at its face value, with accrued interest, and if he can find no purchaser for the same before the next annual tax sale, he shall then sell it to the highest bidder, but at not less than 75 per cent. of the face value thereof, with interest, penalties, and costs. See section 12 of the act. This act, by its terms, does not purport to deal with tax sales had prior to its passage, and, on the other hand, its retrospective operation is expressly limited by section 18 as follows:

"Sec. 18. This act shall not be construed as effecting or as applicable to taxes heretofore assessed and which are delinquent at the time when this act takes effect, except that suit for the same may be brought and judgment thereon rendered in the manner provided by this act, but the validity of all such delinquent taxes shall be determined by the law in force at the time of the making of the assessment therefor."

But section 12, the only one in the act referring to the sale by the county of tax certificates, even without the limiting language of section 18, clearly speaks to the future only, by reason of the terms used.

We have, then, a case of a tax sale for taxes of 1910, had in 1912, at which time the owner had three years from the date of sale within which to redeem. In 1913, while the county was the owner of the tax certificate, if one was issued, or at least while the county was the purchaser at the tax sale, the owner's period of redemption was extended for three years after the recording of said certificate. So far as appears from the findings of the court, or so far as can be gleaned from the pleadings and record, this certificate of sale at the tax sale in 1912, for the taxes of 1910, was never issued until October 11, 1918, and was then recorded. In 1915 and 1917, acts were passed, which were not intended to and which did not affect the rights of the parties to this proceeding. On October 11, 1918, the collector issued to the county a tax sale certificate covering the lands in question,

which was thereupon recorded, and was thereupon assigned to the appellee, and a deed issued to her for the said premises. On this date the taxpayer, under the terms of the act of 1913, had the right to redeem the premises at any time within three years from the date of the recording of such tax sale certificate. Those rights were not impaired by any of the provisions of the acts of 1915 and 1917 heretofore mentioned.

This action of the collector in executing and delivering this tax deed, therefore, was clearly void and of no effect, and conveyed no title to the appellee. This procedure is not authorized by the act of 1917, as heretofore seen. It would not be authorized under either the act of 1915, even if applicable, or the act of 1913, because under the 1915 act the period of redemption was three years from the date of the certificate, and under the 1913 act the redemption period was three years from the recording of the certificate, and the only certificate contemplated to be issued to the purchaser from the county of the tax sale certificate under either of those acts is a duplicate certificate. The deed was not authorized under any law until after three years subsequent to the recording of the certificate, which was in October, 1913.

The question then is, not whether the Legislature could authorize such a deed under the circumstances, but whether it has authorized such a deed, and we hold that it has not. This conclusion precludes a discussion of a much more interesting question, viz. whether the Legislature has power at all to curtail the right of redemption of a taxpayer, and, if so, to what extent such right may be curtailed.

The appellants filed a cross-bill, and prayed for affirmative relief quieting their title against the appellee. The record, however, is in such condition as to prevent us from determining just what the rights of the appellants are as to title to the premises involved.

For the reasons stated, the judgment of the court below will be reversed, and this cause remanded, with direction to dismiss the complaint of appellee; and it is so ordered.

ROBERTS and RAYNOLDS, JJ., concur.

(26 N. M. 300)

**CITY OF RATON v. RATON ICE CO. et al.**  
(two cases).

**SAME v. YANKEE FUEL CO. et al.**  
(Nos. 2321-2323.)

(Supreme Court of New Mexico. July 1, 1920.)

(Syllabus by the Court.)

**I. Eminent domain §28 — Power of city to construct waterworks system.**

Codification 1915, § 3564, subds. 67-70, inclusive, and subdivision 91, Codification 1915,

§§ 2098 to 2108, inclusive, Codification 1915, §§ 2110 to 2118, inclusive, construed and held to grant the power of eminent domain to a city for the purpose of constructing a waterworks system.

**2. Eminent domain §47(1)—Waters and water courses §191—Use of rights of way as water site by water company not exclusive.**

The use of rights of way and reservoir sites by a water company is not exclusive, and another public service corporation may be permitted to use them jointly with the first company.

Appeal from District Court, Colfax County; Leib, Judge.

Separate actions by the City of Raton against the Raton Ice Company, the Yankee Fuel Company, and others. Judgment for plaintiff in each case, and defendants appeal. Affirmed.

Jesse G. Northcutt, of Denver, Colo., and Morrow & Alford, of Raton (F. S. Merrian, of Raton, of counsel), for appellants.

H. L. Bickley, of Raton, and A. T. Rogers, of East Las Vegas, f appellee.

**RAYNOLDS, J.** The facts in this case, so far as they are material to an understanding of the matters in dispute, are substantially as follows:

In the year 1912 the city of Raton decided to own its waterworks system for supplying the city with water. Being unable to purchase or otherwise acquire the waterworks system of the Raton Waterworks Company, one of the appellants, which was then operating at Raton, the city decided to construct its own waterworks system. In 1912, at an election held, the city of Raton was authorized to issue bonds to the extent of \$400,000 for the construction of such waterworks system. An application was made to the state engineer for the purpose of acquiring water rights in Sugarite Canon, and a permit was granted which authorized the city to construct its reservoir No. 2 at Lake Maloya, the site of the appellant waterworks company's reservoir, and to use the same jointly with the waterworks company. Thereafter a contract was entered into for the construction of such waterworks system, and the same was completed in the year 1913. The city of Raton has been furnishing water to its inhabitants for domestic, irrigation, and other purposes since 1913. Its reservoir No. 2 was built on the site of Lake Maloya, by reinforcing, raising, and extending the dam and increasing the capacity thereof, and its pipe line was laid from this reservoir No. 2 to the city of Raton, passing through tracts Nos. 1, 2, and 3 of the land involved in this appeal. The city council of the city of Raton authorized the mayor to negotiate with the appellants herein for the pur-



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chase of said reservoir site for reservoir No. 2, and for the pipe line right of way leading from and passing through tracts 1, 2, and 3. After some negotiations the city of Raton was unable to agree with the owners of the land involved, and a committee appointed for that purpose having so reported to the city council, thereafter the city ordered the condemnation proceedings to be instituted.

Upon filing the petition in condemnation and upon the showing made and giving bond as directed by the court, the city of Raton was let into possession of said land for its pipe line right of way, and the work of laying the pipe line was immediately commenced. The appellants filed their written protest against letting the petitioner into possession of these lands and thereafter filed their answer herein. Later they filed an amended answer, raising certain defenses and issues as follows: (1) That appellants were deprived of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; (2) that there was no statutory authority for a city to condemn land for purposes of erecting waterworks more than two miles beyond the city limits; (3) that no effort was made to agree upon proper compensation with the appellants, which is a condition precedent to condemnation proceedings; (4) that the appellants' property was dedicated to a prior public use which was equal in dignity to that of the purpose for which the condemnation was sought; (5) that no proper notice was given to certain of the appellants. These points were raised at various stages of the trial below and were carried forward into the assignments of error. The case was tried on December 13, 1916, upon the issues presented. Appellants introduced no evidence. In 1918, January 10, a decree was entered by the court resolving the issues in favor of the city of Raton and appointing commissioners to assess damages. Exceptions were filed to this decree and this appeal is taken from it.

In the court below there were three separate cases in that court, which were numbered 4220, 4055, and 4192, and they are respectively in this court Nos. 2321, 2322, and 2323. They were consolidated in the lower court for the purpose of trial, but have been separately appealed. In all three causes the Raton Waterworks Company of New Mexico has appealed. In causes 2321 and 2322 the Raton Ice Company has also appealed; in cause 2321 the Santa Fé, Raton & Eastern Railway Company joined in the appeal. The Raton Waterworks Company of New York, a New York corporation, and the Yankee Fuel Company, a Colorado corporation, also joined in causes 2322 and 2323, respectively. The cases may all be considered together.

[1] Appellants contend that the trial court was without jurisdiction in the premises and

that there is no statutory authority for the condemnation proceeding which was attempted. It seems to be admitted by both sides that the power of eminent domain sought to be exercised by the appellee is not to be implied, but must be granted by express statutory enactment, and that if no such power is granted none exists. Lewis on Eminent Domain (3d Ed.) pars. 367 and 371. The question whether or not such authority exists depends upon the construction of statutes passed at three different sessions of the Legislature, all of which are found in Code 1915. Subdivisions 68 to 71, inclusive, of section 3564, are subdivisions 67-70, inclusive, of chapter 39, § 14, of the Laws of 1884. Subdivision 91 of section 3564, Code 1915, is section 1, c. 3, of the Laws of 1891. Sections 2098 to 2108, inclusive, and sections 2110 to 2118, inclusive, of the Code of 1915, are sections 1 to 11, inclusive, and 13 to 21, inclusive, of chapter 97, Laws of 1905. The first act on the subject is chapter 39, Laws of 1884, entitled "An act to incorporate cities and towns." Section 14 of this act gives to the city council and boards of trustees in towns certain powers, and subsections 68, 69, and 70 of this act authorize the construction and operation of waterworks, either by the city or by the granting of permission to private individuals or incorporated companies to build and operate such water works. Section 70, the section upon which appellee relies in part, is as follows:

"Cities or towns are hereby authorized to condemn and appropriate so much private property as shall be necessary for the construction and operation of said waterworks or gas works, in such manner as is or may be prescribed by law."

The next statutory enactment which is material to this discussion is chapter 8, Laws of 1891, § 1, which reads as follows:

"That municipal corporations shall have the power and right of condemnation of private property for public use in the following cases, to wit: For laying out, opening and widening of streets and alleys and highways or approaches to streets; and for the construction, maintenance and operation of sewers, drains, waterworks and gas works, both within their corporate limits and for a distance of two miles outside of the same."

The Legislature further enacted laws upon this subject in the year 1905, the law being chapter 97, Laws 1905, where method of procedure for condemnation of land for public purposes is set out in an act composed of 21 sections. Section 1, in so far as material, reads as follows:

"In case lands or other property are sought to be appropriated by any railroad, telephone, telegraph company created or authorized to do business under the laws of this territory, for public use, and such corporation and owner of

such lands cannot agree upon proper compensation. \* \* \*

The statute then sets forth the method of procedure for condemnation. Later in the same act, chapter 97, Laws 1905, § 15, is as follows:

"In addition to the purposes hereinbefore specifically mentioned for which property may be condemned under the provisions of this act, it may also be condemned \* \* \* for canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, city and county, village or town, \* \* \* also for ferries, bridges, public roads, electric and horse railroads or other roads for other vehicles for public use, for canals, ditches, flumes, aqueducts and pipes, for irrigation. \* \* \*

This last section, namely, 15, chapter 97, of the Laws of 1905, is carried forward into the Code of 1915 as section 2112, which section is a part of the chapter entitled "Eminent Domain." The law of 1884 heretofore referred to, namely, chapter 39, Laws 1884, is carried forward into the Code of 1915, and is a part of section 3564, being a chapter relating to municipal corporations. There are other provisions in the Laws of 1884 in regard to the powers of municipalities owning and operating waterworks and the right to condemn for such purpose, but they need not be set out here in full.

The contention of the appellants is that the law of 1891 restricts a city in the exercise of eminent domain to the condemnation of land situated not more than two miles from the city limits. It is argued that the broad grant of power given in the law of 1884 is restricted by the law of 1891, and that the subsequent act of 1905 is merely a procedure statute, specifying the manner in which the right of eminent domain may be exercised without extending such right of eminent domain to municipal corporations.

With this contention we do not agree. The statutes should all be construed together. The act of 1884 is a grant of power to municipal corporations and contains a specific grant of eminent domain to a municipal corporation. The act of 1905, although dealing largely with procedure, by its terms in the section above quoted, grants the power of eminent domain to condemn lands for reservoirs, ditches, or pipes for conducting or storing water for the use of the inhabitants of a municipality. The act of 1891, although apparently inconsistent with provisions of the other statutes, does not conflict with the powers granted both by the prior act of 1884 and the subsequent act of 1905.

In view of all the express provisions of the act of 1905 (Code 1915, § 2112), the act of 1891 (Code 1915, § 3564, subd. 91) is either in conflict with the latter act and is repealed by it or is to be construed with and

relates to a specific power granted and included within the grant in the subsequent act. We are inclined to the view that the latter alternative is correct. The act of 1891 does not limit the power granted in general broad terms by the act of 1905. This view is borne out by the various provisions of the acts of 1884 and 1905, which grants to cities rights and duties inconsistent with the view maintained by the appellants that this statute is a limitation on the power of eminent domain and restricts its exercise for the construction of waterworks for cities to a distance of two miles from the city limits. The other provisions last mentioned are subsections 68, 69, and 73 of section 3564, Code 1915, being subdivisions 68, 69, and 72 of section 14, c. 39, of the Laws of 1884, where the power is given to cities to (68) erect water works or authorize others to erect them; (69) to construct or authorize the construction of waterworks without their city limits and extending jurisdiction to protect the sources of the water supply for a distance of five miles above the point from which the water is taken; (73) to construct wells, cisterns, and reservoirs within or beyond the city limits for the purpose of supplying the city with water. Section 5656, Code 1915, being section 3, c. 49, Laws of 1907, gives the right to any person, firm, or corporation, public or private, to acquire the right to the beneficial use of any waters; and section 3774, Code 1915, gives the right to villages both to establish and maintain waterworks and to acquire by condemnation, if necessary, springs or water sources not exceeding three miles from the village limits.

In view of all these provisions it seems improbable that the Legislature intended to restrict a city to a two-mile limitation for condemnation proceedings in constructing waterworks and in acquiring the source of its water supply. Such a limitation would be unreasonable, in view of the broad grants of power in the other sections hereinbefore set out, and the nature of the country for which the laws were enacted. The act of 1891 (chapter 3, § 1 [Code 1915, § 3564, subd. 91]), from its language as above quoted, has in contemplation the development or improvement of municipalities and the territory adjacent thereto: It applies to widening streets, alleys, and highways, construction, maintenance, and operation of sewers, drains, waterworks and gas works within the city for two miles outside the same. It appears to apply to the distribution system of the water company rather than as a limitation of the distance to which a city could go in order to secure its supply of water. The provisions of the act itself as to widening approaches to streets, the operating and maintenance of sewers and drains, seems to bear out this construction. We conclude, therefore, that in view of all these matters the statute of

1891 is not a limitation on the power of condemnation granted previously in 1884 nor subsequently in 1905.

[2] It is further urged that the appellants have a right to the property in question as they are using it for a public purpose of equal dignity as the one for which the appellee seeks to condemn it. Appellants cite the case of *Albuquerque v. Garcia*, 17 N. M. 445, 130 Pac. 118, where the court held that the city of Albuquerque had no right to condemn for a street a public ditch. The case is not applicable to the present one. In *Albuquerque v. Garcia*, the court held that the right of condemnation did not exist where the property was devoted to a public use, and that the first public use could not be obliterated or destroyed. Here, however, no such relief is sought, but appellee is endeavoring to use the property in question jointly with the appellants. Such a right is sanctioned by statute (section 2110, Code 1915) in regard to railroads, and has been applied by this court in the case of *A., T. & S. F. R. Co. v. Citizens' Traction Co.*, 16 N. M. 154, 113 Pac. 810. The appellants introduced no evidence, relying entirely on their amended answer, and there is nothing in the record to impeach the finding of the trial court that joint use of the property may be made and permitting the appellee to use it together with the appellants.

It is further urged that no effort was made by the appellee to agree upon compensation for the land in question before instituting the proceedings to condemn. The record, however, shows that an effort was made, both by verbal consultation and letters, which effort was unsuccessful.

The appellants further urge that certain defendants had no notice of the proceedings, but it appears from the record that they were nonresident corporations and that the law was complied with in regard to giving them the required notice. The court so held, and there is evidence in the record to sustain its findings in this regard.

There being no error in the record, the decision of the court below is therefore affirmed; and it is so ordered.

PARKER, O. J., and ROBERTS, J., concur.

(58 Mont. 272)

STATE ex rel. KEILEY et al. v. DISTRICT COURT OF THIRD JUDICIAL DIST. IN AND FOR POWELL COUNTY et al.  
(No. 4599.)

(Supreme Court of Montana. July 6, 1920.)

1. Contempt §66(7)—Only jurisdiction and legality of exercise of power reviewable.

Every court is the exclusive arbiter of its own contempt, and the question whether the

evidence was sufficient to establish it cannot be reviewed; only the point of jurisdiction and the legality of the exercise of the power to punish for contempt being reviewable.

2. Contempt §60(3)—Punishment warranted despite denial.

In contempt proceedings for violating a judgment fixing water rights, a judgment of conviction was warranted, notwithstanding that defendants denied unlawful appropriation of water from the stream and asserted that they obtained the water from an independent source, for categorical denials may not destroy a conviction founded on substantial evidence.

Holloway, J., dissenting.

Original proceeding by the State of Montana, on the relation of Edward B. Kelley and others, who had been adjudged to be in contempt, against the District Court of the Third Judicial District for the County of Powell, and George B. Winston, the Judge thereof. Order to show cause quashed, and proceedings dismissed.

James A. Walsh, of Helena, for relators.  
S. P. Wilson and E. J. Cummins, both of Deer Lodge, for respondents.

COOPER, J. On November 20, 1911, in a case entitled *David J. Coughlin et al., Plaintiffs, v. Mary V. Hoepfner et al., Defendants*, a judgment was rendered in the district court of the Third judicial district in and for Powell county, adjudicating all the rights in the waters of Nevada creek and its tributaries in that county to the parties therein, and awarding to each the use of a specific number of inches of such waters. To this decree the predecessors in interest of the relators were parties. By affidavit of date September 2, 1919, relators were charged with opening the headgate of their ditch leading out of Nevada creek, and causing to flow upon their lands, and to irrigate the same, more than 15 inches of water to which they were not legally entitled, against the order of the court and in violation of the decree rendered and entered therein. Upon their plea of not guilty a hearing was had in open court, a judgment of guilty rendered, and a fine of \$50 assessed against them. Upon the assumption that the judgment was without sufficient evidence to sustain it and to have it annulled, this proceeding was instituted.

The evidence on behalf of the prosecution tended to show that on August 29, 1919, 15 inches of water were flowing through the headgate and ditch of relators and out upon their land; that the water so diverted came out of the natural channel of a slough tributary to, and a part of, the normal flow of the waters of Nevada creek; that relators knew that prior appropriators were entitled to, and in need of, all the water flowing therein; that the water commissioner, acting

under the orders of the court pursuant to the decree in the original case, when the waters of Nevada creek began to materially diminish in quantity—about the 7th of July—turned all of it out of the ditch mentioned, and into the ditches of persons having rights prior in time and superior to those of relators. Defendants below asserted no right to the waters of Nevada creek proper prior to that of the parties receiving the water from the water commissioner, but did claim, and by the testimony sought to prove, that, by reason of the development of the 15 inches mentioned, the natural source of which is a spring or slough having no connection with Nevada creek or in anywise dependent thereon, they are legally entitled to it, and therefore not properly chargeable with the offense upon which their conviction stands. To the judgment of the district court was confided determination of this disputed question of fact. That court decided against the contention of relators and adjudged them guilty of contempt as charged.

[1, 2] The evidentiary facts and circumstances were sufficient in weight to convince the trial court of the truth of the charge beyond a reasonable doubt. With that conclusion it is not our privilege to interfere; for every court is the exclusive arbiter of its own contempt, the point of jurisdiction and the legality of its exercise being the only questions subject to review. It was within the province of the trial court to entirely disbelieve the testimony of the defendants to the effect that they did not divert any of the waters as charged. Categorical denials may not destroy a conviction founded upon substantial evidence, nor prevent the deduction of inferences the court can properly draw. In *State ex rel. Zosel v. District Court*, 56 Mont. 578, 185 Pac. 1112, too, the defendants claimed a new and different source of supply from that adjudicated in the original case. That contention was there repudiated by the district court, and the proceedings under petition for writ of supervisory control were ordered dismissed by this court. Upon the authority of that case this writ must stand or fall. Further discussion would add nothing to judicial precedent.

The motion to quash the order to show cause issued herein is therefore sustained, and the proceedings are dismissed.

Dismissed.

BRANTLY, C. J., and HURLY and MATTHEWS, JJ., concur.

HOLLOWAY, J. (dissenting). A contempt proceeding is essentially criminal in character, and is subject to the rules of evidence applicable to criminal cases; that is to say the character and quantum of proof are determined by the same standards in a contempt proceeding as in any criminal case. To justify a judgment imposing punishment for contempt, the evidence must establish the contemnor's guilt beyond a reasonable doubt. *State ex rel. Boston & Mont. Co. v. Judges*, 30 Mont. 193, 76 Pac. 10. It is true that the evidence which tends to establish guilt need not be direct. It may be circumstantial; but, if circumstantial evidence is relied upon, then the rule by which the sufficiency of the evidence is to be determined is too well settled to admit of controversy. It has been stated by this court repeatedly as follows:

"When a conviction is sought upon circumstantial evidence, the circumstances proved must be consistent with each other and with the hypothesis of defendant's guilt, and at the same time inconsistent with any rational hypothesis other than that of his guilt."

"Circumstantial evidence, to warrant a conviction of crime, must be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion, and producing a reasonable and moral certainty that the accused, and no one else, committed the crime charged."

*State v. Chevigny*, 48 Mont. 382, 138 Pac. 257; *State v. Sieff*, 54 Mont. 165, 163 Pac. 524; *State v. Riggs*, 56 Mont. 393, 185 Pac. 165.

The evidence produced against the accused upon the hearing of this proceeding is wholly circumstantial and, in my opinion, falls far short of meeting the requirements of the rule above. At most, it does not do more than create a suspicion that the accused were the persons responsible for the water being used in violation of the decree, and that is not sufficient. This court is committed to the doctrine that—

"A defendant may not be convicted on conjectures, however shrewd, on suspicions, however justified, on probabilities, however strong, but only upon evidence which establishes guilt beyond a reasonable doubt; that is, upon proof such as to logically compel the conviction that the charge is true." *State v. Mullins*, 55 Mont. 95, 173 Pac. 788.

(183 Cal. 314)

In re PRATHER'S ESTATE. (S. F. 9162.)

(Supreme Court of California. July 19, 1920.  
Rehearing Denied Aug. 16, 1920.)1. Evidence  $\S$  481(1)—Intent of parties when writing letters furnishing basis of contract, inadmissible.

Where contract as to attorney's fees was embraced in correspondence, evidence as to what the parties had in mind at the time they wrote letters is inadmissible to vary terms of the writings.

2. Contracts  $\S$  169—Intention of parties to written contract must be ascertained from the writing and surrounding circumstances.

The intention of the parties to a written contract contained in correspondence must be determined from the language of letters read in light of surrounding circumstances.

3. Attorney and client  $\S$  144—Attorney held not entitled under contract to additional compensation for services.

Where an attorney employed by the executor of an estate in litigation pending to recover property which the deceased had transferred shortly before his death advised that recovery could be had in creditor's suit, and it was begun and prosecuted to a successful determination, the attorney's agreement that a stipulated fee should cover all necessary litigation in the superior court of the county included litigation not then pending and as well a creditors' suit, which was necessary to recover the property.

4. Executors and administrators  $\S$  256(6)—Allowance of probate court for attorney's fee will not be disturbed unless erroneous.

An allowance by the probate court for services of an attorney in appellate court will not be disturbed on appeal, unless the claim appears to be without justification.

5. Executors and administrators  $\S$  216(2)—An allowance of \$4,550 for attorney's fees rendered in appellate court held warranted.

Where on appeal an attorney secured reversal of an adverse judgment in a suit by an executor to recover property transferred by decedent shortly before his death, and secured an affirmative judgment for the executor, who bought in the property for about \$40,000, an award of \$4,550 for services was not excessive.

## Department 1.

Appeal from Superior Court, Alameda County; W. M. Conley, Judge.

In the matter of estate of Thomas Prather, deceased. Appeal by the executor from order fixing attorney's fees. Affirmed in part, and in part reversed, with directions.

J. P. O'Brien, of San Francisco, for appellant.

Redman & Alexander, of San Francisco, for respondent.

OLNEY, J. This is an appeal by the executor of the will of Thomas Prather, deceased, from an order in probate fixing cer-

tain sums as the compensation to which the respondents, a firm of attorneys, are entitled for legal services rendered the executor, and directing their payment. The facts are:

The decedent, Thomas Prather, shortly before his death transferred to his brother, Samuel Prather, a large amount of his property. The appellant, upon his appointment as executor and before the employment of the respondents, brought a number of suits to recover the property so transferred. Three of these suits were brought in the superior court of San Francisco and others elsewhere. One of the San Francisco suits was to recover an open book account of some \$112,000 due the decedent from the Merced Stone Company. The theory of this action was that the transfer was a gift, and had not been completed so as to pass title before the decedent's death. The other suits were on the theory that the transfers were invalid because of the incompetency of the decedent and the undue influence upon him of his brother.

After these suits had been brought, but before any of them had been tried, the respondents were employed. The terms of their employment were arranged by correspondence between them and what may be described as the attorney for the estate; that is, the attorney having general charge of the legal affairs of the estate. After one of the respondents, Mr. Corbet, had been interviewed by the attorney for the estate, Mr. Snook, and the papers in the pending actions had been placed in Mr. Corbet's hands, he wrote Mr. Snook on December 31, 1913, as follows [the italics being ours]:

"Confirming our understanding as to the fee to be paid to our firm for services in connection with *the pending litigation* in the city and county of San Francisco in which Edson F. Adams, as executor, is the plaintiff, the amount thereof is \$5,000. This to be paid by Mr. Adams."

To this Mr. Snook replied, under date of January 8, 1914 (the italics again being ours):

"In reference to your letter of the 31st ult. regarding your understanding of our agreement for services, I do not think your letter is quite specific enough in the matter of your services in the Prather estate. I told Mr. Adams that your service charge included *all the necessary litigation* in the superior court of the city and county of San Francisco, and also that you would respond when your services would be needed to assist outside of San Francisco in the cases now pending.

"I would also suggest that your charge should be made against the Prather estate, the same to be guaranteed by Mr. Adams."

The next day Mr. Corbet replied (the italics being ours):

"My understanding with Mr. Adams, through you, about my charge for services—\$5,000, includes *the necessary litigation* in the superior

court of the city and county of San Francisco; and, further, I will assist you when needed outside of San Francisco in all of the cases now pending.

"This is to be a charge against the Prather estate, payment of same to be guaranteed by Mr. Edson F. Adams."

Following this exchange of letters, Mr. Corbet examined into the matters committed to him, and advised that he believed a recovery could be had in the action against the Merced Stone Company, but that none could be had in the other actions, based as they were on the theory of incompetence and undue influence; that, however, he believed the transfers attacked could be set aside as in fraud of the decedent's creditors and advised the bringing of such an action. This was done, and the action so brought is referred to in the present litigation as the creditors' suit, meaning not that it was brought by the decedent's creditors, but by the executor on behalf of the creditors. Pursuant to the advice of Mr. Corbet, the action against the Merced Stone Company and the creditors' suit were brought to trial, and resulted, after appeal, in a judgment in each case in favor of the executor. Mr. Corbet had charge of and conducted both actions, both in the superior court and on appeal. The actions pending in the San Francisco court at the time of Mr. Corbet's employment other than the one against the Merced Stone Company were not prosecuted, and were finally dismissed without trial. The soundness of his advice that a recovery could not be had in them, but that the result desired, the recovery of the property transferred, could be had in the creditors' suit, was demonstrated, not only by the success of the latter, but by the fact that one of the actions in another county on the theory of incompetency and undue influence was tried and lost.

The two judgments in favor of the executor obtained by Mr. Corbet resulted in the recovery for the estate of a very considerable amount of property. There is a sharp dispute as to just how much its value was, but it is evident it had substantial value. The mere statement of the character of the litigation is enough to indicate to any lawyer of experience that it was difficult and required time, attention and ability for its successful prosecution, and that the services of Mr. Corbet were of decided value.

Under the foregoing circumstances the respondents asked that, in addition to the \$5,000 called for by their exchange of letters with Mr. Snook, they be allowed compensation for their services on appeal in the action against the Merced Stone Company, and for their services both in the superior court and on appeal in the creditors' suit. The probate court allowed them \$4,550 because of the first item, and \$3,600 because of the second, making in the latter case no apportionment as between services rendered in the superior

court and those rendered on appeal. The appeal of the executor is, as to the first item, on the ground that the amount allowed is excessive, and as to the second item, on the ground that nothing should have been included for services in the creditors' suit in the superior court because such services came under the contract for \$5,000.

[1,2] Taking up the second point first, it turns, of course, on the proper construction of the letters between Mr. Corbet and Mr. Snook, which evidence the terms upon which the respondents were employed. Much testimony was introduced as to what the parties had in mind when they wrote these letters. We do not understand upon what theory such testimony was offered or received or may be considered by us. It certainly cannot be received or considered for the purpose of varying the terms of the writings. As to construing those writings, it is certainly also the primary rule of construction that the meaning of the parties is to be determined by the language of the writings read in the light of the surrounding circumstances. It is also the rule that with the exception of a single class of cases, of which the present is not one, testimony either by the parties themselves as to what they intended, or as to declarations of intention made by them at the time, is wholly incompetent.

[3] Reading the letters in the light of the situation as it existed when they were written, we find ourselves unable to avoid the conclusion that they cover the services rendered by the respondents in the creditors' suit in the superior court. The first letter written by Mr. Corbet specifies that the services for which he is to receive \$5,000 are services in the superior court of San Francisco in the "pending litigation." This plainly would limit the services covered by the arrangement to services in the actions then pending, if this letter were the final arrangement between the parties. But it was not. Mr. Snook replied to it that it was not specific enough, and that he had informed the executor that the respondent's charge (of \$5,000) included "all the necessary litigation in the superior court." To this Mr. Corbet replied that his understanding with the executor made through Mr. Snook was that his charge of \$5,000 included "the necessary litigation in the superior court," and this letter is the final expression of the terms of the respondent's employment. It is plain that the expression in the first letter "pending litigation" was changed *ex industria* to "all necessary litigation." The inference from this is unavoidable that the charge of \$5,000 was intended to cover litigation not then pending if such litigation were necessary.

There remains the question as to whether or not the creditors' suit subsequently brought comes within the expression "all necessary litigation." It is claimed that this suit was not contemplated at the time Mr.

Corbet's letter was written. This is undoubtedly true in the sense that an action of that particular character was not then contemplated. But it is also true that the possibility of other actions than those pending was contemplated, as otherwise there would have been no occasion for the deliberate change from an arrangement for "pending litigation" to one for "all necessary litigation."

What, then, was meant by the phrase "all necessary litigation?" Necessary for what? Clearly, it must have been all litigation necessary to accomplish the object for which the pending actions had been brought. It was the accomplishment of this object for which the respondents were employed, and was the thing which the parties had in mind and about which they were talking. That object was the setting aside of the transfers by the decedent to his brother. This also was the object of the creditors' suit. The situation, therefore, is that the respondents by the arrangement for their employment agreed that they would charge only \$5,000 for their services in the superior court in all litigation necessary to set aside the decedent's transfers of property to his brother, and the creditors' suit, subsequently brought, comes directly in the category of such litigation.

It follows that the order of the lower court was in error in allowing the respondents compensation for services in the superior court in addition to the \$5,000 provided for in the arrangement for their original employment. Before dismissing this branch of the case, however, it may be advisable to note one argument made on respondents' behalf by their counsel. It is argued that the creditors' suit could have been brought in any one of a number of counties, while the \$5,000 charge of the respondents was limited to services in the superior court of San Francisco, and that it is not to be supposed that it was intended that the services in the creditors' suit were within the \$5,000 charge, when they could have been taken without it by the simple expedient of bringing the action elsewhere than in San Francisco. The answer to this is: First, that no lawyer worthy of his profession would change the venue of a contemplated action for such a reason, and we are certain that this is true of the respondents; and, second, that the matter of the venue was one finally within the control of the client and not of the lawyer.

[4, 5] As to the other branch of the case, the claim of the executor that the allowance

of \$4,550 for services on appeal in the action against the Merced Stone Company was excessive, little need be said. The question of what was the proper amount was one to be determined by the probate court, and with its decision we cannot interfere, unless it appear plainly that it was without justification. It does not so appear, but rather the contrary. The action was a difficult and complicated one, and the services on appeal were quite exceptional. The trial court gave judgment against the executor. This was affirmed on appeal by the District Court of Appeal. The respondents then petitioned for a hearing before this court and obtained it. This court reversed the judgment against the executor, and ordered the action back for a new trial. The respondents thereupon petitioned that the order of reversal be modified by directing judgment for the executor upon the findings, instead of requiring a new trial. This petition was granted, so that the final result of the respondents' services on appeal was that a judgment against the executor was transformed into one for him. The chief argument of the executor's present counsel is that the compensation allowed is excessive because of the comparatively small actual value of the claim against the Merced Stone Company which was recovered from the decedent's brother. But while the value of the recovery made is an element to be considered in determining the proper amount to be allowed as compensation, it is not controlling, and, furthermore, the actual value of the recovery does not appear with any certainty. It does appear that the executor, upon acquiring the claim against the Stone Company, proceeded to enforce it, and, upon execution sale, bought in the assets of that company for about \$40,000. If this was the real value of the recovery obtained by the respondents for the executor, the compensation allowed them was certainly no more than reasonable, in view of the rather exceptional services rendered.

Order affirmed as to the compensation allowed the respondents for services on appeal in the action by the executor against the Merced Stone Company, and reversed as to the compensation allowed respondents for services in the so-called creditors' suit, with directions that the lower court redetermine the amount to be allowed for the latter services, eliminating all services rendered in that action in the superior court.

We concur: SHAW, J.; LAWLOR, J.

(188 Cal. 285)

**OAKLAND BANK OF SAVINGS v. CALIFORNIA PRESSED BRICK CO. et al.**  
(S. F. 8685.)(Supreme Court of California. July 9, 1920.  
Rehearing Denied Aug. 5, 1920.)

1. Chattel mortgages  $\S$  138(1)—Sales  $\S$  473  
(1)—Buyer and seller may agree that title to personalty shall remain in the seller until payment, which title will be superior to that of subsequent mortgagee or purchaser.

The owner of personalty has the right to sell the same and deliver possession to the buyer, on condition that title shall remain in him until payment, and the title so withheld will until payment be superior to that of a subsequent mortgage or purchase of the property from the buyer, even if such subsequent mortgage, etc., was made without notice so long as the property retains its character as personalty.

2. Fixtures  $\S$  21—Notwithstanding personalty is converted into realty because affixed to the land, it will as between the buyer and seller be treated as personalty.

Notwithstanding the fact that personalty may be converted into realty by being affixed to the land, yet where the question arises solely between the seller, who retains the title, and the buyer, who affixes it to the land, the property as between the two will, under Civ. Code,  $\S$  1013, be treated as personalty.

3. Fixtures  $\S$  21—Personalty affixed to the land becomes realty, and may be held by subsequent mortgagees against seller who reserved title.

Where boilers and other heavy machinery were affixed to land, so as to become land, within Civ. Code,  $\S\S$  658-660, such property, though the seller retained title, will pass to a subsequent mortgagee without notice, notwithstanding section 1013, for under the circumstances the machinery became part of the land and passed under the mortgage.

In Bank.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by the Oakland Bank of Savings against the California Pressed Brick Company to foreclose a trust deed, in which Curtner and McWhinney alleged they were owners of certain personal property placed by defendant on the incumbered property. From a judgment foreclosing the trust deed as to the other property, but directing that certain funds should be paid over to Curtner and McWhinney, plaintiff appeals. Reversed and cause remanded.

McKee & Tashera, and Peck, Bunker & Cole, all of Oakland, for appellant.

Thomas C. Huxley, of Oakland, for respondents.

SHAW, J. The California Pressed Brick Company executed a deed of trust conveying

to Bankers' Trust Company certain property, real and personal, comprising the plant in use by the brick company for the making of pressed brick and similar articles, as security for payment of a series of bonds issued by the brick company, amounting to \$100,000. Afterwards, the Oakland Bank of Savings was duly substituted as trustee. Bonds to the amount of \$93,400 have been issued and are unpaid. The object of this action is to foreclose the lien of said trust deed upon said property and thus enforce payment of the bonds.

The defendants Curtner and McWhinney made answer, alleging that they are the owners of certain boilers, machinery, and personal property conveyed by said deed of trust and embraced in said plant and that their title thereto is superior to that of the trustee. They claim as successors in interest of C. N. Raymond Company, a corporation, which was the seller in an agreement for the conditional sale of the property to the brick company, providing that the title should remain in the seller until the price was fully paid, notwithstanding the delivery of possession to the buyer. The conditional sale was made, the property delivered, and the boilers and the heavy machinery affixed to the land in the manner specified in section 660 of the Civil Code, prior to the execution of the trust deed. The portion of the property not so affixed is not in controversy; it being conceded that the reservation of title in the seller is good with respect to that part of the property, as against the subsequent deed of the buyer to the trustee. Prior to the judgment the property was, in pursuance of a stipulation between the parties, converted into money, which was deposited to await the event of the action.

The court below was confronted with the question which party, under these circumstances, had the superior title. It decided that Curtner and McWhinney, as successors to the title of C. W. Raymond Company under the conditional sale, had title superior to that conveyed by the trust deed from the brick company, and gave judgment foreclosing the trust deed as to the other property, but directing that the money so deposited should be paid over to Curtner and McWhinney free from all claims of the plaintiff. The plaintiff appeals from the part of the judgment in favor of said defendants.

[1] The owner of personal property has the right to make an agreement to sell the same and deliver possession thereof to the buyer, upon the condition that the title thereto shall nevertheless remain in the seller until the price agreed on has been fully paid, and the title so withheld by the owner will until full payment, be superior to that of a subsequent mortgage or purchase of such personal property from the buyer, even if such subsequent



mortgage or purchase was made without knowledge or notice of the reservation of title and paid full value for the property. Putnam v. Lumphier, 36 Cal. 157; Kohler v. Hayes, 41 Cal. 457; Palmer v. Howard, 72 Cal. 295, 13 Pac. 858, 1 Am. St. Rep. 60; Lowe v. Woods, 100 Cal. 409, 34 Pac. 959, 38 Am. St. Rep. 301; Vermont M. Co. v. Brow, 109 Cal. 241, 41 Pac. 1031, 50 Am. St. Rep. 37; Rodgers v. Bachman, 109 Cal. 555, 42 Pac. 448; Van Allen v. Francis, 123 Cal. 477, 58 Pac. 339; Perkins v. Mettler, 126 Cal. 105, 58 Pac. 384; Lundy F. Co. v. White, 128 Cal. 170, 60 Pac. 759, 79 Am. St. Rep. 41; Liver v. Mills, 155 Cal. 462, 101 Pac. 299.

[2, 3] The above rule prevails so long as the property retains its character as personalty, and the cases cited state the rule applicable in such case. The case at bar raises the question what the rule is or should be when the personal property which is the subject of the conditional sale has become affixed to the land of the buyer, so as to become a part of the realty, after its delivery to him, and the buyer has thereafter made a mortgage or trust deed to one who has no knowledge or notice that such title remains in the seller on condition, and money has been loaned on the faith of such security, also without knowledge of the secret title.

Few cases have arisen in this state which touch upon this precise question. The Civil Code declares the law as to what constitutes real property as follows:

"Real or immovable property consists of: 1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law." Section 658.

"Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance." Section 659.

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." Section 660.

The boilers in controversy were set in the building on the land on a concrete foundation made to receive them, and then bricked in by a wall, so as to retain the heat. The heavy machinery was set on concrete blocks built in the ground for that purpose, with large bolts or rods brought up through the concrete, by means of which the machines were fastened down. The machinery, engine, and boilers were connected together by pipes, rods, shafts, and belts, so that the engine would operate the machinery, and they were all attached for the purpose of using them permanently in the plant in the making of brick. There can be no doubt that they were affixed to the land, so as to become real prop-

erty, under the definition given in section 660. Lavenson v. Standard Soap Co., 80 Cal. 250, 22 Pac. 184, 18 Am. St. Rep. 147; McNally v. Connolly, 70 Cal. 3, 11 Pac. 320.

Notwithstanding the fact that personal property may be converted into real property by being affixed to land in this manner, there is a well-established rule in this state and elsewhere that where the question arises solely between the seller, who retains the title, and the buyer, who affixes it to the land, the relations or the contract between the parties may be such that the property will be deemed personalty, and will be treated as such in law, so that the title will continue in the seller, after it is so affixed, as well as before. The Civil Code recognizes this rule in section 1013, which declares that:

"When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it."

But this does not cover the case of a bona fide purchaser or mortgagee of the land without notice of the agreement.

Our decisions are not harmonious on the subject. In Hendy v. Dinkerhoff, 57 Cal. 5, 40 Am. Rep. 107, Hendy had leased a steam engine and boiler to one Lampson for two months, for use on a mining claim, the latter to pay \$566.50 for the use for that period, and then to have the right to buy them from Hendy for \$1, but until then he should have no right to them, except as lessee. They were permanently affixed to the quartz mill on the claim, so as to become part of the realty. The mining claim and mill belonged to Dinkerhoff, who had agreed to sell it to Lampson, who took possession thereof and affixed the engine and boiler, but afterward failed to complete the purchase, whereupon Dinkerhoff took possession and claimed ownership of the engine and boiler as part of the realty. The court held that as between Hendy and Lampson "the engine and boiler remained personal property, notwithstanding the fact that it was by him attached to the mill," and then proceeded to say:

"Can they be so regarded in the hands of the defendants? How this would be if the latter occupied the position of bona fide purchasers, without notice, of the real estate to which the chattels were attached, need not be determined, for they are not in that position."

In March v. McKoy, 56 Cal. 85, March, being the owner of a threshing engine and boiler mounted on wheels so that they could be readily moved from place to place, leased the same to one Woods for six months at a rental of \$100 per month, with an agreement that if \$600 was paid at the end of six months he would sell the property to Woods. Woods took off the wheels, bolted the axles

to large timbers bedded in the soil, and connected the same with machinery in a sawmill owned by him and thereafter the engine was used to drive the machinery. Woods failed to pay the rent, but made repairs on the engine at a cost of \$30. A mechanic's lien was filed upon the entire property for these repairs. The same was foreclosed and the property sold, March not being made a party to the suit. It was described in the foreclosure proceedings as a planing mill contiguous to McKoy & Hubbard's sawmill. The decree did not provide for any sale of the land on which the engine stood. The court said that assuming that, the Code gave a lien upon personal property for repairs by mechanics who did not take possession of it, it was clear that March could not be deprived of his title unless he was a party to the foreclosure proceedings, and gave its decision accordingly. The opinion shows that the case was decided upon the theory that all the parties to the foreclosure proceedings had treated the property as personalty and that it was to be considered in that aspect. The case does not appear to be applicable to the question we have before us.

In *Jordan v. Myres*, 126 Cal. 565, 58 Pac. 1061, the question arose in an action to foreclose mechanics' liens against Myres and Joshua Hendy Machine Works; the latter being the appellant. Myres was the owner of mining property. He agreed to sell the same to one Berry under an agreement that if he failed to complete the purchase he could remove any engine or hoisting machinery which he may have placed on the mine above ground. Shortly afterwards the Machine Works leased to Berry and his associates an engine and other machinery for a stipulated rental, on payment of which they were to have the right to purchase the same. The lessees placed the same on the mine, where it was permanently affixed to the land, and was thereafter used in working the mine. The work for which the mechanics' liens were filed was done after the machinery was so affixed. The court said:

"It is settled law that this personal property cannot be treated as part of the realty, so far as the owner of the mine and the defendants were concerned. \* \* \* The question is: Must it be so treated as to respondent? Section 1183 of the Code of Civil Procedure provides as follows: 'And any person who performs labor in any mining claim or claims has a lien upon the same, and the works owned and used by the owners for reducing ores from such mining claim or claims, for the work or labor done or materials furnished by each respectively,' etc. This section contemplates that the lien shall attach to the property of the owner, and not to the property of some other person."

To the objection that the machinery had been affixed to the realty as a part of it, and that the lien would attach to it as the property of the owner of the mine, unless notice

was given to the lienholders by the appellant of its title, the court referred to and quoted from *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209, and *Stell v. Paschal*, 41 Tex. 640, holding that the intention of the parties to affix personal property to land is controlling as to the character of the property after it is so affixed. In the Texas case the machinery was merely put into the mortgaged property for exhibition and not for permanent use. The court then said that the general rule as to sales on execution and foreclosure was that the purchaser acquired only such title and interest as the judgment debtor had and "we cannot see in what way the sale upon foreclosure of a mechanic's lien can be said to carry any greater interest than the owner of property had at the time the lien attached, whatever may be the rule as to a bona fide purchaser or mortgagee of land without notice," and that "respondent secured no lien upon this personal property by virtue of the statute, for he could only have a lien upon the property of the owner of the mine." It proceeded to say that any other view would greatly retard development, especially of mining property, where it often became necessary for the miner to hire machinery, which for the time being, in order to utilize it, must be affixed to the realty. It will be observed that the court took care to say that the rule might be different with respect to a bona fide purchaser or mortgagee of land without notice. It seems to have been assumed by the court that the plaintiff in the mechanic's lien suit did not occupy the same position as a purchaser or mortgagee without notice. In its relation of the facts, however, the court stated that it would deal with the case as though the plaintiffs had no notice of the appellant's claim of title. Apparently the court was of the view that the statute allowing such liens restricted the rights of the lienholders to a greater extent than those of a subsequent mortgagee or purchaser without notice. The case is not an express authority on the question before us, although it is somewhat difficult to distinguish it on principle.

In *Tibbitts v. Moore*, 23 Cal. 208, Moore executed a mortgage on real property to the appellant, and thereafter purchased certain machinery from Lambard, giving to him a chattel mortgage for the price thereof, and then attached the machinery to the mortgaged realty in such manner that it became a part thereof. Each mortgage was duly executed and recorded. The court held that the lien of the realty mortgage did not take effect upon the personalty until it became attached to the realty, and consequently that as to that property the chattel mortgage was superior to the prior mortgage on the realty.

These comprise all the cases in this state which have any material relation to the question. None of them, except *Jordan v. Myres*

and Tibbitts v. Moore, touches upon the exact question. In the former the court expressly excepted cases of bona fide purchasers or mortgagees of the land without notice, while the latter involved only the question of the lien of a mortgage on land to which personal property already subject to a chattel mortgage was afterward affixed. In the case at bar the machinery in question was affixed to the realty, so as to become a part thereof, before the deed of trust, under which plaintiff claims, was made, and there was nothing to indicate to a purchaser or mortgagee that the property so affixed was not a part of the realty, or that the title thereto was not in the owner of the soil. The question, so far as this state is concerned, is an open one.

The rules of the Civil Code, above quoted, are essentially the same as those of the common law on the subject. They prevail generally throughout the United States. The exact question has often arisen in other states, and the overwhelming weight of authority is to the effect that the title of the seller of personal property of this character, which title is to be held by him until the price thereof is paid, and which is afterwards affixed to land of the vendee, so as to become part of the realty, is subject to the lien of a subsequent mortgagee in good faith without notice of the reserved title. This is fully shown in the elaborate note of Mr. Freeman to Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, in 84 Am. St. Rep. at pages 892 and 893, and also in the notes to Muir v. Jones, 23 Or. 332, 31 Pac. 646, in 19 L. R. A. 444, and Lawton, etc., Co. v. Ross-Kellar, etc., Co., 33 Okl. 59, 124 Pac. 43, in 49 L. R. A. (N. S.) at page 396, to which we refer for a list of the cases.

We think the proposition is in accordance with justice and reason. The seller of the personal property voluntarily placed it in the possession and control of his vendee, with knowledge that, if it was put to the use for which it was designed, it would be affixed to land. Its character was such that it could not ordinarily be used at all by the vendee, unless it was so affixed to the real estate comprising its plant. The seller, because of these facts, is presumed to have agreed that the personal property should be, or might be, converted into real property. By this transformation it was brought under the operation of the laws for recording contracts affecting realty and for the protection of innocent purchasers thereof, regardless of the conditions of the agreement of sale. The contract between the Raymond Company and the brick company shows by its terms that this was the intention and hence Curtner and McWhinney are chargeable with knowledge thereof. A person about to loan money on the security of a mortgage or trust deed on such real property, and having no informa-

tion of the secret agreement as to the title, would be justified in believing that all the machinery would be hypothecated by such mortgage or deed and would have the right to rely on such belief and to make the loan accordingly. He is the innocent party in the transaction, and he should be protected, rather than he who caused the deceitful appearances.

Our conclusion is that the court below erred in directing that the proceeds of the machinery in question which was affixed to the realty should be paid over to Curtner and McWhinney. They were entitled to the proceeds of those of the articles sold by the Raymond Company to the brick company that were not so affixed, if any such articles were included in the sale made under the stipulation for the sale of the property claimed by Curtner and McWhinney. It may be necessary for the court below to take evidence to ascertain how much of the \$5,000 deposited is attributable to such articles; consequently we cannot direct a judgment.

The portion of the judgment appealed from and set forth in the notice of appeal is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOB, J.

(183 Cal. 326)

# LAMPOR V. SOUTHERN PAC. CO.

(L. A. 6026.)

(Supreme Court of California. July 21, 1920.)

## 1. Master and servant §286(33)—Negligence as to switchman held question for jury.

In an action for death of a switchman struck by the rear of a train while signaling to the engineer of another train, where there was evidence that deceased was directly on a line between the engineer of the train by which he was struck and a switchman signaling to such engineer so as to be clearly in the field of their vision, whether their failure to warn him of his danger was negligence held a question for the jury.

## 2. Appeal and error §1078(1)—Points not argued not considered.

Points not argued either in brief or oral argument will not be considered on appeal.

### Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Edith S. Lampor, administratrix of the estate of Lester C. Lampor, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment.

The complaint stated a cause of action to recover damages for the death of the plaintiff's intestate, Lester C. Lamport, which death, it is alleged, was caused by the negligence of the defendant. Lamport was in the employ of the defendant as a switchman in the Oakland yards at the time of his death.

The only point argued by the defendant in support of its appeal is that the evidence is insufficient to support the allegations of the complaint with regard to the negligence of the defendant. The complaint alleges that while Lamport was engaged in his work as switchman standing near one of the switch tracks of the defendant, the defendant ran one of its cars against and over him, causing his death; that said death was caused solely by the negligence of defendant in giving no warning or notice of the approach of said car, and in negligently failing to have any light upon the car that struck the decedent.

[1] There was evidence of the following facts: At the time of the accident two trains were being operated in the switchyard of the defendant. One of them was the train with which Lamport was connected. It was upon a track on which there was a platform scale for weighing cars. It was being operated to place the rear car on the platform in the track, so as to have the car weighed. It was necessary to stop the car that was to be weighed at the exact spot where its whole weight would be on the rails laid upon the scale platform. This was a process termed "spotting the car." The accident happened at about midnight. At each end of the scale a light was erected to enable the switchman to ascertain when this car was exactly at the right place to be cut out and weighed. The train with which Lamport was engaged was several car lengths away moving toward the scales upon a cross-over track leading from another track to the track in which the scales were affixed. This made it a curved track and required that Lamport should stand some distance to one side from the scale track in order that the engineer, who was upon the engine of that train at the farther end thereof could see his signals and be informed of

the exact point at which to stop. It was also necessary for him to observe the lights opposite the end of the scale, so as to see precisely when to give the signal. At a point some 15 feet from the scales on the side on which Lamport had to stand to give the signals to his engineer there was another straight track upon which another engineer and switchmen were engaged in moving another train in the same direction as the train with which Lamport was engaged. This other train consisted of several cars, the rear car being an oil tank car without any light at the rear end thereof. This train was moving backwards toward Lamport. The switchman of that train was at some distance beyond Lamport at a point where he intended to stop his train and was standing there to give signals to his own engineer. Lamport was standing on a direct line between the two and between the two rails of that track. In order to give and receive these signals, it was necessary for the switchman and engineer upon the other train each to look toward the other and toward Lamport. While Lamport was so standing engaged in signaling to "spot" the car, the engineer of the other train moved that train down towards Lamport, and the rear car thereof ran over and killed him. Lamport while so engaged had in his hand a lighted lantern with which to give signals to his own engineer for the "spotting" of the car. It is plain that when the engineer and switchman of the other train were watching for each other's signals, as they were doing at that moment, Lamport would be clearly in the field of their vision and directly on a line between them.

No argument is required to demonstrate the proposition that, under these circumstances, they should have observed him and warned him of the danger, or that it was at least a question for the jury to determine whether or not their failure to do so was negligence. It is obvious from the mere statement of the facts that the evidence tended to show negligence, if it did not demonstrate it absolutely.

[2] Other points are mentioned in the brief on appeal, but no other point was argued either in the brief or oral argument. It is therefore unnecessary to consider any other questions in the case.

The judgment is affirmed.

We concur: LAWLER, J.; OLNEY, J.

(183 Cal. 321)

**SUTTER BUTTE CANAL CO. v. SUPERIOR COURT** in and for BUTTE COUNTY et al.  
(Sas. 3105.)(Supreme Court of California. July 20, 1920.  
Rehearing Denied Aug. 19, 1920.)**Prohibition §5(3)**—Not issued to restrain judicial action where question of lower court's jurisdiction had not been presented.

Superior court, which has overruled demurrers in actions to enjoin irrigation company from supplying water in new territory and has dismissed the Railroad Commission's complaint in intervention, will not be restrained from proceeding in such actions on the ground that the Railroad Commission had directed the company to supply such new land with water, under St. 1913, p. 84, where the complaint made no reference to the commission's order, so that ruling on demurrers was no more than a ruling that the complaint stated a cause of action within the general jurisdiction of the court, and where the dismissal of such complaint in intervention may have been ordered on the ground that the commission was not a party beneficially interested, since in such case the question of whether the court had jurisdiction in the face of the commission's order had not been presented.

Angellotti, C. J., dissenting.

In Bank.

Application for writ of prohibition by the Sutter Butte Canal Company against the Superior Court of the State of California in and for the County of Butte and Hon. H. D. Gregory, the Judge thereof. Writ denied.

Bell, Brookman, Simmons & Creech, of San Francisco, W. H. Carlin, of Marysville, and Isaac Frohman, of San Francisco, for petitioner.

George F. Jones, of Oroville, and Armfield & Eddy, of Woodland, for respondents.

**OLNEY, J.** This is an application for a writ of prohibition. The petitioner is a public utility corporation engaged in the business of selling and distributing water largely, if not entirely, for irrigation. By its articles of incorporation it was authorized to engage in this business in the counties of Butte and Sutter. Prior to the present year there were some 58,000 acres of land, mostly, if not all, in Butte county, to which water was furnished by it. In the fall of last year the Railroad Commission authorized the company to obligate itself to supply some 14,400 acres more of land, all in Sutter county. Pursuant to such authority, the petitioner did so obligate itself by contract with the owners of these lands, and has extended its work so as to supply them at a cost which the commission finds to have been between \$200,000 and \$250,000. No objection to this was made at the time by the old consumers of the water company, but it may be that

they were unaware of the application for authority, although notice of the application was published in the newspapers circulating in Butte county, and the commission finds that the construction of the additional works by the company and its intention to serve thereby additional land was a matter of common knowledge in the county.

The last winter was an exceedingly dry one, and by spring it became evident that there would be a general water shortage. Representatives of the old consumers thereupon filed a complaint with the Railroad Commission, setting forth that they were old consumers of the company, that the company was intending to take on some 14,400 acres of additional land, that there was a shortage of water and the company would not be able to supply both the lands of the old consumers and the new lands, and asking that the company be ordered not to supply the contemplated additional lands. The owners of the latter lands intervened in the proceeding, so that all parties in interest were represented. After a hearing, the commission denied the complaint and directed the water company to deliver water for the new lands without discrimination between it and the lands previously supplied. See Stats. 1913, p. 84; Deering's General Laws, Act 4348a.

Pending the decision of the commission, three actions were commenced in the superior court of Butte county against the water company, one by a consumer of five years' standing under a contract, one by a consumer of a year's standing without a contract, and one by a landowner who was not a consumer but whose lands lay within the area served by the company's system as it had theretofore existed without the extension for the supplying of the 14,400 acres of new land. The complaints alleged a shortage of water, that the water company was intending to supply 14,400 acres of additional land, that there was not enough water for this land and the company's old consumers, and prayed for an injunction restraining the company from supplying the new land. No mention whatever was made in the complaints of any of the proceedings before the Railroad Commission. Demurrers were interposed to these complaints, and the Railroad Commission itself filed a complaint in intervention, setting up the authority previously given by it to the water company to supply the additional land and the pendency of the proceedings before it. After the rendition by the commission of its decision, the superior court of Butte county dismissed the commission's complaint in intervention and overruled the demurrers of the water company and directed it to answer. The water company thereupon applied to this court for a writ of prohibition to prevent the Butte county court from proceeding further with the actions before it. An alternative

writ was granted, and a hearing has been had upon it.

The ground on which the writ is sought is that the superior court has no authority to enjoin the petitioner from supplying the additional lands in the face of the order of the Railroad Commission directing it to supply those lands. The question as to this authority has been the only point presented to us, and since it is one of importance, and its decision, if in favor of the petitioner, would finally determine the controversy between the parties, we would much prefer to decide it and grant or deny the writ asked for accordingly. But we think it fairly plain that the question is not presented by the proceedings before the superior court in their present stage, and we do not feel at liberty deliberately to overlook this fact and to proceed to decide a question not in reality presented by the record. The only action taken by the superior court has been to overrule the demurrers to the complaints and to dismiss the commission's complaint in intervention. Its action in neither of these respects involved a ruling that it had authority to enjoin the water company from doing what the commission directed it to do, or necessarily indicated that the court would proceed without regard to the order of the commission when the existence of such order and the water company's reliance upon it were properly presented to the court.

So far as the overruling of the demurrers is concerned, the essential point is that the complaints make, as we have said, no reference to the proceedings before the commission or to the latter's order in the matter. They merely allege the relation of consumer to the company, or, in one case, the right and desire to initiate the relation, the intention of the company to take on other lands, and the lack of water to supply both the company's old consumers and the new lands. The complaints and the demurrers to them present merely the question whether, under these circumstances, no order of the Railroad Commission being involved, an old consumer may enjoin a water company from taking on further requirements upon its supply. This question is purely one within the general equity jurisdiction of the superior court, and as such the court had authority to pass upon it and to overrule the demurrers to the complaints if it concluded that the old consumers were entitled to an injunction upon the facts alleged. With the correctness of this conclusion we are not concerned. If the facts were merely as stated in the complaints, and the court's conclusion that upon such facts causes of action existed in favor of the plaintiffs was incorrect, its decision could be reviewed on appeal, but not by prohibition. In brief, the action of the superior court in overruling the demurrers to the complaints was no more than a ruling that the complaints stated a

cause of action within the general equity jurisdiction of the court. The question of whether or not the court had no authority to grant relief because of the fact that the Railroad Commission had made an order in the premises was not presented. With the complaints reading as they did, this question could be presented only by an answer to them, setting up the order of the commission. It may well be, and, in fact, we presume, that the superior court overruled the demurrers upon this theory, particularly in view of the decisions of this court in *Pacific, etc., Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, and *Sexton v. Atchison, etc., Co.*, 173 Cal. 780, 161 Pac. 748; between which and the more recent decisions in *Yolo, etc., Co. v. Superior Court* (App.) 185 Pac. 195, and *Red Bluff v. Southern Pacific* (App.) 187 Pac. 152, we see no conflict.

As to the action of the court in dismissing the commission's complaint in intervention, the court may well have done this upon the ground that the case was not one for intervention by the commission, that the commission was not a party beneficially interested, and that if the defense that it had made an order in the matter was to be presented it should be presented either by the water company or by the owners of the additional land to be served. Such theory, at first blush, would seem to be sound, but, whether it be or not, the fact that the superior court may well have acted upon it establishes at once that the court's action in dismissing the commission's complaint is not a ruling that it has jurisdiction despite the order of the commission, or any indication that the court intended to proceed despite that order, if the fact of its existence were properly shown.

There is, therefore, as we have said, as yet no ruling by the superior court that it has jurisdiction to issue an injunction in the face of the order of the Railroad Commission, and the question as to such jurisdiction has not been presented.

It follows that the writ sought must be denied, but without prejudice to another application if occasion should hereafter require; and it is so ordered.

We concur: SHAW, J.; SLOANE, J.; LAWLOR, J.; WILBUR, J.; LENNON, J.

ANGELLOTTI, C. J. I dissent, being of the opinion that it is apparent from the face of the complaints in the superior court actions that, in view of sections 5 and 6 of the act of April 25, 1913 (Stats. 1913, p. 84; Deering's General Laws, Act 4348a), the subject-matter of such actions is within the exclusive jurisdiction of the Railroad Commission, subject only, in so far as the courts of this state are concerned, to review by this court, as provided by the Public Utilities Act.

(183 Cal. 854)

KNIGHT et al. v. MARKS et al. (S. F. 8653.)

(Supreme Court of California. July 26, 1920.  
Rehearing Denied, Aug. 23, 1920.)

1. Damages  $\S$ 79(5) — Liquidated damages may not be stipulated for mere failure to pay an installment of rent.

Provision in lease fixing liquidated damages for breach, so far as applying to mere failure to pay an installment of rent, is void; Civ. Code,  $\S$  3302, fixing the damages for breach of obligation to pay money only at the amount due by the terms of the obligation, with interest, and sections 1670, 1671, declaring void provision of a contract determining in advance the amount of damages for breach of obligation, except when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage.

2. Landlord and tenant  $\S$ 184(2) — Assignee of lessee's interest in fund deposited by lessee as security for performance of covenants has contingent interest.

Assignee of the lessee's interest in a fund deposited by the lessee as security has a contingent interest in the fund, so long as lessee does not fail to perform.

3. Landlord and tenant  $\S$ 184(2) — Deposit not released by change of lease, where unknown to lessor a third person was, as to such deposit, surety for lessee.

Where lessor did not know that as to a fund deposited as security for performance of lessee's covenants a third person stood in the relation of surety, the fund was not released by alteration of the lease.

4. Appeal and error  $\S$ 158(2) — Right to prosecute appeal not lost by enforcement of judgment by execution.

Appellant does not lose his right to prosecute appeal by the fact that after it is taken the judgment was satisfied through enforcement by execution; the appellate court, under Code Civ. Proc.  $\S$  957, having power, in case of reversal, to make restitution.

#### In Bank.

Appeal from Superior Court, City and County of San Francisco; Bernard J. Flood, Judge.

Action by Thomas G. Knight and another, executors of Serena H. Knight, deceased, against Benjamin L. Marks and others. From an adverse judgment, defendant Joseph C. Bianchi appeals. Reversed.

Geo. C. Sargent, of San Francisco, for appellant.

Peter A. Breen, Percy E. Towne, Goodfellow, Eells, Moore & Orrick, and Elliott M. Epstein, all of San Francisco, for respondents.

SHAW, J. This is an action for money claimed to be due to the plaintiffs' testatrix upon a lease executed by her to Benjamin

L. Marks, on October 22, 1908. The cause was tried by a jury and upon the verdict judgment was rendered in favor of plaintiffs against Marks for the sum of \$2,900 and against defendant Bianchi and the German Savings & Loan Society for the sum of \$11,222.87. From this judgment the defendant Joseph C. Bianchi appeals.

The lease embraced property upon which the lessor agreed to erect a building in accordance with plans and specifications annexed thereto, which plans, however, do not appear in the record. It was for the term of 10 years, beginning 30 days after the completion of the building. The total rental was \$120,000, payable in monthly installments of \$1,000 each on the 1st day of each month, and Marks was to pay \$200 as attorneys' fees in any action by the lessor against the lessee for a breach of any covenant of the lease. It provided that the lessee should furnish \$8,000 as security for the performance of the covenants on his part, which sum should be deposited in the German Savings & Loan Society in the names and for the joint account of the lessor and lessee, there to remain with such interest as should accumulate thereon, provided that, in the event of failure to pay rent or other breach of covenant by Marks, the "lessor may withdraw from the said account the entire sum, together with the accumulated interest, as agreed liquidated damages for the breach," and that upon the termination of the lease by expiration of time or otherwise any balance of the money and interest so on deposit and not applied to the claims of the lessor should be returned to the lessee.

The complaint alleged that the purpose of the parties in leasing the premises was that the lessee should conduct a livery stable therein and that the building was constructed so as to be suitable for that use; that the lessor would not have erected a building for that purpose except in consideration of the covenants and conditions of the lessee and except for the money deposited as security for performance; that because of the fact that it was designed for that use it would be difficult to procure another tenant and impractical and extremely difficult to fix the damages that would be suffered by the lessor in case of the ouster of the lessee for the nonpayment of rent or other breach of the conditions of the lease; and that it was for this reason that the provision regarding liquidated damages was inserted in the lease and the sum of \$8,000 deposited as above stated. It further alleged that Joseph C. Bianchi claimed some interest in the fund on deposit.

Bianchi in his answer alleged that the money deposited by Marks with the defendant German Savings & Loan Society in pursuance of the lease was furnished to Marks by C. D. Bianchi for the purpose of making

said deposit therewith; that the lessor was informed that the money was the property of Bianchi and was pledged by him as security for the obligation of Marks under the lease; that in May, 1912, without the consent of said C. D. Bianchi, the lessor and lessee by agreement in writing altered the terms of the lease by providing that the building could be accepted by the lessor and lessee in an uncompleted state and located upon ground other than that described in said lease and that the time for its completion should be extended and that it might be used as a garage instead of as a stable. It is also alleged that in November, 1912, said C. D. Bianchi assigned all of his right, title, and interest in the said fund on deposit to the defendant Joseph C. Bianchi. He asked judgment to the effect that he was the owner of the said fund on deposit.

[1] The parties to a contract may agree therein upon an amount to be allowed as damages for a breach thereon only "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Civ. Code, §§ 1670, 1671. The only breach of the covenants of the lease here in question that is alleged is the failure to pay the stipulated rent. In the verdict, the jury found specially against Marks for \$2,700. It was admitted that this sum included all rent due up to and including the rent due July 1, 1917. The trial was had on July 18, 1917, and judgment was entered on July 19, 1917. The building was completed and occupied by the lessee on or about August 1, 1909, and consequently the 10-year term began on September 1, 1909, and ended on September 1, 1919. This action was merely for the rent due and the stipulated damages, and no notice to quit or forfeiture of the lease was alleged, nor any restitution of the possession to the lessor demanded. Nor is it alleged that the lessee has vacated, abandoned, or surrendered the possession, or that he is insolvent. Where the lease has not expired and a forfeiture and restitution is not sought, the measure of damage for a breach of the covenant to pay the rent fixed by the lease is the amount of the rent unpaid and no more. It could not be difficult or impracticable to fix the damages in such a case. It was a breach of an obligation to pay money only, and the damages were "the amount due by the terms of the obligation, with interest thereon." Civ. Code, § 3302. The parties cannot overcome this objection in such a case by any provision in the contract itself, for such a provision is expressly declared to be void. Civ. Code, § 1670; *Green v. Frahm*, 178 Cal. 262, 168 Pac. 114; *Jack v. Sinsheimer*, 125 Cal. 564, 58 Pac. 130. It follows that the plaintiff was not entitled to anything as liquidated damages for the breach of contract alleged, and that the verdict and judgment are, to

that extent, without support in the law and evidence.

[2] It must be admitted that, at the time of the judgment at all events, it was possible that Marks might fully perform all the covenants of the lease. If he did so the money on deposit would have then fully served its purpose as security and it would then belong to Marks, absolutely, free from any claims of the lessor. The evidence showed that at the time the money was deposited C. D. Bianchi, as a loan to Marks for the purposes of said lease, gave him a check for \$8,000 to be used in making said deposit; that the check was indorsed by Marks and transferred to the bank; and that the deposit was by that means effected. Upon the deposit being made, Marks, in writing, assigned all his interest therein to C. D. Bianchi, "subject to the lien thereon of said Serena H. Knight," under the lease, as security for the repayment of said sum to Bianchi by Marks, and Marks therein expressly promised to repay the same. C. D. Bianchi having, as the evidence shows, assigned to the appellant, Joseph D. Bianchi, all his rights under the writing between him and said Marks to the fund so deposited, it follows that the appellant had, when the judgment was rendered, a contingent right to the fund, which would become a full right if Marks should perform his covenants in the lease. The judgment was erroneous, in that it denied Bianchi all relief. It should have declared his contingent interest therein.

[3] The appellant claims the absolute and immediate right to the fund, on the ground that, by the terms of an alleged agreement between Mrs. Knight, Marks, and C. D. Bianchi at the time the deposit was made, it was understood between them that said Bianchi should deposit the money as security for the performance by Marks of his obligations under the lease, and consequently that said Bianchi and the fund he so deposited stand in the relation of a surety for Marks to Mrs. Knight for such performance. It is claimed further that in May, 1912, after the lease had run nearly three years, Mrs. Knight and Marks made an agreement in writing constituting a material alteration of the terms of the lease, so far as the obligations of Marks thereunder were concerned, which alteration, it is argued, operated to release the fund and transfer the same to Bianchi as the absolute owner thereof, under his assignment from Marks. It does not appear that Mrs. Knight had any knowledge of the terms of the agreement between C. D. Bianchi and Marks whereby the money was loaned to Marks for the purpose of making the deposit, and was immediately assigned by Marks to Bianchi as security for the repayment to Bianchi of the money so loaned by him to Marks. By the terms of the agreement and of the loan, the title to it



(191 P.)

passed absolutely to Marks. Mrs. Knight was not informed that the right of Marks thereto, such as it was, had been pledged to Bianchi for the repayment of the loan to him by Marks. The evidence does not show that she knew that Bianchi was, or claimed to be, a surety for Marks with respect to this money. Consequently the alteration of the lease, even if there were such alteration, did not operate to release her claim to the money so deposited. It may be added that the agreement, which it is claimed changed the terms of the lease, merely gave the consent of the lessor to the lessee to make some alterations in the premises which he desired to make and thereafter to use the premises as a garage instead of a stable. Prior to that time he had been using it as a stable. There was no covenant in the original lease which restricted the lessee's right to use the premises for anything other than a stable. We do not perceive how the consent of the lessor to the proposed alterations operated in any respect to change the obligations of Marks for which the money was deposited as security.

[4] The respondents move to dismiss the appeal on the ground that after it was taken the judgment was fully satisfied. The proofs in support of the motion show that the satisfaction was the result of the enforcement of the judgment by execution. The appellant does not lose the right to prosecute his appeal by such enforcement. Code Civ. Proc. § 957.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; SLOANE, J.; WILBUR, J.; LENNON, J.

(183 Cal. 335)

SCHNEIDER v. SCHNEIDER. (L. A. 6027.)

(Supreme Court of California. July 26, 1920.)

1. Marriage  $\Leftrightarrow$  54—Void marriage confers no rights in respect to property of other.

A void marriage confers no rights upon either of the parties in respect to the property of the other, such as would be conferred by a valid marriage.

2. Marriage  $\Leftrightarrow$  63—Wife of void marriage entitled to division of property jointly earned.

While, strictly speaking, there can be no community property in the absence of a valid marriage, courts will, in dividing gains of a married man and woman living together under a void marriage, innocently entered into, applied by analogy the rule which would obtain when a valid marriage is dissolved.

3. Marriage  $\Leftrightarrow$  65—Judgment dividing property or void marriage without settling legal status held valid.

In an action by a wife for divorce, where it was discovered that the plaintiff was not

entitled to a divorce because she had a husband by a prior marriage, from whom she believed she had been divorced, and it was agreed that there should be a trial for the purpose of hearing evidence on the issue of the property rights of the parties, and such issue was tried on the day set, the court was warranted in adjudicating on the question of their property rights, and a judgment, dividing the jointly earned property, will not be reversed, although no decree of annulment was entered.

#### Department 2.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Sarah Schneider against Jacob Schneider. From a judgment for plaintiff, and an order denying a motion to set aside the judgment, the defendant appeals. Affirmed.

Gerecht & Chambers and Harry Ellis Dean, all of Los Angeles, for appellant.

A. P. Thomson, of Los Angeles, for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal, First Appellate District, while acting as justice pro tem, of this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

This was an action for divorce brought by the wife, and the appeal is taken by the defendant from that part of the judgment awarding to the plaintiff a portion of the joint property. The defendant also appeals from an order denying his motion to set aside the judgment, and brings said appeals to this court upon the judgment roll alone. No argument is made in the briefs in support of the appeal from said order.

As to the appeal from the judgment, it appears from the findings of the trial court that the plaintiff at the time of her marriage to the defendant was the wife of another man, although at that time she was laboring under the belief that as the result of a certain proceeding had in the year 1905 her prior marriage had been dissolved. Her union to the defendant took place in 1906, and was entered into in good faith, and the parties thereafter lived together as husband and wife for about eight years, accumulating by their joint efforts certain property, a part of which by the judgment in this case, was awarded to the plaintiff.

The plaintiff as a ground for divorce alleged cruelty on the part of the defendant, and, in addition to praying for the dissolution of the matrimonial bonds, sought a division of the "community property." Upon the finding as to the continued existence of said prior marriage of the plaintiff the court denied a divorce, but declared the property described in

the complaint to be joint property of the parties in the nature of and analogous to community property, and by its decree divided it equally between them giving to the defendant, however, in such division, credit for certain payments which he had been required to make to the plaintiff during the pendency of the action, in recognition of the fact that the parties were not legally husband and wife.

[1] Under the authorities it is clear that a void marriage confers no rights upon either of the parties to it in respect to the property of the other such as would be conferred by a valid marriage; but in the case before us the question for determination is, Conceding that the marriage was void, what right, if any, has the plaintiff in the property acquired by the joint efforts of herself and the defendant during their cohabitation entered upon innocently upon the faith of their admittedly void marriage?

On this question there is a conflict in the decisions. In the states where the common-law right of dower exists it is generally held that a woman, in order to be entitled to dower, must base her claim upon a legal marriage. In those states if a man has a wife living, and enters into a second marriage, no matter how innocent of wrongdoing the other party to it may be, nor how gross the deception by which she enters into the marriage, she is not entitled to dower, not being his lawful wife. *Kennelly v. Cowle*, 6 Ohio Dec. 170.

In the case of *De France v. Johnson* (C. C.) 26 Fed. 891, a man had a wife living at the time he married the plaintiff, a mere girl, with whom he lived for a great many years and until his death. By her he had 13 children. After his death she sought to recover dower, but the court decided against her, holding that a woman who innocently marries and cohabits with a man who has a wife living from whom he has never been divorced, cannot acquire an interest in his land by reason of such illegal marriage.

This doctrine does not prevail in all the states, nor in fact in any where the community property regime has been adopted. In Louisiana and possibly New Mexico a marriage such as the one here is known as a "putative" marriage, and the property rights of the woman are recognized and protected by statute. In four of the seven states where the community rule as to property of the character here considered prevails it has been held that where a woman is an innocent party to a void marriage she is entitled to the same interest in property acquired by the parties as if the marriage were valid. In the state of Texas the question has often been before the courts, and in a number of recent cases has been given attentive consideration. The Spanish law as to marital rights prevailed in Texas until 1840, and the

doctrine of putative marriage was a part of that law, as shown by the decisions of its courts, and even since the adoption of the common law the property rights of persons who contract void marriages, but in good faith, have been upheld. *McKay on Community Pro.* 194.

In the case of *Morgan v. Morgan*, 1 Tex. Civ. App. 315, 21 S. W. 154, which was decided after the adoption of the common law in that state, the court said:

"The status of property acquired by a man and woman living together as husband and wife without having been lawfully married has been the subject of doubt and litigation almost from the time Texas became an independent republic,"

—and after reviewing the early cases the court continued:

"It will thus be seen that the strong tendency of our judges in the past has been to hold that property acquired in this state, under our community laws, by a man and woman living together as husband and wife, should belong to them in equal shares, whether they were legally married or not. And why should this not be so, especially when they have attempted to enter into a marriage contract, and believed that they were lawfully husband and wife? In such cases, by attempting to enter into the marriage contract, they agreed, as far as they had the power to agree, that they would live together as husband and wife, and that all property that they might thereafter acquire should be community property, and belong to them in equal portions. Such is the meaning of the contract they attempted to make under our law. How, then, can it be said that the property acquired in pursuance of such a contract shall belong to one of the parties more than to the other? What right has the husband to all of the property to the exclusion of the wife, or what right has the wife to all of the property to the exclusion of the husband? Suppose a wife so situated should by her own exertions acquire property towards which the husband did not contribute anything, would it be contended that this property became his property? How, then, can it be that where the property is acquired by the joint labors of both, each in the eye of the law contributing one-half thereto, it shall belong only to the husband? It will not do to refer to the decisions in common-law states to sustain the proposition that the woman under such circumstances has no right to any part of the property so acquired. In those states, by entering into the marriage contract she understood that all the property they might acquire while living together should belong to the husband, but in this state she understood that their rights in the property they might accumulate should be equal."

See, also, *Lawson v. Lawson*, 30 Tex. Civ. App. 43, 69 S. W. 246; *Routh v. Routh*, 57 Tex. 589.

In the case of *Barkley v. Dumke et al.*, 99 Tex. 150, 87 S. W. 1147, a girl had innocent-

ly contracted marriage with a man having a living wife; and the court held that it was the settled doctrine in that state that by virtue of such a marriage the putative wife became entitled to the same rights in property acquired by the parties as would be the case if the marriage were free from defect, pointing out that the statute law of Texas upon the subject of the mutual property rights of married persons is so inconsistent with the common law as to show an intention on the part of the law-making power not to subject such rights to the rule of the latter. This case has since been frequently followed in that state.

[2] In California, as in Texas, the common law is the general rule of decision, but in both states the law regulating the mutual property rights of married persons is radically different from that law; and, while we do not wish to be understood as saying that the rule of the common law as to husband and wife apply to no case under our system, yet we agree with the Texas courts that the common-law rule as to the consequences of a void marriage upon the mutual property rights of the parties to it is inapplicable where the community property regime prevails. This conclusion is dictated by simple justice, for where persons domiciled in such a jurisdiction, believing themselves to be lawfully married to each other, acquire property as the result of their joint efforts, they have impliedly adopted, as is said in the Texas case cited, the rule of an equal division of their acquisitions, and the expectation of such a division should not be defeated in the case of innocent persons.

In *Werner v. Werner*, 59 Kan. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. Rep. 372, a case very similar to the present one, a woman having a husband living contracted marriage, and lived with this supposititious husband for many years in the belief that her former marriage was invalid. Her action for divorce was held to be an equitable proceeding in which the court had full jurisdiction to give adequate relief, and accordingly it annulled the marriage and made an equitable division of the property.

In the province of Quebec, a civil law jurisdiction, it was held, in *Gregory v. Dyer*, 15 L. C. Jur. 223, that a woman who in good faith had married a man who had a wife living, and lived with him until his death, was entitled to a community interest in the property acquired by them after their marriage. See, also, *Cathcart v. Union Bldg. Soc.*, 15 L. C. Rep. 467; *Morin v. Corporation des Pilotes*, 8 Quebec, 222; 1 Cyc. 1633.

In the case of *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900, it is held that, where a woman enters into a marriage contract with a man without knowledge that he has a wife living, the court has power to annul the marriage,

whether the action be for divorce or annulment, and in such action to dispose of property acquired by the joint efforts of the parties, and can, as in a true divorce proceeding, award to the innocent injured woman such proportion of the property as under all the circumstances would be just and equitable.

The authorities on the subject are reviewed and the rule in this state announced by Mr. Justice Sloss in the well-considered case of *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 88. That was an action, after a decree of annulment, for a division of the property which had been accumulated by the parties after the marriage. It was held that a woman who in good faith had entered into a marriage, which was subsequently annulled at the instance of the other party upon the ground of her physical incapacity to enter into the marriage state, was entitled to participate in the property which had been accumulated by the efforts of both parties during the existence of the abortive marriage. "To say," declares the court, "that the woman in such case, even though she may be penniless and unable to earn a living, is to receive nothing, while the man with whom she lived and labored in the belief that she was his wife shall take and hold whatever he and she have acquired, would be contrary to the most elementary conceptions of fairness and justice." In that case the appellant argued that, the marriage being voidable, the effect of the decree of annulment was to render the marriage void from the beginning, and that all property rights of either dependent upon the marriage were terminated and annulled. "But," said the court, "these decisions \* \* \* deal with the rights of one of the parties in property owned by the other. \* \* \*. Here, however, the question is a different one. The controversy is not over the property owned by the defendant prior to marriage, or acquired by him alone thereafter, but has to do with the acquisitions of the two parties after marriage and before annulment. \* \* \*. In the absence of fraud or other ground affecting the right to claim relief, there can be no good reason for saying that either party should, by reason of the annulment, be vested with title to all the property acquired during the existence of the supposed marriage." And the court proceeds to hold that while, strictly speaking, there can be no community property in the absence of a valid marriage, courts will, in dividing gains made by the joint efforts of a man and woman living together under a voidable marriage which is subsequently annulled, apply by analogy the rule which would obtain when a valid marriage is dissolved. It is true in that case that the marriage was only voidable, while here it was void; but this difference furnishes no logical or sound reason why a different rule should be applied in the

division of the jointly acquired property. Indeed, in the case from which we have quoted, the marriage having been annulled, the court assumed it to have been void ab initio.

[3] We do not overlook the fact that the present action was for divorce, and that no decree of divorce or annulment of the marriage was entered. But it is also to be noted that when the parties discovered that the plaintiff was not entitled to a divorce they agreed upon a day to which the trial should be postponed for the purpose of hearing evidence on the issue of their property rights, and accordingly such issue was tried on the day set. It therefore appears to us that, in view of the issues framed by the pleadings, and the course of trial adopted upon the development of the facts bearing upon the marriage of the parties, the court was warranted in adjudicating upon the question of their property rights. The circumstance that the court failed to settle their legal status, as it might well have done, is no ground for reversing that part of its judgment dealing with such property rights, and to which the appeal is directed.

The judgment and order are affirmed.

WILBUR, LENNON, and SLOANE, JJ.,  
concur.

(183 Cal. 342)

**SAN PEDRO, L. A. & S. L. R. CO. v. ATCHISON, T. & S. F. RY. CO. (L. A. 6099.)**

(Supreme Court of California. July 26, 1920.)

**1. Railroads ⇨ 138—Trackage agreement for division of taxes construed.**

A covenant in a trackage agreement between two connecting railroads for joint use of leased connecting lines operated by one of them, requiring the other to pay one-half of all taxes accruing upon the joint line during the term of the agreement, must be construed without regard to the subsequent change in the law to the gross earnings method of taxation provided for by Const. art. 13, § 14, and Laws 1911, c. 335, § 9, where the agreement contains no provision for such contingency.

**2. Contracts ⇨ 303(1) — Unforeseen contingency cannot affect.**

An unforeseen contingency or event, not considered by the parties at the time they entered into a contract, can in no manner affect the same.

**3. Evidence ⇨ 48 — Common knowledge that taxes do not remain constant.**

It is a matter of common knowledge that our tax laws and the amount of the tax to be paid seldom, if ever, remains constant.

**4. Appeal and error ⇨ 1050(2) — Admission of immaterial evidence harmless.**

Admission of immaterial evidence was harmless, where it in no manner tended to aid

the court in the interpretation of a contract, which was the issue involved.

**Department 2.**

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the San Pedro, Los Angeles & Salt Lake Railroad Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. S. Halsted, of Los Angeles, Dana T. Smith, of Salt Lake City, Utah, and E. E. Bennett and Fred E. Pettit, Jr., both of Los Angeles, for appellant.

E. W. Camp, U. T. Clotfelter, M. W. Reed, and Robert Dunlap, all of Los Angeles (Gardiner Lathrop, of Chicago, Ill., and Charles H. Woods, of Carlinville, Ill., of counsel), for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal for the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

By this action plaintiff seeks to recover the sum of \$71,534.08 paid on account of state taxes to defendant under a certain agreement relating to the same. It is admitted that the amount was paid under duress and protest. For the sake of brevity counsel have referred to the plaintiff as the Salt Lake Company and to the defendant as the Santa Fé Company. We will so refer to them.

The plaintiff and defendant are railroad companies, and this action involves the construction of a certain trackage agreement entered into between them. It appears from the record that the Santa Fé Company holds and operates in this state two connecting lines of railroad under lease from the Southern Pacific Company. One of these lines extends from Barstow to Daggett, and the other from Colton to Barstow. The Salt Lake Company owns, controls, and operates a line of railway extending from San Pedro to Colton. By the terms of the contract under consideration the parties hereto agreed to jointly use the leased lines of the Santa Fé Company upon certain conditions. The lines are designated in the agreement as the "Joint Line." The contract is lengthy, but the issue in the case relates to the covenant to pay taxes. This issue arises from a difference between the parties as to the proper construction and effect to be given to that covenant. The right or license to use the Joint Line was for an indefinite period, terminable upon three years' notice, the grant being conditioned, among other things, upon the payment to the Santa Fé Company, for such use, of a sum of \$48,782.38 per annum and a certain per cent. of costs chargeable to capital account, to-

gether with sums equal to one-half of all taxes and assessments accruing upon or in respect of all or any part of the railroads, franchises, and other property composing the Joint Line, during the term of the agreement, since terminated.

The contract further provided that the taxes and assessments accruing upon the Joint Line should be deemed to be such proportion of the total taxes paid by the Santa Fé Company as the Joint Line mileage bore to the total mileage on which said taxes were paid.

The so-called Joint Line is situated within the state of California, and the lines of the Santa Fé Company, of which the Joint Line forms a part, extend into different counties.

The contract here involved is dated April 26, 1905. From that date until the year 1910 taxes were assessed and levied directly against railroad property in the state, the assessment being an ad valorem one only. The amount paid as taxes by the Salt Lake Company for the period aggregated \$70,687.36. There is no dispute concerning payments made during this time. Upon the adoption in 1910 of a constitutional amendment prescribing what is generally termed the "gross earnings" method of taxation of railroads, this system of taxation was changed. Section 14, art. 13. By it and the enactment of laws in conformity therewith (Laws 1911, § 9, c. 335) the railroads were required to pay, as taxes to the state in lieu of all other taxes, sums equal to a certain percentage of the gross earnings from the operation of their railroads. By reason of this change a dispute arose between the parties as to the proper interpretation of their contract relating to the payment of taxes. Under the constitutional amendment and the laws passed in pursuance thereof both the Santa Fé Company and the Salt Lake Company were required to pay a tax "equal to the percentages hereinafter fixed upon the gross receipts from the operation of such companies within the state." The amendment also provided that the gross receipts shall be deemed to be all receipts on business beginning "and ending within this state, and a proportion, based upon the proportion which the mileage within the state shall bear to the entire mileage over which the business is done, of receipts on all business passing through, into or out of this state."

After the adoption of this constitutional amendment the Santa Fé Company claimed that the Salt Lake Company should pay one-half of the amount of the Santa Fé Company's gross earnings tax allotable to the Joint Line on a mileage basis. The Salt Lake Company, on the other hand, insisted that the amount of its gross earnings tax allotable to the Joint Line by the same method of taxation should be taken into consideration in order to determine the amount due from it to the Santa Fé Company under the agree-

ment, it being claimed that the total sum to be paid by the Salt Lake Company under the terms of the contract was one-half of the aggregate of the taxes so paid by both companies allotable to the Joint Line.

The trial court adopted the construction of the Santa Fé Company and rendered judgment in its favor, and plaintiff appeals.

We are of the opinion that the construction adopted by the trial court is the proper one to be given to the agreement.

It is admitted that the tax paid by both companies under the new method of taxation is a tax upon property within the meaning of the contract. The question here presented, therefore, requires a construction of the tax clause in the agreement. That portion of the covenant involved is as follows:

"That in consideration of the foregoing grant, the San Pedro Company agrees: That from and after the date of the commencement of said term, and until such term shall expire as provided in section 3 of article 1, it will pay to the Atchison Company, at its office in the city of Los Angeles, California, the following sums, namely:

"(b) From time to time, sums equal to one-half of all taxes and assessments, which during said term shall accrue upon or in respect of all or any part of the railroads, franchises and other property composing the Joint Line.

"The taxes and assessments accruing upon or in respect of that portion of the Joint Line which is leased by the Atchison Company from the Southern Pacific Company, shall be deemed to be sums bearing the same ratio to the whole sums payable by the Atchison Company, under said indenture of lease and contract dated July 15, 1898, in respect of taxes and assessments upon the whole line leased to the Atchison Company under said indenture of lease and contract, as the mileage of said portion thereof embraced in the Joint Line bears to the mileage of said leased line.

"Inasmuch as the portion of the Joint Line leased by the Atchison Company from the Southern California Railway Company, will not be taxed or assessed separately, but will be taxed or assessed with or as a part of other railway lines of the Southern California Railway Company or of the Atchison Company, it is understood and agreed that the taxes and assessments upon that portion of the Joint Line shall be deemed and taken to be such share of the taxes and assessments upon all such lines including such portion of the Joint Line so taxed together as an entirety, as shall bear to the whole of such taxes and assessments thereon the same ratio as that which the mileage of said portion of the Joint Line shall bear to the mileage of all such lines so taxed together or as an entirety.

"Any taxes or assessments for any year of which only a part is included in said term shall be apportioned and the San Pedro Company shall pay a sum equal to one-half of a share thereof proportionate to such part of the year as is included in the term.

"Each sum payable under this subdivision (b) in respect of taxes and assessments shall be payable by the San Pedro Company, within

thirty days after the Atchison Company shall have paid such taxes and assessments, and shall have caused a written statement thereof to be furnished to the San Pedro Company."

Neither counsel has furnished us authority, and we have found none, where a contract of like character has received judicial interpretation. To us, however, it appears that none is required, for the terms of the covenant involved seem clear and free from doubt. From the language employed, considering the surrounding circumstances at the time the contract was entered into, it is plainly manifest that it was the intention of the parties hereto that the Salt Lake Company was to pay one-half of the taxes imposed on the Joint Line, which the Santa Fé Company was required to pay during the life of the agreement.

[1, 2] The contract provides that the Salt Lake Company shall pay one-half the taxes allocated to the Joint Line "after the Atchison Company shall have paid such taxes." Again, it is provided that the taxes shall be payable by the Salt Lake Company "thirty days after the Atchison Company shall have paid such taxes and assessments, and shall have caused a written statement to be furnished to the San Pedro Company." The plain inference from these provisions is that the Santa Fé Company was to be reimbursed for one-half of the taxes paid by it upon the property constituting the Joint Line. Nothing is contained in the contract with reference to what the Salt Lake Company might be obliged to pay by reason of a change in the taxing method. Under the method of taxation in force at that time the taxes levied against the Joint Line were wholly paid by the Santa Fé Company. No other system of taxation, such as here involved, under which both parties might become liable for a tax by reason of the use of the Joint Line, seems to have been contemplated by the parties, for their contract contains no clause with reference to such a contingency. An unforeseen contingency or event, not considered by the parties at the time they entered into their agreement, can in no manner affect the same.

[3] It is a matter of common knowledge that our tax laws and the amount of the tax to be paid seldom, if ever, remains constant. Different character and forms of taxes and assessments are frequently being created. The parties hereto are deemed to have had knowledge of this fact, and it was their duty, if such was their intention, to make provision relating to such change. We cannot do this for them. To do so would be to impose upon them a contract which neither party might have assented to in the first instance.

The fact that the change in the law might create additional burdens upon either of the parties is of no consequence. The agreement provides that the Salt Lake Company shall pay to the Santa Fé Company one-half of all

taxes which shall accrue during the term thereof. It is admitted that the amount paid by defendant was paid as taxes, and there is no question that they accrued during the term of the contract.

[4] Appellant complains of the admission of certain evidence offered by defendant for the purpose of showing that the change in the method of taxation did not bring about an equitable result. From this evidence it appeared that for the years 1907 to 1910 the taxes paid by the Salt Lake Company aggregated \$70,887.36, and that from 1911 to 1914, inclusive, the amount paid was \$93,513.69. To justify its admissions respondent argues that the evidence refutes the claim of gross injustice, for the reason that under plaintiff's construction of the agreement it would only pay \$21,979.60 for the disputed period, notwithstanding that the taxes were materially higher than during the preceding four years. The evidence should have been rejected. Courts are not concerned with the question of how changed conditions might or might not benefit either party, where their contract is silent with reference thereto. The admission of the evidence, however, was harmless, for it in no manner tended to aid the court in the interpretation of the agreement, for it did not affect the same.

For the reasons given, the judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.; SLOANE, J.

(183 Cal. 329)

ANTHONY et al. v. JANSSEN. (L. A. 5038.)

(Supreme Court of California. July 24, 1920.)

1. Evidence  $\S$  183(15)—Sufficient foundation held not laid for secondary evidence of lost deed's contents.

Sufficient foundation is not laid for introduction of secondary evidence of the contents of a deed as lost, where, so far as appears, if searched for, it could have been found.

2. Mines and minerals  $\S$  117—Sheriff's deed under decree against holder of option on mining claim not evidence of recitals against owner.

A sheriff's deed, purporting to be made pursuant to a decree, only against one having merely an option to purchase a mining claim, ordering foreclosure, of a lien for debt contracted by him in development, is not evidence against the one giving the option.

3. Mines and minerals  $\S$  117—Sheriff's deed under judgment against one person only held to convey no other interest.

Under Code Civ. Proc.  $\S$  700, sheriff's deed, pursuant to judgment, in action to foreclose lien for debt contracted by P. in developing mining claim for which it had option, conveyed only the interest of P., the judgment

running only against P., and directing sale of the property and execution of a deed for the interest of P.

**4. Corporations**  $\Leftrightarrow$ 619—**Directors, as trustees, on forfeiture of charter, must act as a body.**

The powers of directors as trustees, which they become under St. 1905, p. 493, as amended by St. 1907, p. 746, on a corporation forfeiting its charter for nonpayment of its license tax, must, under Civ. Code, §§ 860, 2268, in absence of provision to the contrary, be exercised by their united action, so that a deed by one of them, as an act in execution of the trust, transfers no title, unless done in consummation of some disposition of the property made by all the trustees acting unitedly.

**5. Corporations**  $\Leftrightarrow$ 619—**Deed of individual stockholder after forfeiture of charter subject to powers of trustees.**

Deed of individual interest of stockholder of a corporation which had forfeited its charter for nonpayment of its license tax, is subject to the rights and powers of the trustees of the corporation in settling the corporate affairs, and so is no basis for judgment quieting title to mining claim of the corporation in the grantee against the trustees.

**6. Judicial sales**  $\Leftrightarrow$ 3—**Direction in decree, for deed immediately after sale, void as contrary to Code.**

Direction in the decree that deed be made immediately after execution sale, being contrary to Code Civ. Proc. §§ 700a, 703, and beyond the court's power, is void.

**7. Execution**  $\Leftrightarrow$ 241—**Deed executed on making sale given effect as certificate of sale.**

A deed, executed by a sheriff on making execution sale of real estate, subject to redemption, when under Code Civ. Proc. § 700a, he should execute only a certificate of sale, may be given effect as a certificate of sale; it containing all the statutory requirements thereof, except the statement that the property was subject to redemption, which is declared by the law itself.

**8. Execution**  $\Leftrightarrow$ 303—**Deed after time to redeem necessary to complete transfer of interest.**

A deed under Code Civ. Proc. § 703, after failure to redeem within a year from execution sale of interest in real estate, is necessary to complete transfer to the purchaser of the rights of the judgment debtor.

**In Bank.**

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by Mabel E. Anthony and others against I. P. Janssen. From an adverse judgment, plaintiffs appeal. Reversed.

Eugene Ferry Smith, of San Diego, for appellants.

O. E. Joslin, of Los Angeles, for respondent.

The following opinion was prepared by Mr. Justice Kerrigan of the District Court of Ap-

peal, First Appellate District, while acting as justice pro tempore of this court in place of Mr. Justice Melvin. It is adopted as the opinion of the court.

This is an appeal from the judgment in an action brought by the plaintiffs, as trustees of the Palagonite Industrial Mining Company, a defunct corporation, and of the stockholders thereof, to quiet title to four separate mining claims in San Diego county. The complaint is in the form usual in such cases. In the answer of the defendant it is not only denied that the plaintiffs are the owners of the premises or have any interest therein, but facts are therein set forth constituting the basis of the defendant's alleged title, for the quieting of which he also prays the court's decree.

The court by its decision determined, first, that the plaintiffs have no interest in these mining claims and are not entitled to any relief in the action; second, that defendant is the owner of the portion claimed by him of the said mining claims. Judgment was entered accordingly, and the plaintiffs appealed therefrom. Plaintiffs also duly presented in the lower court a motion to vacate the judgment and for a new trial. On that motion it was ordered:

"That the said judgment and decree be vacated and set aside and a new trial be, and the same is hereby, granted as to all matters contained therein, quieting defendant's title to the described premises and as to all affirmative relief to the defendant other than his judgment for costs."

At present, therefore, and assuming that the said order did not vacate the entire judgment, it is only necessary to consider that part of the judgment from which the appeal is insisted upon at this time, viz. the determination "that the plaintiff take nothing by this action." This adjudication resulted from a finding that the allegations of the complaint are untrue; in other words a finding that it is not true that the plaintiffs own or have any interest in the described property.

At the trial it was stipulated that on the 2d day of June, 1910, title to the said mining claims was vested in the plaintiffs as trustees of the Palagonite Industrial Mining Company and of its stockholders. On this stipulation plaintiffs rested, whereupon the defendant in support of the allegations of his answer introduced in evidence a contract entered into between the plaintiffs and Ralph E. Pearce on the 2d day of June, 1910, whereby the plaintiffs agreed to convey the premises to Pearce for \$50,000 upon certain specified conditions, and under which Pearce went into possession of said claims. Thereafter, on or about July 15, 1910, Pearce assigned this contract to the Premier Investment Company, a

corporation, at the same time delivering to said corporation possession of the premises. On August 1, 1910, Margaret Standeford, one of said plaintiffs, conveyed to Pearce all her interest in the mining claims as one of the trustees of said defunct corporation, and Pearce two weeks later conveyed that interest to the Premier Investment Company. Oral evidence was also introduced tending to show a similar conveyance from Mabel E. Anthony and Ada D. Anthony, the remaining trustees. While the Premier Investment Company was in possession of the mining claims, debts were incurred by it for work and labor done thereon, for which liens were filed. James R. Haddock became the owner of these liens, and in August, 1911, commenced an action to foreclose the same against these plaintiffs and the Premier Investment Company. All of the defendants in said suit failed to appear, and their default was entered. The judgment, however, ran against the Premier Investment Company alone. By it the sheriff was directed to make a sale of the property, and to execute a deed thereof to the purchaser "for the interest of said defendant Premier Investment Company." In the month of May, 1917, the sheriff of San Diego county sold and conveyed the property described in the judgment to the plaintiff therein, James R. Haddock, who thereafter conveyed it to I. P. Janssen, the defendant and respondent herein.

[1] It is not claimed by the respondent that the option agreement divested plaintiffs of their title, but that he deraigned title from the plaintiffs by means of the above-mentioned conveyances to the Premier Investment Company, coupled with the sheriff's deed made in the foreclosure suit, and which purported to convey to the grantee therein named whatever interest in the property was owned by said corporation. As before stated, the defendant introduced evidence for the purpose of establishing that plaintiffs, as trustees of the Palagonite Industrial Mining Company, had conveyed the real property involved in this action to the Premier Investment Company. Such evidence included a deed from Margaret S. Standeford, but the only evidence produced tending to show a similar conveyance by the other two trustees was in the form of testimony, offered and received on the theory, as counsel for the defendant stated, that there had been executed by said plaintiffs as trustees a deed conveying the property to Pearce, which deed had been lost and had not been recorded. There were two witnesses on the subject. The testimony of Charles L. Brown, at one time president of the Premier Investment Company, amounted to nothing more than that "the assignment from Mabel E. Anthony and Ada D. Anthony to Pearce" had been brought to him by Pearce and had been examined by him; that afterwards this document and others having been

deposited in the files of that company, the papers had been missing, had been searched for and returned to the files. This testimony was stricken out by the court, except the statement that the papers were missing, were sought for and returned. J. E. Neal, a bookkeeper of the Premier Investment Company for about a year following September 1, 1910, after examining the deed from Standeford to Pearce and of Pearce to the Premier Investment Company, testified that he saw a paper "similar to the first of these instruments," but whether the wording was just the same he could not say. Further he testified:

"I know nothing of any search being made for the papers and was not aware of it. It is among the files of the company now."

It is manifest that no sufficient foundation was laid to entitle the defendant to introduce secondary evidence of the contents of the deed said to have been made by plaintiffs Anthony. So far as appears, if searched for, it would have been found and could have been produced at the trial. Moreover, there is no evidence of its delivery by the grantors. It is also clear that the testimony does not show what property, if any, was conveyed thereby.

[2-5] The only other evidence relied on by the defendant to show that the title of the trustees had passed to him consisted of the decree of the superior court of San Diego county and the sheriff's deed executed to James R. Haddock, above referred to, purporting to be made under the authority of that decree, which evidence was received over the objection of plaintiffs. The Premier Investment Company was in possession of the property under the optional contract of purchase, according to the terms of which the corporation was authorized to do certain development work. It was while operating the property under this contract that the company incurred certain debts for such work for which the mining claims were legally subject to liens as against the plaintiffs as well as against that company. We have already referred to the filing of these liens, their foreclosure by decree of the superior court, and the sheriff's deed to the predecessor in interest of the defendant pursuant thereto. In that proceeding the plaintiff therein proceeded on the theory that the trustees for the Palagonite Industrial Mining Company had only some incidental or subordinate claim to the premises, and that the Premier Investment Company was the only real and substantial owner thereof, and accordingly prayed and was granted a decree ordering the foreclosure of the liens only against the interest of the Premier Investment Company in the property. The sheriff's deed, purporting to be made pursuant to the terms of this decree, while broad in its terms, is evidence only against the Premier Investment Company,



and not against these plaintiffs. *Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78. The sheriff's deed could convey no more than directed by the decree, and therefore conveyed to the purchaser only the right, title, and interest of the judgment debtor, the Premier Investment Company. Code Civ. Proc. § 700; *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680. Under it the defendant could obtain only the rights of that company under the option contract of plaintiffs with Pearce, and the title conveyed by the deed from Margaret Standeford to Pearce. The option contract gave Pearce only the right to purchase the property on the specified terms, by complying with the conditions therein stated, and the right of possession of the property in the meantime, subject to forfeiture for failure to perform those conditions. It does not appear that that company ever exercised the option or obtained any title under it. Hence the sheriff's deed did not transfer the title of the plaintiffs. The deed of Margaret Standeford, so far as the evidence shows, was of no effect upon the rights and powers of the trustees. The Palagonite Company forfeited its charter on November 30, 1908, because of its failure to pay its license tax as provided in the act of 1905 and amendments thereto. Stats. 1905, p. 493, as amended by Stats. 1907, pp. 664, 746. The plaintiffs were then its directors, and under the amendment of 1907 (page 746) they thereupon became trustees of the corporation and its stockholders, with full power to settle its affairs and take such legal proceedings as should be necessary for that purpose. They have the same power under section 400 of the Civil Code. Their powers as trustees include authority to sell and convey the corporate property whenever in their judgment it is necessary for the settlement of the corporate affairs. *Rossi v. Caire*, 174 Cal. 81, 161 Pac. 1161. There is no provision of the law authorizing them to act separately in the matter. Their powers as trustees must therefore be exercised by the united action of all of them in order to be valid. Civ. Code, §§ 860, 2268. The Standeford deed was executed by herself alone, and it purports to be her deed, both as trustee of said Palagonite Company and in her own right. As an act in execution of the trust, it was not binding on the trust property, and transferred no title, unless it was done in consummation of some dis-

position of the property made by all the trustees acting unitedly, which does not appear. As a conveyance of her own right, since there is evidence that she was a stockholder in some amount, it would operate to convey whatever title or interest she then had as a stockholder. That title or right, whatever it be, would be subject to the rights and powers of the trustees in settling the corporate affairs, and hence the deed would afford no basis for a judgment against the trustees in this action by them in their trust capacity.

[6-8] With respect to the sheriff's deed, it is sufficient to say, in anticipation of a new trial, that the sheriff was without lawful power at that time to execute a conveyance of the property, or to do anything in consummation of the sale, except to execute to the purchaser a certificate of sale as provided in the Code. Code Civ. Proc. § 700a. The property was real estate and the sale was made subject to redemption. Code Civ. Proc. §§ 700a, 701, 702. The sheriff's power to convey did not accrue until there had been a failure to redeem within the time fixed. Code Civ. Proc. § 703. The direction in the decree that the deed should be made immediately after the sale was contrary to the Code, and beyond the power of the court. It was therefore void. The deed, however, may be given effect as a certificate of sale. It contains all the statutory requirements of a certificate of sale, except the statement that the property is subject to redemption, and as that is declared by the law itself its omission in the certificate does not affect the validity of the sale, nor deprive the document of effect as a certificate showing the sale upon the decree. A deed based thereon, made after the failure to redeem within the year, is, however, necessary to complete the transfer of the right of the Premier Investment Company to the purchaser or his successors in interest.

Under all these circumstances it is clear that the evidence fails to show, as found by the court, that the plaintiffs have no interest in the property. The judgment that they take nothing by their action, and that the defendant recover costs, is therefore erroneous.

The judgment is reversed. .

ANGELLOTTI, C. J., and OLNEY, SHAW, LAWLOR, and LENNON, JJ., concur.

(183 Cal. 359)

**ROY v. POS et al. (S. F. 8642.)**

(Supreme Court of California. July 28, 1920.)

1. **Specific performance** ⇨73—Contract for personal services, dependent on personal will, not enforceable.

Under Civ. Code, §§ 3386, 3390, subd. 1, contracts for personal services, where the full performance rests upon the personal will of the contracting party, will not be specifically enforced against him.

2. **Specific performance** ⇨6 — Contract for services not enforced, where plaintiff has not performed.

Under Civ. Code, §§ 3386, 3390, subd. 1, contracts for personal services will not be specifically enforced, where the plaintiff is the party who has contracted to render the services, and there has been no full performance on his part, since in such case mutuality in the equitable remedy is lacking.

3. **Specific performance** ⇨94—Contract to devise land in consideration of support held not substantially performed.

Contract to devise land in consideration of support to be furnished by plaintiff during owner's lifetime will not be specifically enforced, where plaintiff furnished such support during only six months following the agreement, though owner continued to live for a year and a half thereafter; plaintiff not having substantially performed her part of the contract.

4. **Wills** ⇨58(1)—Agreement to devise not affected by duration of promisor's life.

Validity of an agreement to devise in consideration of support for life is not affected by the length of life of the promisor after the making of the agreement, provided the agreement was fair in its inception.

5. **Wills** ⇨66—Factor determining substantial performance of contract to devise.

Where one has contracted to devise land in consideration of support for life, the proportion of the remaining lifetime during which the services are rendered is a material factor in determining whether or not there has been a substantial performance of the agreement for support.

6. **Specific performance** ⇨94—Contract to devise in consideration for support not enforced under evidence.

Contract to devise land, made in consideration for care and support to be furnished owner by plaintiff during owner's lifetime, will not be specifically enforced, where plaintiff did not furnish such care and support more than one-third of remainder of owner's lifetime, though plaintiff was able and willing, but was prevented from so doing by owner, notwithstanding Civ. Code, §§ 1511, 1512, in absence of showing that plaintiff in reliance upon agreement had expended a considerable amount of labor or money upon the property agreed to be devised to her, since during owner's lifetime plaintiff could not have been compelled to perform, and owner could not have been compelled to accept plaintiff's performance, and since plaintiff

in such case has an adequate remedy at law in action for damages for the breach.

7. **Wills** ⇨68—Measure of damages for breach of contract to devise stated.

Where a party to a property owner's contract to devise in consideration of support for life does not sue in quantum meruit on the owner's breach but waits until owner's death and sues for damages, the measure of damages is not the value of the services rendered, but the value of the property agreed to be devised.

8. **Wills** ⇨68—Mortgage deducted from value of property in ascertaining damages for breach of contract to devise.

If the consideration for a mortgage is the support of owner by mortgagee, and such support is not so inadequate a consideration as to amount to fraud on a party benefited by the owner's prior contract to devise in consideration of support for life, the mortgage is a valid charge against the owner's estate, and should be deducted from the value of the property in ascertaining damages for the owner's breach of the contract.

9. **Specific performance** ⇨127(3)—Mortgage, executed in violation of agreement to devise, will not be set aside.

In an action to specifically enforce contract to devise property, plaintiff is not entitled to a decree setting aside mortgage on the property executed by owner in breach of such contract, where no cause of action for setting aside the mortgage is separately stated; a cause of action for setting aside such mortgage being separate and distinct from the action for specific performance.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Cecile B. Roy against Rosa L. Pos and others. Judgment for defendants, and plaintiff appeals. Affirmed.

P. A. Bergerot and A. P. Dessouslavy, both of San Francisco, for appellant.

W. W. Sanderson, of San Francisco, for respondents.

**LENNON, J.** The plaintiff in this action sought to enforce a written agreement to devise property. The appeal is from a judgment in favor of defendants, entered upon the failure of the plaintiff to amend her complaint within the time granted for that purpose by an order sustaining the demurrers of the defendants.

The facts alleged by the complaint are substantially these: In October, 1914, Constance Roy was a widow about 81 years of age, having no living brother, sister, or parent, and without child or other issue; the only person in the United States in any way related to her was the plaintiff, who was the widow of a deceased stepson. Said Constance Roy had lived in the state of California for over

40 years. On and prior to the date above mentioned she lived with strangers, having no home or residence of her own. She was the owner of real property of the approximate value of \$8,000 and of personal property amounting to about \$1,700, and consisting largely of moneys in bank. Being desirous of making her home with plaintiff, who with her mother lived in San Francisco and supported herself by her own efforts, Constance Roy "solicited and importuned" plaintiff to enter into a written agreement, made and dated October 24, 1914, whereby plaintiff, as the party of the second part covenanted "to maintain, support, care for the party of the first part [Constance Roy], and to furnish to and provide for her suitable board, lodging, clothing, medical attention and all other necessities of life, in a manner in keeping with the first party's present means and situation in life, from the date of this agreement, for and during the natural lifetime of the party of the first part [Constance Roy]." In consideration of this covenant, Constance Roy, as the party of the first part, agreed as follows:

"To make and execute her last will and testament in due, proper and legal form, whereby the party of the first part shall give, devise and bequeath unto the party of the second part, the whole of the estate now owned by her or belonging to her, real or personal, wheresoever situate, without conditions or restrictions of any kind whatsoever, and to appoint in said will the party of the second part, as her executrix without bonds. The party of the first part hereby further agrees not to revoke said will or any of its provisions or to change or modify the same, in any respect without the written consent of the party of the second part first had and obtained."

The agreement further provided that plaintiff was thereupon and thereafter entitled to the use and possession of all of Constance Roy's property and the income thereof, but was to "assume, pay and discharge for the account of the party of the first part [Constance Roy], all charges, taxes, assessments, insurance premiums and all costs and expenses of keeping any and all of the property of the party of the first part in good and tenable condition and repair. \* \* \*" Constance Roy, however, by further provisions of the agreement, reserved the right to "rescind this contract and revoke said will or any of its or their provisions \* \* \* upon a substantial violation" thereof by the plaintiff, who, upon such rescission, so the agreement provided, should be entitled to the reasonable value of the services, etc., rendered Constance Roy. The agreement further provided that it was "conclusively admitted and established as a fact by the party of the first part that the damages which shall result to the party of the second part upon a violation of the terms of this agreement, or by a revo-

cation of said will, or any part thereof by the party of the first part, without cause or without the written consent of the party of the second part, shall not be capable of pecuniary compensation and that in consequence, the party of the second part shall, in said event, be entitled to relief in equity upon the death of the party of the first part, and the estate of the party of the first part shall thereupon be impressed with a trust in favor of the party of the second part to the extent of securing to her, all and singular, all benefits contemplated by this agreement." The agreement was recorded October 26, 1914, and thereupon Constance Roy went to live with plaintiff and executed her will and a power of attorney to plaintiff pursuant to the terms of the agreement.

About April 22, 1915, Constance Roy, against the will and without the consent of the plaintiff, left plaintiff's home and refused to live with or be cared for by plaintiff, although plaintiff at all times since the execution of the agreement and until the death of Constance Roy was ready, able, and willing to perform all the terms of the agreement, and offered so to do. About April 22, 1915, Constance Roy gave to defendant, Rosa L. Pos, without consideration, the sum of about \$1,000, which was part of the money owned by Constance Roy at the date of her agreement with plaintiff. On April 29, 1915, Constance Roy revoked the power of attorney to plaintiff, and since said date plaintiff has been unable to collect any of the rentals of said real property, which have been received by defendant Rosa L. Pos, who gave no consideration therefor. Defendants at all times subsequent to March 1, 1915, had notice and actual knowledge of the provisions of plaintiff's agreement. On June 25, 1915, Constance Roy executed to defendant Rosa L. Pos a mortgage on her real property, which purported to secure the payment of the sum of \$3,000, but this mortgage was executed with intent to defraud plaintiff, and the only consideration therefor if any, was the care and support of Constance Roy by defendant Rosa L. Pos. On March 26, 1916, 10 days before her death, Constance Roy made another will leaving her entire estate to defendant Rosa L. Pos, and appointing the latter's husband, defendant Bernard Pos, executor. This will was admitted to probate and administration is pending.

The complaint prays for a decree to the effect that all of the property owned by said Constance Roy on October 24, 1914, or at the date of her death is held by defendants in trust for plaintiff, and that plaintiff is the owner thereof, subject only to administration; that defendants be directed to convey all of said property to plaintiff, together with the rents from May 15, 1915; that the mortgage to defendant Rosa L. Pos be decreed

fraudulent and void as to plaintiff; and that defendant Bernard Pos, as the executor of the last will of Constance Roy, deceased, be enjoined and restrained from delivering to Rosa L. Pos any portion of the property belonging to said estate or the rents, issues, and profits thereof, and be directed to deliver said property to plaintiff.

It is earnestly urged by counsel for plaintiff that the cases which have heretofore arisen in this state for the specific performance of agreements to devise interests in land furnish no tests for the solution of the problem here presented. In this behalf it is argued that the agreements sued upon in the former cases were parol and therefore prima facie within the statute of frauds (Browne on Statute of Frauds, § 283), and that the court in those cases directed the discussion merely to the nature of the part performance necessary to relieve the contract from the operation of the statute, and that, in this connection, the tests of irremediable change of position and the rendition of services incapable of pecuniary estimation were the controlling and determining factors of the decision in each instance. Because of this it is insisted that the cases referred to have no application to the case at bar, where the agreement is not within the statute of frauds. While there is probably no case in this state for the specific performance of a contract to make a will which is directly in point with the pleaded facts of the instant case, nevertheless the principle which must control in the decision of the case now before the court is one which has long been established in this state in actions for the specific performance of contracts for the conveyance of real property.

[1-3] "It is a familiar rule that contracts for personal services, where the full performance rests upon the personal will of the contracting party, will not be specifically enforced against him. It is also generally true that they will not be enforced where the plaintiff is the one who has contracted to render the services and there has been no full performance on his part, since mutuality in the equitable remedy is then lacking." Pomeroy's Equity Jurisprudence, vol. 5, § 2181. That this is the law in California is evidenced by section 3386 and section 3390, subdivision 1, of the Civil Code. It is apparent from the complaint that the plaintiff in this case has not in fact fully performed the services agreed upon.

[4, 5] Neither do the services alleged to have been actually rendered by plaintiff amount to substantial performance on her part, for it appears from the complaint that Constance Roy lived about a year and a half after the agreement was made, and plaintiff's services covered only the first six months of this period. While the length of life of the promisor after the making of an agreement such as the one in suit here is

immaterial, providing the agreement was fair in its inception (*Howe v. Watson*, 179 Mass. 30, 60 N. E. 415), nevertheless it is a self-evident proposition that the proportion of the remaining lifetime during which the services were rendered is a material factor in determining whether or not there has been a substantial performance of the agreement.

[6] Counsel for plaintiff, however, advance the theory that, since plaintiff was able and willing and offered to perform, but was prevented from fully performing by the decedent herself, want of performance is excused, and plaintiff's acts were tantamount to full performance. Sections 1511, 1512, Civ. Code. In support of this contention counsel cite the case of *Alexander v. Lewes*, 104 Wash. 32, 175 Pac. 572. In that action, although the personal services had not been fully performed by plaintiff, a written agreement similar to the one in the instant case was specifically enforced upon the theory that—

"One who is willing to act upon the contract, but who is prevented by the voluntary repudiation of the other party, is in the same legal position as one who has substantially complied before repudiation, goes without saying."

Whatever may be the law in other jurisdictions, the rule in California was definitely defined in the early case of *Cooper v. Pena*, 21 Cal. 404, and since then consistently adhered to in this state. In the case of *Moore v. Tuohy*, 142 Cal. 342, 75 Pac. 896, a suit for the specific performance of an agreement to convey land in return for personal services, this court said:

"It seems to be the theory on the part of the plaintiff that, because the defendant failed in his action to rescind the contract in question, and as he refuses to permit the plaintiff to proceed thereunder, and practically has repudiated the contract, therefore plaintiff has a right to have said contract specifically performed. This, however, does not follow. One party to a contract may refuse to carry it out, and thereby cause damage to the other party; still the nature of the contract and the conditions may be such that the contract cannot be specifically enforced. \* \* \* The defendant, within less than a month, having repudiated the contract, and refused to carry it out on his part, as alleged, may have caused the plaintiff damages, as was stated in the original complaint herein filed, and for which he may have a right of action. But an action for specific performance cannot be maintained unless the plaintiff has performed, or can be compelled to perform, on his part." *Wakeham v. Barker*, 83 Cal. 46, 49, 22 Pac. 1131; *Pacific, etc., Ry. Co. v. Campbell-Johnston*, 153 Cal. 106, 94 Pac. 623; Civ. Code, § 3392.

While the agreements in the cases cited were for conveyances inter vivos, the rule therein adopted is not, for that reason, inapplicable to the case at bar. Plaintiff could not, during the lifetime of Constance Roy, have been compelled to perform, nor could

Constance Roy have been compelled to accept plaintiff's performance. Had plaintiff actually performed the services called for by the contract up to the time of the death of Constance Roy, she would probably now be in a position to ask specific performance.

If, on the other hand, plaintiff had so altered her position before the breach of the agreement that to deny specific performance would operate as a fraud upon her, equity would probably regard her part performance as a substantial performance, and grant the relief prayed for. While the excessive weight and inordinately large appetite of Constance Roy may have rendered her care "costly, burdensome, and wearisome," still it does not appear that plaintiff altered her position even to the extent of changing her residence or giving up her position in life in order to care for Constance Roy; nor does it appear that plaintiff, in reliance upon the agreement, expended any considerable amount of labor or money of her own upon the property agreed to be devised to her. The allegations of the complaint do not disclose any injustice to plaintiff such as amounts to a fraud within the purview of equity, and nothing was undertaken or done by plaintiff pursuant to the provisions of the agreement in suit for which she cannot be adequately compensated in an action for damages.

[7] We turn now to a consideration of the claim of plaintiff that a judgment in an action at law for damages would be unavailing for the reason that "the real estate—virtually the sole fund for the payment of such judgment—would be subject to extinction by a foreclosure of the mortgage." This necessitates a consideration of the amount of damages to which plaintiff would be entitled in an action at law for damages. Where a creditor under a written contract of the nature of that now in suit does not sue in quantum meruit, but waits until a final breach of the contract and sues for damages, the measure of damages is the value of the property agreed to be devised or bequeathed, and not the value of the services rendered. *Morrison v. Land*, 169 Cal. 580, 590, 147 Pac. 259; *Noyes v. Noyes*, 224 Mass. 125, 112 N. E. 850; *Dilger v. McQuade's Estate*, 158 Wis. 328, 148 N. W. 1085; *Day v. Washburn*, 76 N. H. 203, 81 Atl. 474; 40 Cyc. 1073. Section 1512 of the Civil Code provides:

"If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties."

We are proceeding upon the assumption that plaintiff is able to prove the allegations of her complaint, and that performance on her part was prevented solely by the act of decedent. From what has been said it is clear that, in an action at law for damages,

the measure of damages to which plaintiff would be entitled would include the value of the property agreed to be bequeathed, subject to administration. From this amount, in the instant case, in addition to the debts and expenses of administration, there must also be deducted the reasonable cost of caring for and maintaining the deceased and the reasonable expenditures upon her property from the time of the breach of the agreement, unless, of course, these expenses have been paid from the property of deceased or have been charged as debts against the estate, as well as the amount which plaintiff earned, or could have earned, by devoting her services to others than the decedent.

[8] If, therefore, the mortgage to defendant Rosa L. Pos is a valid charge against the estate, it must be deducted from the value of the estate in ascertaining the amount of damages to which plaintiff is entitled and plaintiff cannot be heard to complain. On the other hand, while decedent retained the ownership of the property during her lifetime, her right to the control of the property was subject to the qualification that any disposition of the property to persons with knowledge of plaintiff's agreement and for the sole purpose of defeating the benefits to be derived by plaintiff from the agreement would be "a fraud in law, or a constructive fraud upon the agreement." *Rogers v. Schlotterback*, 167 Cal. 35, 48, 138 Pac. 728, 733; *Van Duyne v. Vreeland*, 12 N. J. Eq. 142.

[9] If such is the case here, plaintiff does not thereby become entitled to specific performance of her agreement, but she may have the right to have the mortgage set aside. The complaint alleges that the mortgage was executed to defendant Rosa L. Pos, defendants having at the time full knowledge and notice of plaintiff's agreement, and neither Constance Roy nor her estate has ever received the \$3,000 or any money or property whatever in respect of said mortgage; that the only consideration for said mortgage, if any existed at all, was the care and support of said Constance Roy by defendant Rosa L. Pos; that the mortgage was executed in pursuance of the plan and agreement between the parties of evading and defeating the operation of plaintiff's agreement with said Constance Roy, and with the intention to defraud plaintiff, and in the attempt to withdraw and remove the real property from the effect and operation of plaintiff's agreement. If the support of Constance Roy was the consideration for the mortgage, and such support was not so totally inadequate a consideration as to amount to fraud, the mortgage is a valid charge against the estate. Even were the allegations of the complaint upon this phase of the case sufficient in themselves to state a cause of action for

setting aside the mortgage, still the fact remains that such a cause of action would necessarily be separate and distinct from the action for specific performance, and it was not separately stated in this case. Plaintiff having failed to amend in this particular, the complaint cannot, as it stands, be said to state a cause of action for the setting aside of the mortgage, nor can it be held that the complaint was primarily intended to or did do anything more than attempt to state a cause of action for specific performance. Inasmuch as plaintiff has been held not to be entitled to specific performance, she cannot be held to be entitled, under the pleadings presented upon this appeal, to a decree setting aside the mortgage. *Sharp v. Miller*, 54 Cal. 329.

The demurrers were properly sustained, and the judgment is therefore affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LAWLOR, J.; WILBUR, J.

(47 Cal. App. 300)

**MILLS v. SAN DIEGO CONSERVATORY OF MUSIC et al.** (Civ. 3194; L. A. 5662.)

(District Court of Appeal, Second District, Division 2, California. May 1, 1920. Opinion of Supreme Court, In Bank, Denying Hearing, June 28, 1920.)

**1. Trade-marks and trade-names §92—Complaint for unfair competition stated cause of action.**

A complaint in an action to enjoin the use of a name, alleging that the name was adopted with the intent and for the purpose of defrauding plaintiff and appropriating for defendants' use and benefit the good will of plaintiff's business, etc., held sufficient as against a general demurrer.

**2. Trade-marks and trade-names §79—Courts will enjoin use of name.**

Courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of compelling competitors to use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field.

**3. Trade-marks and trade-names §69—Fraudulent intent in using the same name inferable from facts.**

In an action to enjoin the use of a trade-name, fraudulent intent and deceit by the defendants practiced upon the plaintiff held fairly inferable from the facts.

**4. Damages §5—"General damages" defined.**

"General damages" are such as the law implies and presumes to have accrued from the wrong complained of and are such as naturally and necessarily result from the wrong.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Damages.]

**5. Damages §142—Special damages must be pleaded.**

Where special damages are not claimed, a party can recover only such damages as are not only the natural and proximate result, but also the necessary result of the act complained of.

**6. Trade-marks and trade-names §92—Damages shown special and not general, requiring pleading.**

In an action to enjoin use of a trade-name of a school of music, where no special damages were alleged, evidence that a certain music company refused to carry out a contemplated scheme it had agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music was inadmissible to show damages; such damage being special, requiring that it be alleged.

**7. Appeal and error §1039(13) — Proof of special damages not pleaded reversible error.**

The admission of evidence over objection as to special damages not specially pleaded will result in a reversal, where it cannot be ascertained whether such damages were allowed.

**On Hearing in Supreme Court.**

**8. Trade-marks and trade-names §92—Proof of special damages not alleged erroneously admitted.**

In an action to enjoin use of a trade-name and for damages, where the alleged damage was confined to a loss of patronage in that the use of plaintiff's name by defendants had actually misled the public to patronize defendants in the belief that they were patronizing the plaintiff, and that the reputation of plaintiff's business had been greatly injured and damaged, it was error to permit introduction of evidence that a certain music company had refused to carry out a contemplated scheme which had been agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music; such evidence relating to an entirely different matter than the special damage alleged.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Chesley Mills, doing business under the name and style of the San Diego Conservatory of Music, against the San Diego Conservatory of Music, a corporation, and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed in the District Court of Appeal, and hearing denied in the Supreme Court.

Henry C. Ryan and F. F. Grant, both of San Diego, for appellants.

Sweet, Stearns & Forward and Stephen Connell, all of San Diego, for respondents.

THOMAS, J. This is an action for an injunction against the defendants, praying that the latter be enjoined from using the name "San Diego Conservatory of Music," and from conducting business under that name "or using the same in any manner whatsoever,"

asking for damages and for general relief. The relief is sought on the ground of unfair dealing on the part of the defendants.

The complaint, in apt and proper allegations, set forth the acts complained of and because of which plaintiff seeks relief. A general demurrer was interposed to the complaint, and was by the court overruled. Defendants, by their answer, deny practically all the material allegations of the complaint, admitting, however, that defendants other than the corporation organized the defendant corporation, adopting said name therefor "for the purpose of engaging in the same character and line of business claimed to be carried on by plaintiff herein," the location of their business as alleged by plaintiff, and the publishing of certain advertisements; averring that only for the injunctive order of the court they would have continued to carry on such business. The court found for the plaintiff on all the issues, and judgment was entered accordingly. There was a motion for new trial, which was denied. The appeal is from the judgment.

We have read the entire record. From the record it appears that the plaintiff, Prof. Chesley Mills, during the year 1915 established a school devoted to the art of music in all its branches, including instruction in the playing of the piano, organ, violin, flute, cornet, mandolin, ukulele, and other orchestral instruments together with voice culture, platform art, and dramatic training in general, and for the operation and management of a conservatory of music for such instruction and teaching, and the holding of public and private musicals and entertainments incident thereto, as well as the employment of teachers necessary to conduct and carry on such business; that at the time said business was so established the plaintiff adopted the name of "San Diego Conservatory of Music," under which name, since the establishment of said business as aforesaid, he has carried on and conducted the same at 1630 Fifth street, in the city of San Diego; and that under said name plaintiff built up a large business, widely and favorably known, as well as a valuable reputation, etc.; that in September, 1917, the defendants, other than the corporation, organized the defendant corporation, under the laws of this state, under the identical name adopted by plaintiff at the time and place aforesaid, and established the office of said corporation and studio at No. 1434 Fifth street, in San Diego, "within 800 feet of plaintiff's said place of business, on the same side of the street," from which place and under which name defendants caused certain advertisements to be published; and that such business was so transacted by defendants from that time until restrained from so doing by the court. It is further alleged in the complaint that all this was done "with the intent and for the purpose

of defrauding plaintiff and appropriating for their own use and benefit the good will of plaintiff's business and deluding and deceiving plaintiff's customers and the public in general into the belief that the business of plaintiff conducted at the aforesaid place was being conducted by defendants, \* \* \* and that the same has actually misled many of them to patronize defendants in the belief that they, the said persons, are patronizing the plaintiff," all to plaintiff's damage, etc.

Appellants enumerate eight assignments of error, which may be reduced to two: Errors of law occurring during the trial, and insufficiency of the evidence to support certain findings.

[1] As to the first point urged, it is claimed that the court erred in overruling defendants' demurrer to plaintiff's complaint. With this we cannot agree. We think the complaint amply sufficient as against the general demurrer.

The next point urged is that the evidence does not support findings Nos. 4, 5, and 6. These findings, in full, are as follows:

"(4) That said defendants, B. Roscoe Schryock, Florence M. Young, Mary Barnum Kessler, Edna D. Anderson, J. Wm. Brown, and Mrs. L. R. Kirby, Sr., caused the name of San Diego Conservatory of Music to be adopted as the name of said defendants' corporation with the intent and with the express purpose of defrauding plaintiff and appropriating for their own use and benefit the good will of plaintiff's business and deluding and deceiving plaintiff's customers and the public in general into the belief that the business of plaintiff conducted at 1630 Fifth street in said city as aforesaid was conducted by said defendants, and that each and all of the said notices or advertisements placed by defendants in said newspapers as aforesaid were caused to be placed therein for the same purpose and with the same intent, and that if said defendants are permitted to carry on said business at said No. 1434 Fifth street or elsewhere under said corporate name of San Diego Conservatory of Music that the prospective applicants for instruction and customers of plaintiff and the public in general will at all times be deceived, misled and defrauded into believing that the place where defendants are so conducting business is plaintiff's place of business, all of which is and will be to the injury and damage of plaintiff and to the public in general.

"(5) That unless restrained from so doing by this court, the defendants will continue and proceed to carry on the said business under the said name of San Diego Conservatory of Music for and with the express purpose of deceiving plaintiff's customers and the public in general into the belief that plaintiff's business conducted at its place aforesaid is defendants' business; and that the name adopted by said defendants, to wit, San Diego Conservatory of Music, was at all times calculated and intended to receive the prospective applicants for instruction at plaintiff's said school or business and the patrons and customers thereof together with the public in general; that by reason of

each and all of the acts of said defendants herein so done or caused to be done by them and each of them, plaintiff has been injured and damaged in the sum of \$100.

"(6) That the adoption of said name of defendant corporation, San Diego Conservatory of Music, was made with the intention or purpose of defrauding plaintiff and deceiving or misleading the public and to injure plaintiff, and that each and all of the acts of said defendants have created much confusion in plaintiff's said business. Plaintiff has fully complied with all the provisions of sections 2466-2468 of the Civil Code of the State of California relating to the use of fictitious names. That plaintiff having had the prior and exclusive right to said name of San Diego Conservatory of Music, the said defendants herein and neither of them have any right to use said name of 'San Diego Conservatory of Music' for the reason that the use of said name by defendants is of damage to plaintiff and his business and is calculated to mislead and deceive as hereinbefore set forth."

[2, 3] There is no merit whatever in the "point" that the evidence does not support these findings. Indeed, by the evidence of Mr. Schryock, director and head of the violin and piano department of the defendant corporation, it was shown that he knew, at the time of the incorporation of the defendant company, that plaintiff was conducting a business under that name, and instead of being open and aboveboard in his testimony, as one would be if acting wholly devoid of any ulterior motive, we see all through his testimony evidence of evasiveness and elusiveness, which, we think, amply justified the trial court in its observation that in its opinion this was a case of "rank fraud" on the part of the defendants. As we have already seen, plaintiff was first in the field doing business as above set forth. We think "that in the interest of fair commercial dealing courts of equity, where one has been first in the field doing business under a given name, will protect that person to the extent of making competitors to use reasonable precautions to prevent deceit and fraud upon the public and upon the business first in the field." *Spieker v. Lash*, 102 Cal. 38, 36 Pac. 362; *Dunston v. Los Angeles Van, etc., Co.*, 165 Cal. 89, 131 Pac. 115; *Temple v. Gordon*, 31 Cal. App. 127, 159 Pac. 983. We think, too, that the fraudulent intent, as well as the deceit and fraud which defendants practiced upon the plaintiff here, are fairly inferable from the situation of the parties and the defendants' acts.

[4, 5] It is also urged by defendants, in support of this same assignment, that if any damage was done to plaintiff by reason of the fraudulent acts of the defendants, "that it was a special damage and not a general damage," and by reason of that fact that the complaint did not set forth the elements of the special damage incurred by the plaintiff. Hence, it is argued, no damages can be recovered against the defendants herein.

There is merit in this contention. "General damages are such as the law implies and presumes to have accrued from the wrong complained of. They are such as naturally and necessarily result from the wrong, although this does not mean that they must inevitably and always result from a given wrong. \* \* \* The subject of general and special damages as contradistinguished is principally a question of pleading, the general rule being that, where special damages are not claimed, a party can recover only such damages as are not only the natural and proximate result, but also the necessary result of the act complained of." 17 C. J. 712, § 20.

[6] The defendants were obliged to conduct themselves and to carry on their business in such a way as to be not unfairly or unjustly detrimental to plaintiff. Because of their admitted actions in this matter they breached that obligation in this, that because of defendants' adoption in use of the same name as that under which plaintiff had been and was at the time of said breach conducting his business, the Gray-Maw Music Company, a corporation, refused to carry out a contemplated scheme which had been agreed upon to buy a certain number of scholarships in plaintiff's conservatory of music. It is undoubtedly true that such injury might be said to follow naturally as a result of the defendants' said actions. We do not think, however, that it can be successfully maintained that they were such damages as necessarily would follow or result therefrom.

[7] It follows, we think, that because of the absence of a pleading setting forth the special damages referred to, the court erred in overruling defendants' objection to the reception of evidence in support of the item of \$100 damages found by the court to have been actually suffered by plaintiff as aforesaid. The purpose of the rule requiring that such damages must be specially pleaded is to advise the defendant of the case he is expected to meet, and thus to prevent surprise at the trial. And where the admission of evidence as to special damages not specially pleaded will result in a reversal where it cannot be ascertained whether any such damages were allowed, it is prejudicial error to receive such evidence, in the absence of such a pleading, over defendants' objection. 8 R. C. L. § 157; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; *Terrace W. Co. v. San Antonio, etc., Co.*, 1 Cal. App. 511, 82 Pac. 562; *Morris v. Allen*, 17 Cal. App. 684, 121 Pac. 690. It follows therefore that there is no legal evidence to support the finding as to this item of \$100.

The judgment, in so far as it awards damages to the plaintiff, is reversed. In all other respects it is affirmed.

I concur: FINLAYSON, P. J.



SLOANE, J. I concur in the decision, but not in all the conclusions of the majority opinion.

Unless the trial court was justified in finding that the defendants were guilty of fraudulent attempt to pirate the business and patronage of the plaintiff, from the mere fact that they attempted to appropriate to their own use the trade-name under which plaintiff was doing business, I fail to see wherein the findings are supported by the evidence.

That there was a deliberate plan and purpose of the defendant Schryock to deprive the plaintiff of the use and benefit of the name "San Diego Conservatory of Music," and, in so far as possible, by incorporating his own business under the same name, obtain the exclusive use of such name, I think there is no doubt. But I fail to find any evidence in the record that he intended or attempted or used any means calculated to deceive the public or patrons of the plaintiff into patronizing his business under the belief that they were patronizing the plaintiff, other than by the bare use of the same trade-name. And there is certainly no evidence, if such was his purpose, that he succeeded in doing this with a single individual. The only publicity given the defendants' business after incorporating under the same name, "San Diego Conservatory of Music," so far as appears in evidence, was certain advertisements in the San Diego papers in which he announces the "San Diego Conservatory of Music (Incorporated)," with the name of "B. Roscoe Schryock, Director," displayed and emphasized in black-faced type. This use and display of defendant Schryock's name is calculated to distinguish his conservatory of music from the one which it is claimed owes its identity and standing to the name and personality of Chesley Mills, the plaintiff in this action. From the obvious attitude of these two rival musicians towards each other, it is probable that the last thing either of them would desire would be to have any of their patrons think he was serving the other's brand of music. If the defendant Schryock had located his home and business in the immediate vicinity of the plaintiff's school of music for the first time in connection with the incorporating under the same name, it might be argued from that circumstance that he chose the location with a view to confusing the public as to the identity of the two schools; but the record discloses that Schryock had been on the ground and teaching music there nearly, if not quite, as long as had plaintiff, and in the neighborhood of two years before he incorporated under the same name that plaintiff was using.

It seems clear from the settled rule in this state that the mere appropriation of a geographical name which has previously been adopted and is in use by a rival in business affords no ground of action unless accom-

panied by acts of unfair competition calculated to deceive the public into patronizing the usurping concern under a mistake as to identity. The name "San Diego Conservatory of Music" is admittedly not one that is subject to exclusive appropriation as a trade-name, and the rule applicable to such trade designations is laid down in the leading case of *Weinstock, Lubin & Co. v. Marks*, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, in the following words of the syllabus:

"Although there can be no property right in a trade-name which is not the subject of a trade-mark, yet it is a fraud on a person who has established a trade and carried it on under a given name that some other person should use the same name \* \* \* in such a way as to induce persons to deal with him in the belief that they are dealing with one who has given a reputation to the name."

As is said in *Banzhaf v. Chase*, 150 Cal. 180, 88 Pac. 704:

"The gist of the action is not the appropriation and use of another's trade-mark, but is based upon the fraudulent injury to and appropriation of another's trade."

If in this case the defendants' acts were confined to the mere appropriation of the trade-names used by plaintiff, without acts calculated to mislead those desiring to patronize the plaintiff into patronizing the defendant through a mistake in identity, no cause of action is shown.

I am not sufficiently satisfied, however, to justify dissenting from a majority of the court that the mere fact of the appropriation of the name of plaintiff's business to a rival business, to be carried on in the same immediate vicinity may not in itself sufficiently establish a condition calculated to mislead plaintiff's patrons, and justify a finding of the trial court to that effect, beyond reversal on appeal for want of evidence. The attempt to deprive plaintiff of the benefit of the trade-name under which in good faith he had established his business was morally indefensible, and I do not know that the appellate court should go out of its way to strain a legal point in defendants' favor.

I cannot, however, agree with the conclusions of the opinion that there is evidence of intention on the part of defendants to mislead the public as to the separate identity of the two music concerns, or that they have been guilty of anything more than a constructive fraud.

Opinion of Supreme Court, In Bank, Denying Hearing.

PER CURIAM. [8] In denying the petition for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, it seems

proper to note that by the complaint the alleged damage was confined to loss of patronage in that the use of its name by defendants has actually misled and does still mislead the public to patronize defendants in the belief that they are patronizing the plaintiff, and that the reputation of the plaintiff's business has been greatly injured and damaged. The only evidence in fact introduced on the subject of actual damage related to an entirely different matter. As the pleadings stood the evidence was inadmissible, and the finding of actual damage is without support in the evidence.

The petition for hearing in this court is denied.

All concur.

(48 Cal. App. 53)

**GASCHLIN v. SIERRA.** (Civ. 3322.)

(District Court of Appeal, First District, Division 1, California. June 3, 1920. Hearing Denied by Supreme Court, Aug. 2, 1920.)

**1. Trial ¶165—Giving fair intendment on motion for nonsuit does not prevent weighing of evidence.**

The rule that the court must, on motion for nonsuit, indulge every fair intendment that can be drawn from plaintiff's testimony, does not mean such court must surrender its right to estimate the weight and sufficiency of the evidence as a whole, or to determine whether the evidence is sufficient to support plaintiff's case.

**2. Wills ¶93—Evidence held to show grantor intended testamentary disposition by deed.**

In a grantee's action to quiet title, evidence held to show that grantor intended to make a testamentary disposition by deed.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Fred G. Gaschlin against Celso T. Sierra, individually and as executor of the will of Karl Theodore Schuppert, deceased. From a judgment of nonsuit, plaintiff appeals. Affirmed.

August L. Fournier, of San Francisco, for appellant.

Wm. T. Satterwhite, of Oakland, and J. E. Harper, of San Francisco, for respondent.

**RICHARDS, J.** This is an appeal from a judgment in favor of the defendant in person and as executor of the will of Karl Theodore Schuppert, deceased, in an action by the plaintiff to quiet title to a certain piece of real estate against said defendant and said estate. The court granted a motion for nonsuit at the close of the plaintiff's case, basing its action in doing so upon its conclusion from the plaintiff's testimony that the deed from said Karl Theodore Schuppert to the plaintiff, on which he relied to establish

his ownership of said property, had never been delivered to him. The facts of the case, as shown by the plaintiff's testimony, may be briefly summarized as follows:

Karl T. Schuppert had for some years prior to December 6, 1911, been, and on that date was, the owner of a house and lot on Waller street in San Francisco. He and the plaintiff had been on friendly terms for a number of years, and the latter had done for the former, who was the older man, many little kindnesses. On the 6th day of December, 1911, Karl T. Schuppert, taking the plaintiff with him, went to the office of a scrivener, and there caused a grant, bargain, and sale deed of said premises to be made to the plaintiff as the grantee thereof, which deed, when drawn, he signed and acknowledged before a notary public. When this had been done, Schuppert, taking the deed, went with the plaintiff to the offices of the Merchants' National Safe Deposit Company where Schuppert had a safe deposit box. When they arrived there, Schuppert sat down and, taking the deed from his pocket handed it to the plaintiff, saying:

"This is what the old man has done for you. This is yours."

The plaintiff read the deed through and handed it back to Schuppert, who placed it in his safe deposit box. Schuppert then caused the plaintiff to be entitled to access to the box, and he received a key to it. At some time during this episode Schuppert asked the plaintiff to give him \$10, which he did, and in this connection it may be noted that the consideration named in the conveyance was \$10. The parties then left the safe deposit vaults and went to the premises on Waller street, where the plaintiff was residing, and when they arrived there Schuppert said to him:

"Fred, remember what I tell you. When I am gone, when I am passed out, take that deed and have it recorded."

Thereafter, and up to the time of his death, Schuppert remained in the full possession and control of the premises in question, collecting or causing to be collected its rents, and applying the same to his own uses. The plaintiff never saw the deed again, except upon one occasion, in the month of October, 1913, when Schuppert, being ill and in bed, requested the plaintiff to go to the safe deposit vaults and get the deed and bring it to him. This the plaintiff did, and left the deed with Schuppert. A few days later, at the latter's request, he took the deed again to the safe deposit vaults, and left it there. On June 14, 1917, Schuppert died, and the defendant Celso T. Sierra was appointed executor of his last will and testament. When the safe deposit box was opened after the death of Schuppert, it was found to be empty, and

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there is evidence to the effect that at some time between October, 1915, and the date of Schuppert's death he had sent for and destroyed the deed; at any rate, it was never found nor produced at the trial of the action.

The trial court held these facts insufficient to show a delivery of said deed, and the only question before this court is as to whether the trial court was in error in so ruling upon the motion for nonsuit.

[1] It is conceded by the parties hereto that upon a motion for nonsuit every fair intendment that can be drawn from the testimony offered in support of the plaintiff's case is to be indulged in by the trial court in his favor. This does not mean, however, that the trial court, in passing upon a motion for nonsuit, must surrender its right to estimate the weight and sufficiency of the evidence taken as a whole, or to determine whether, giving to such evidence such fair and reasonable intendment, it is sufficient to support the plaintiff's case.

[2] Putting ourselves in the position of the trial judge in this respect, we are unable to arrive at the conclusion that the plaintiff had sufficiently shown a delivery of the deed in question to him with the intent on the part of its grantor to presently convey title to the premises in question. It is true that the grantor had of his own motion caused the deed to be signed and acknowledged by himself, and that he had asked the defendant to give him \$10, the consideration named in the deed, which the defendant had done; but these facts would be insufficient to show a transaction between the parties for the purchase and sale of the premises coincident with the preparation, signing, and acknowledgement of the deed. It is also true that, when the parties arrived at the safe deposit vaults, the grantor handed to the grantee the deed in question, saying:

"This is what the old man has done for you. This is yours."

But evidently the grantor's intent at the time was merely to show the plaintiff the deed as evincing the former's desire and purpose that the plaintiff should at some later time come into the ownership and enjoyment of the property described therein. Evidently, also, the plaintiff himself so understood Schuppert's action, since, after reading the deed, he handed it back to him, and never thereafter until the death of the grantor attempted either to possess himself of said deed

or to exercise any acts of ownership or control over the premises. Further light is shed upon this particular episode by the words of the grantor, when, upon arriving at his home upon the premises, he said to the plaintiff:

"Fred, remember what I tell you. When I am gone, when I am passed out, take that deed and have it recorded."

We think it is plain upon the face of this transaction, taken as a whole that it was the intention of the grantor not to invest the grantee in said deed with the present title and ownership in the premises described therein, but rather to invest the grantee named in said deed with the right to its possession and to the ownership of said premises after the grantor's death, or, in other words, to make a testamentary disposition of the property. A strong light is shed upon this intent by the subsequent action of the grantor in instructing the grantee to go to the safe deposit vaults and get the deed and bring it to him at his home where he was lying ill, and in again a few days later instructing the grantee to return said deed to its place of deposit. The action of both parties upon this occasion indicates clearly that it was not understood by either of them that the grantor in said deed had so far surrendered possession and control over it to the grantee named therein as to constitute such a delivery thereof as would suffice to pass the title to the property.

Upon the trial of the cause, and while testifying in his own behalf, the plaintiff himself made this statement:

"I was to assume possession of the property, to have the benefit of it, when he died, and from that time on I claimed the ownership of it."

This statement on the part of the plaintiff is wholly inconsistent with the idea that it was understood by the parties to the conveyance that their acts at the time of the making of said deed and of its deposit in the safe deposit vaults amounted to such a delivery of the instrument as would invest the grantee with the present title to the premises described therein. We are of the opinion, therefore, that the trial court was not in error in granting the defendant's motion for nonsuit at the close of the plaintiff's case.

This being so, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

(48 Cal. App. 38)

**KEISER v. BUTTE CREEK CONSOL.  
DREDGING CO. et al. (two cases).**  
(Civ. No. 3066.)

(District Court of Appeal, Second District, Division 1. California. June 1, 1920.)

1. Bills and notes  $\S$ 397 — That indorsers were officers of maker corporation does not excuse notice of presentment.

The fact that defendants, indorsers of corporation's notes, were also directors or officers with full knowledge of the corporate affairs and of the failure to pay the note does not excuse lack of notice of presentment and dishonor.

2. Bills and notes  $\S$ 526 — Evidence held insufficient to show waiver of presentment and dishonor.

In an action against a corporation upon its note and against its officers as indorsers, evidence of a statement by one of the parties in the hearing of the others, made to plaintiff, asking him to wait, stating that he was taking no risk, that they were all responsible on the note, held insufficient to show a waiver of notice of presentment and dishonor, of which strict proof is required.

Appeals from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Two actions by E. T. Keiser against the Butte Creek Consolidated Dredging Company and others resulted in judgments for defendants, and separate appeals were taken by the plaintiff and presented upon one record and one set of briefs by stipulation. Affirmed.

Joseph E. Hannon and J. Vincent Hannon, of Los Angeles, for appellant.

Kemp, Mitchell & Silberberg and C. E. Joslin, all of Los Angeles, for respondents.

**JAMES, J.** Separate appeals were taken in the two actions the titles of which appear first above. As precisely the same questions of law were involved, the parties stipulated to present both cases upon one record and one set of briefs. The appeals were taken by the plaintiff from a judgment entered in favor of respondents, the latter being indorsers upon two promissory notes executed by the defendant corporation in favor of the plaintiff. All of the respondents except Ira D. McCoy, as well as the plaintiff, were, at the times the two promissory notes were executed, directors of defendant corporation. McCoy was secretary of the same corporation. All of the respondents were at all times familiar with the transactions having to do with the execution of the two notes, and had actual knowledge of the fact that the notes were not paid at maturity. It is admitted that no formal presentment and demand for payment of the obligations was made upon

the makers of the notes, and no notice given to the indorsers of dishonor thereof.

[1] The first point made on behalf of appellant is that the fact that the directors and McCoy the secretary (the indorsers) at all times had full knowledge of the fact that the corporation had not satisfied its obligations to the plaintiff, relieved him of the duty of making demand upon the payor and giving notice of dishonor to the indorsers. Appellant cites to this point a decision from another state which supports that view, the case being *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653. Respondents make question with the soundness of that decision, claiming that its reasoning is illogical, and refer to the case of *Hudson Furniture Co. v. Harding*, 70 Fed. 468, 17 C. C. A. 208, 30 L. R. A. 513. In the latter decision the federal court distinctly decides the question the other way, and refers pointedly to *Hull v. Myers*, with this observation:

"The case of *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653, is urged upon our attention in support of this contention. The decision of the court upon this question is bottomed, as we think, upon incorrect reasoning, and is without the support of authority."

Upon an examination of the two decisions, we prefer the determination as made in the federal case as representing a more careful consideration of the question and better logic in its reason. Respondents also cite *McDonald v. Luchenbach*, 170 Fed. 434, 95 C. C. A. 604, and *Houser v. Fayssoux et al.*, 168 N. C. 1, 83 S. E. 692, Ann. Cas. 1917B, 835, both of which give support to the proposition that the fact that an indorser on a note of a corporation is also a director, with full knowledge of the corporate affairs, does not excuse the lack of notice of presentment and dishonor. In this case it was shown that the various indebtednesses of the defendant corporation, including that to the plaintiff, were discussed at different meetings of the board of directors, both before and after the particular obligation sued upon here became due. In so far as those discussions showed familiarity of the indorsers with the true situation as to nonpayment of the obligations, they add nothing to the statement of fact already made herein and conceded by respondents, that the indorsers at all times were possessed of such knowledge.

[2] Appellant further argues, however, that after the maturity of the two notes and at a meeting of the directors at which all of the indorsers were present, a statement was made by one of the directors which was in itself of potent effect in establishing a waiver of the notice to the indorsers. This statement was testified by plaintiff to have been made by respondent Hubbard, in which Hubbard said to the plaintiff:

"'Can't you just wait? You are taking no risk whatever; we are all responsible on that note—on those notes.' Nobody said anything to the contrary. That statement was made in the presence and hearing of each of the parties whose names appear on the back of the notes."

The secretary and several of the directors testified that they were present at the meeting, and did not hear any one request the plaintiff to forbear payment of the note. This testimony created a conflict as to a portion at least of the statement made by plaintiff attributing the words quoted to Hubbard. It left lacking categorical contradiction of the words, "You are taking no risk whatever; we are all responsible on that note—on those notes." There is merit in the argument of respondents that the court in drawing its deductions had the right to conclude that no part of the statement attributed to Hubbard was made. However, conceding that the contradiction which in express terms only covered a portion of the Hubbard statement left without denial the assertion of Hubbard that plaintiff was taking no risk, that "we are all responsible," we do not believe that this expression was of such positive scope as to entitle it to be considered as evidence of a waiver of the presentment and notice of dishonor. Strict proof is required, and statements to bear the import attempted to be attached to those here made must be clear and unequivocal. *Keyes v. Fenstermaker*, 24 Cal. 329. In that case it is said that the law is settled that a promise to pay by an indorser, made after maturity with full knowledge of the payee's neglect to make demand and give notice, must be established by clear and distinct evidence. To the same effect is another case cited by respondents, to wit, *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479.

The points discussed are the principal ones argued upon this appeal. Under the evidence shown, we think that the court was justified in each of the findings made. We conclude also that the rulings upon the admission of evidence were without prejudicial error.

The judgments are affirmed.

We concur: CONREY, P. J.; SHAW, J.

(48 Cal. App. 34)

**HASKETT v. HARTWICK et al.** (Civ. 2936.)

(District Court of Appeal, Second District, Division 1, California. June 1, 1920. Hearing Denied by Supreme Court July 30, 1920.)

**Sales** §52(6)—Evidence held to show plaintiff, and not another, was seller of property.

In an action by conditional seller of automobile to recover possession thereof as against

purchaser and his vendees, evidence held to show that plaintiff, and not another, was the owner and had sold the automobile to defendant purchaser.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by R. C. Haskett against C. B. Hartwick and others. Judgment for defendants, and plaintiff appeals. Reversed.

E. A. Klein, of Bakersfield, for appellant.

E. J. Emmons, of Bakersfield, for respondents.

**JAMES, J.** Plaintiff in this action brought to recover the possession of an automobile was aggrieved by the judgment entered against him; hence this appeal.

Defendant Hartwick had possession of the automobile in question. He attempted to transfer title thereto for a valuable consideration to Berges, and Berges in turn attempted to sell the machine to Swett. Berges and Swett appear as alleged innocent purchasers resisting the claim of Haskett, the plaintiff. In support of his side of the case, plaintiff introduced a conditional-sale contract made between him and Hartwick whereby he agreed to sell and Hartwick agreed to buy the automobile. An initial payment on account was acknowledged in the writing to have been received by Haskett, and monthly installments were provided to be paid until the whole sum agreed upon was satisfied. In the meantime the contract contained provisions reserving title in the vendor and providing that in case of default in payments Haskett might take possession of the property. All of these provisions were the familiar ones usually contained in contracts of that kind. Haskett's testimony further showed that payments as agreed upon had not been made by Hartwick. Plaintiff, learning that Hartwick had attempted to dispose of the machine and that it had passed out of his possession, resting finally in the hands of Swett, brought this action to recover possession or the value of the automobile. The original parties defendant were Hartwick and Swett, Berges having afterwards been permitted to intervene and become a party to the suit. Berges' defense was similar to that of Swett. We do not find that any appearance was made on the part of Hartwick. By the answers and the intervention pleading, issue was made as to the ownership of the automobile being in the plaintiff, and facts were alleged for the purpose of showing that plaintiff was estopped from denying the authority of Hartwick to transfer title to the machine.

The material point in the case is as to whether the evidence sustains the findings of the trial judge. In those findings it was determined that the plaintiff was not the owner or entitled to possession of the automobile; that Hartwick had purchased the property

from a motorcar company in the city of Los Angeles on August 18, 1917; and that said motorcar company was the owner thereof at the time of said sale. The judgment was that plaintiff take nothing, and the defendants Berges and Swett recover their costs. In order to establish ownership in Hartwick, Berges and Swett called a bookkeeper of the Leach Motorcar Company, the original vendor of the machine, who testified that the books of that company showed a transaction had with Hartwick, commencing on August 18th and concluded on the 20th, whereby the company sold to Hartwick the automobile. This bookkeeper spoke only by the authority of the records in his possession, and had no direct part in the claimed transaction had with Hartwick. On the other hand, plaintiff produced a bill of sale of the machine made directly to him by the same motorcar company and dated August 20th. He supplemented that evidence with the sworn testimony that he (the plaintiff) was engaged in a brokerage business in the course of which he purchased automobiles for persons who desired them and made sale of the desired automobiles to such persons upon similar contracts as that which he exhibited and which he testified had been signed by Hartwick; that at about the date of the bill of sale Hartwick had requested that he purchase for him from the Leach Motorcar Company the automobile in question; and that he (the plaintiff) had, after agreeing upon the terms of the contract, made a bargain with the motorcar people and had actually received delivery of the automobile on the premises of the Leach Company, and had then turned it over to Hartwick under the contract already referred to. When his attention was called to the fact that it appeared that Hartwick had had dealings with the Leach Company regarding the same machine, he testified that he knew in fact that Hartwick had had negotiations affecting the same car; that Hartwick had turned in an old automobile on account and had given a check, which check was dishonored for lack of funds; and that the motorcar company had canceled the sale before delivery was made to Hartwick. The testimony of the plaintiff was in no wise contradicted, unless it may be said that the testimony of the bookkeeper of the Leach Company presented a contradiction as to the facts. The case, as we view it upon the evidence, presented no such conflict. Plaintiff produced Hartwick's written contract as to the making of which there was no denial whatsoever. By that contract it appeared that plaintiff had conditionally sold to Hartwick the automobile, reserving title in himself until all payments had been made. No witness was introduced to contradict plaintiff's statement as to the termination of the negotiations between Hartwick and the motorcar company looking to a sale of the

machine to the former. Plaintiff's testimony was, as already noted, that that deal had fallen through because Hartwick's check given in part payment of the price was dishonored. The mere fact that upon the books of the Leach Company there appeared a record of a transaction with Hartwick was not inconsistent at all with the explanation given by plaintiff of that transaction. That the motorcar company did not cancel that record, or make an entry evidencing the nullity of the purported deal with Hartwick, indicates only that such was not their method of bookkeeping or that they had been neglectful in recording the facts showing the termination of the transaction. The evidence did not show facts sufficient to justify the legal conclusion that the plaintiff by any act of his became estopped from asserting his title and right to possession of the automobile as against subsequent purchasers thereof; neither did the court so find.

For the reasons given, it seems quite plain that the determination of the trial court cannot be sustained.

The judgment is reversed.

We concur: CONREY, P. J.; SHAW, J.

(47 Cal. App. 745)

**RICHMOND v. DENNY et al.** (Civ. 3393.)

(District Court of Appeal, First District, Division 1, California. May 26, 1920.)

1. Records  $\S$  17(2,3)—Unless satisfied that destroyed record was as claimed, court may refuse to restore it.

On application to restore a lost or destroyed record in a divorce action, held that under St. 1906 (Ex. Sess.) p. 73, § 2, the trial court, not being fully satisfied that the provision for alimony, alleged to have been part of the original divorce decree, correctly expressed the order made, was justified in refusing to direct the restoration, particularly in view of petitioner's long delay, the application not being made until more than 30 years after the divorce, and also after the death of the petitioner's former husband.

2. Witnesses  $\S$  258—Testimony as to date of action based on record not made by witness inadmissible.

In an action to restore the record of a destroyed divorce judgment, it was not error to refuse to allow a witness to testify as to the date of the action from a record of a title and trust company, which was not made by the witness or under her direction.

3. Evidence  $\S$  320—Testimony based on hearsay properly excluded.

Testimony based on hearsay is properly excluded.

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**4. Witnesses ⇨313—Tests showing that plaintiff had a remarkable memory properly excluded.**

In an action for the restoration of a lost or destroyed record, tests showing that plaintiff had a remarkable memory were properly excluded.

**5. Witnesses ⇨164(2) — Conversation with deceased defendant in proceeding to restore lost record inadmissible.**

In an action to restore the alimony provision of a lost or destroyed record in a divorce action, testimony as to a conversation between plaintiff and her former husband, since deceased, showing that he knew the divorce had been granted and the amount of alimony, etc., was properly excluded.

**6. Appeal and error ⇨1041(2)—Refusal to allow amendments to complaint not prejudicial.**

Where the amended petition sufficiently presented the facts for restoration of a lost or destroyed record, the refusal to allow amendments was not prejudicial.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Eva F. Richmond, formerly Eva F. Denny, against Helen V. Denny, executrix, and others. From the judgment refusing to restore the lost or destroyed record in accordance with plaintiff's application, plaintiff appeals. Affirmed.

Louis P. Dunkley and George F. Owens, both of San Francisco, for appellant.

Jas. P. Sweeney and Frank J. Fontes, both of San Francisco, for respondents.

**WASTE, P. J.** This is an appeal from a judgment, or order, of the trial court refusing to restore a lost or destroyed record, in conformity with appellant's application for restoration of the records in the case of *Eva F. Denny v. Orion O. Denny*, a divorce action instituted by the appellant against her husband, since deceased, in 1884, the record of which was destroyed in the conflagration of April 18, 1906. The court found, in substance and restored, the complaint, the summons, service of which was made and default entered, the findings, and the decree of divorce. It refused to incorporate in the decree an alleged provision granting the plaintiff the sum of \$250 per month as and for permanent alimony, for the maintenance and support of plaintiff alone, commencing September 1, 1884. The restoration of the decree of divorce as presented would have laid the foundation for a judgment in favor of the petitioner, which could have been made the basis of a claim against the estate of the deceased.

The lower court found that—

"In view of the impecunious condition of the defendant [the deceased husband] in said action at the time of said trial, as disclosed by the evidence herein, that no such amount as the sum of \$250 per month was awarded to plaintiff for the support of herself alone; \* \* \* that, at the time of the destruction of said records by fire, the said Eva F. Richmond (formerly Eva F. Denny) was a resident of the city and county of San Francisco; that, in failing to apply for the restoration of said record for more than 32 years since the date of said decree of divorce, and more than 10 years after the destruction of the records herein, and more than 6 months after the date of the death of said Orion O. Denny, the said Eva F. Richmond, formerly Eva F. Denny, was guilty of laches, in allowing an unreasonable length of time to elapse before the filing of said petition herein, thus rendering uncertain and unsatisfactory to the court the testimony offered as to the contents of the proposed record."

[1] The act providing for the restoration of lost or destroyed records provides, in part:

"If, upon such hearing the court shall be satisfied that the statements contained in such written application are true, the court shall make an order reciting what was the substance and effect of such lost, injured, or destroyed judgment." Stats. Ex. Sess. 1906, p. 73, § 2.

While the attorney of record for the plaintiff in the divorce action testified that, to the best of her recollection, the complaint prayed for, and the decree contained, a provision awarding \$250 to the plaintiff as her permanent alimony, the uncontradicted testimony of the plaintiff was that she testified, upon the trial of the divorce action, that her husband had no business or occupation; that his father put him in business in Seattle; that he did not "make good"; that she and her husband were living upon the bounty of defendant's father; that the largest amount that the defendant had ever received from his father, as an allowance, was \$150 per month; and that these facts were true. There was therefore sufficient warrant for the court's action in holding the evidence unsatisfactory, and in refusing to include the alimony provision in the decree as restored, and ample justification for the remark of astonishment of the trial judge, the same one before whom the action was tried some 32 years ago, that he, "having heard that the man was only getting \$150, ordered him to pay \$250."

The lower court, not being fully satisfied from the evidence adduced in support thereof that the provision for alimony, alleged to have been a part of the original decree of divorce correctly expressed the order previously made by it, was justified in refusing to direct the restoration of the record, to the extent of including it. *Kaufman v. Shain*, 111 Cal. 16, 21, 43 Pac. 393, 52 Am. St. Rep. 139. Regardless of the question of the effect

of the long delay in making the application, and the strong inference thereby arising, the failure of the petitioner to satisfy the lower court as to the contents of the destroyed decree was fatal to her cause.

Certain errors complained of by the appellant may be briefly disposed of. The objection that the executrix and executors of the estate of the deceased defendant in the state of Washington were allowed to appear and defend the action was expressly waived in the court below, and no motion was made to strike out their answer, the verification of which, by the attorney for the defendant, complied with the requirements of the Code.

[2-4] It was not error to refuse to allow the witness, Mrs. Faltz, to testify regarding the date of the divorce action from a record of the Title Guaranty & Trust Company, which was not made by the witness, or under her direction. The evidence of the plaintiff that she knew her husband, the defendant, was served with summons in the divorce action in San Francisco was based on hearsay, and was properly excluded. Neither was it error to refuse to permit plaintiff's counsel to show by tests of her recollection that she had a remarkable memory.

[5] The appellant urges as one of the grounds of her appeal that the court erred in refusing to allow the plaintiff to testify as to conversations had by her with the defendant subsequent to the divorce action, for the purpose of showing that he was served personally in the city and county of San Francisco, that he knew a divorce had been granted, and that he knew the amount of the permanent maintenance, and the other facts contained in the decree of divorce. On this ground the evidence was immaterial in a proceeding to restore the lost record, and was properly excluded, regardless of the other reasons urged by respondents in their objections, and which seem to have been favored by the lower court. The claim that the rejected testimony would have had some bearing on the matter of laches of the petitioner appears to be an afterthought. Such contention was not made in the lower court.

[6] The alleged facts as to the contents of the destroyed documents were fairly presented by the amended petition for the restoration, and the action of the court in not permitting certain minor amendments was not prejudicial to the rights of the petitioner. The motion for a new trial was properly denied. No statutory provision has been called to our attention permitting a retrial of the limited, and special, proceedings provided for the restoration of lost or destroyed records.

The order is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

(47 Cal. App. 533)

**TITLE INS. & TRUST CO. v. GOULD.**  
(Civ. 3310; L. A. 6176.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1920. Opinion of Supreme Court in Bank Denying Hearing, July 16, 1920.)

1. Abatement and revival  $\Leftrightarrow$ 75(1)—Summons on original complaint need not be served on representative of deceased defendant after supplemental complaint showing death.

Where defendant died pending action, and supplemental complaint was filed, in which the substance of the original complaint was incorporated, together with appropriate allegations showing the death of the defendant, the appointment of the executor, and presentation of the claim, it was not necessary to serve the executor with the summons on the original complaint; the supplemental complaint stating a complete cause of action in itself, under Code Civ. Proc. § 1502.

2. Evidence  $\Leftrightarrow$ 571(7)—Court may determine value of legal services, regardless of testimony by attorneys.

In an action on a note, the court, considering the work performed and shown in evidence, was authorized to form its own conclusion as to the value of services performed by plaintiff's attorney, notwithstanding testimony was given by experienced attorneys as to what in their opinion would be a reasonable fee.

3. Executors and administrators  $\Leftrightarrow$ 456(5)—Costs may be taxed against executor personally.

In an action against an executor on a claim which he has refused to pay, it is within the discretion of the court to assess the court costs against the executor personally, without making any particular finding against mismanagement or bad faith.

4. Executors and administrators  $\Leftrightarrow$ 434(5)—Presentation prerequisite to counterclaim.

A claim for damages and for services rendered an estate cannot be set up as a counterclaim in an action by the executor, where not presented against the estate.

5. Executors and administrators  $\Leftrightarrow$ 111(1)—Attorney's fees are allowances, not charges.

Attorney's fees are not charges directly against the estate, but are allowances made to the administrator or executor.

On Hearing in Supreme Court.

6. Executors and administrators  $\Leftrightarrow$ 434(1)—Counterclaim for attorney's fees improper.

Matter of rendering legal services to an estate was one to be adjudicated in the probate proceedings, and could not be set up as a counterclaim in an action on a note by the executor.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Title Insurance & Trust Company, a corporation, special administrator of the estate of Samuel F. Baker, deceased, against James H. Blanchard. Defendant dy-



ing pending the action, Will D. Gould, his executor, was substituted as defendant. Judgment for plaintiff, and defendant appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

Clara Shortridge Foltz and Will D. Gould, both of Los Angeles, for appellant.

Thos. C. Ridgway and Chas. H. Brock, both of Los Angeles, for respondent.

**JAMES, J.** This action was brought in the lifetime of James H. Blanchard to recover upon a promissory note made in favor of Samuel F. Baker, of whose estate plaintiff is the special administrator. The judgment was in favor of plaintiff, and the defendant, in his representative capacity as executor of the estate of Blanchard, appeals.

[1] Summons in the action was not served upon Blanchard, but after his death his executor was substituted as party defendant and a claim for the amounts sued for was regularly presented to such executor. The executor allowed the claim for the principal amount of the note and interest, and rejected the same as for any attorney's fees or costs. Supplemental complaint was then filed, in which the substance of the original complaint was incorporated, together with appropriate allegations showing the death of the maker of the note, the appointment of the executor, and presentation of the claim. The summons was issued upon this supplemental complaint and served upon the executor.

One of the points made by appellant is that he should have been served with the summons on the original complaint. However, the plaintiff appears to have proceeded in strict compliance with the law in such a case, and as the supplemental complaint stated a complete cause of action in itself, there was no necessity or requirement that any other summons than that served should have been used. Section 1502, Code Civ. Proc. In *Falkner v. Hendy*, 107 Cal. 49, at page 52, 40 Pac. 21, at page 22, the court said:

"Section 1502 of the Code of Civil Procedure provides that, if an action is pending against a decedent at the time of his death, it must be presented to the executor or administrator as in other cases, 'and no recovery shall be had in the action unless proof be made of the presentations required.' Regularly, in such cases, a supplemental complaint should be filed, alleging the death and due presentation of the claim."

See *Frazier v. Murphy*, 133 Cal. 91, 65 Pac. 826.

In *McMinn v. Whelan*, 27 Cal. 300, at page 813, the court declared:

"By filing the supplemental complaint and issuing a summons thereon, the original action became merged in the action as supplemented by the addition of parties and subject-matter, and the summons last issued should have been served by publication in order to clothe the court with jurisdiction of the persons of the absent defendants."

In the claim as presented to the executor the claimant set forth that—

"\$300 is a reasonable attorney's fee therein, and in addition thereto claimant incurred costs of court and sheriff's fees amounting to \$11.75."

As before noted, the executor allowed only the principal sum and interest due, and rejected the "balance" of the claim. The trial judge made an allowance of \$105 for attorney's fees and included the \$11.75 costs. The additional costs incurred in this action, which amounted to \$8.35, were assessed against the executor personally. Appellant complains that under the evidence no attorney's fees should have been allowed; also that the item of costs last mentioned should not have been assessed against the executor personally.

The first contention is based upon the fact that it appeared in evidence that one of the attorneys for the plaintiff was a regular paid attorney of plaintiff corporation, and that therefore it appeared that plaintiff had not incurred by reason of this action any charge which it was not obligated to pay in the course of its own business. This contention, however, is not borne out by the evidence, because it is shown that the main counsel in the case was not connected with the plaintiff corporation, but was specially employed by plaintiff, and that plaintiff was liable to this counsel for such an amount as would compensate him for his services. This evidence was sufficient to sustain the allowance as made. On the last question, *Prescott et al. v. Grady*, 91 Cal. 518, 27 Pac. 755, is not at all decisive in favor of appellant's position. In this case it was particularly alleged in the complaint that a special attorney had been employed, and this attorney testified to different acts which he had performed in the conduct of the case from its commencement. The court, considering the work performed and shown in evidence, was authorized to form its own conclusion as to the value of such services, which were purely legal. *Conner v. Blodget*, 18 Cal. App. 787, 124 Pac. 733; *Eastman v. Sunset Park Land Co.*, 35 Cal. App. 628, 170 Pac. 642.

[2, 3] Even though testimony had been given by experienced attorneys as to what, in their opinion, would be a reasonable fee, the court, under the circumstances of this case, might have disregarded such testimony. It is within the discretion of the court to assess these costs against the executor personally, without making any particular finding of mismanagement or bad faith. *Meyer v. O'Rourke*, 150 Cal. 177, 88 Pac. 706. The decision last cited also holds that, where the executor appeals in his representative capacity alone (as is the case here), he is not an aggrieved party in the sense that permits him to contest the allowance of a judge for costs entered against him personally.

[4, 5] By way of counterclaim, defendant charged that an attachment against the prop-

erty of his testator was levied without cause or sufficient reason, and prayed for damages on that account in the sum of \$1,000. By cross-complaint he asserted a charge against the estate of Baker for attorney's fees rendered by the deceased after the death of Baker and before the appointment of plaintiff as special administrator. The court properly refused to allow testimony to be given to sustain either alleged cause of action. This ruling in the first place was properly made, because it was not pretended that any claim had been presented against the estate of Baker covering the matters alleged. The presentation of such a claim was a necessary prerequisite to the bringing of suit. As to the attorney's fees, a further answer is suggested to the alleged cause of action made by the cross-complaint, to wit: That attorney's fees are not charges directly against an estate, but are allowances made to the administrator or executor. To this point respondent cites *Briggs et al. v. Breen et al.*, 123 Cal. 657, 56 Pac. 633, 886. The findings made by the trial judge sufficiently disposed of the issues presented.

We find no error in the record sustaining appellant's plea for a reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

Opinion of Supreme Court in Bank, Denying Hearing.

ANGELLOTTI, C. J. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, is denied.

[8] As to the refusal of the trial court to allow testimony to sustain the claim of defendant's testator for attorney's fees for services rendered in the matter of the estate of Baker, if the services were rendered to some one authorized to bind the estate the action of the trial court is correct for the reason that the matter was one to be adjudicated in the probate proceedings.

We concur: SHAW, J.; LAWLOR, J.; SLOANE, J.

(48 Cal. App. 41)

HENDERSON v. D. S. DENEHY MERCANTILE CO., Inc., et al. (Civ. 2174.)

(District Court of Appeal, Third District, California. June 2, 1920.)

1. Action  $\S$  38(1)—Complaint seeking goods under Bulk Sales Law held to state one cause of action.

Complaint by judgment creditor, seeking goods sold in violation of Bulk Sales Law (Civ. Code,  $\S$  3440), and setting forth the judgment and return of execution nulla bona, need not allege an attachment proceeding; but such allegation could do no harm, and, since but one

cause of action is stated, a special demurrer for uncertainty, that it commingled different causes of action, is without merit.

2. Creditors' suit  $\S$  6, 13—Proceedings supplementary to execution not adequate remedy; resort to supplementary proceeding usually condition precedent.

Generally resort must be had to proceedings supplementary to execution under Code Civ. Proc.  $\S\S$  717-720, before a creditors' bill will lie; but where such proceedings do not afford an adequate remedy, as where there has been a void transfer of personal property, and the transferee claims the title, such proceedings do not supersede the remedy by action.

3. Fraudulent conveyances  $\S$  182(1)—Fraudulent grantee of property personally liable.

A fraudulent vendee, who sells the property, is liable for its value to the creditors of the vendor.

Appeal from Superior Court, Modoc County; Clarence A. Baker, Judge.

Action by J. S. Henderson against the D. S. Denehy Mercantile Company, Incorporated, and others. From a judgment in favor of the named defendant, after sustaining of demurrer to second amended complaint, and plaintiff declining to further amend, plaintiff appeals. Reversed, with directions to overrule demurrer.

J. T. Sharp, of Alturas, for appellant.

Jamison & Wylie, of Alturas, for respondent.

BURNETT, J. The appeal is by plaintiff from a judgment in favor of defendant Denehy Mercantile Company after a demurrer to a second amended complaint had been sustained and the plaintiff had declined to amend. The sole question on this appeal is therefore the sufficiency of said amended complaint. Appellant has made and presented a synopsis of said complaint, which we substantially adopt in the following statement:

On April 30, 1918, M. Hotchkiss & Sons, retail merchants of Lake City, Modoc county, Cal., while indebted to plaintiff's assignors in the sum of \$1,197.91, sold and delivered their stock in trade, of the value of \$3,000, to the defendants herein.

"That neither the said M. Hotchkiss & Sons nor said defendants, D. S. Denehy Mercantile Company, Incorporated, and John H. Hornback, or either, or any of them, either at least seven days before the consummation of said sale, or transfer, or assignment, or ever, or at all, recorded, or caused to be recorded, nor was there at any time recorded on behalf of either of said persons, or at all, in the office of the county recorder of the county of Modoc, state aforesaid, or any other place, a notice of said intended sale, transfer, or assignment, nor was there ever recorded a notice, or any notice, as

provided in section 3440, division 4, part 2, of the Civil Code of the state of California; that no notice of said intended sale, transfer, or assignment, of any kind, character, or description, was filed, or recorded, or filed for record, either in the office of the county recorder of the county of Modoc, state aforesaid, where said stock in trade was situated, or at any other place."

On August 5, 1918, plaintiff brought suit on his assignors' claims, and on September 5, 1918, procured judgment thereon against Hotchkiss & Sons, and caused a writ of execution to be levied by way of garnishment on defendants in this action, and by way of direct levy on all other known property of said Hotchkiss & Sons in Modoc county, Cal. Defendants denied having any property belonging to Hotchkiss & Sons, and asserted themselves to be the owners of said stock in trade, and refused to turn over the same to the sheriff for application to satisfy the execution. Under the execution upon the other property the net receipts of the sheriff amounted only to \$192.46. With this exception the writ was returned nulla bona, and as a result the plaintiff has an unsatisfied judgment for over \$1,000 against Hotchkiss & Sons, who were and are insolvent, and have no other property out of which the judgment can be realized. After alleging in conclusion that the transfer of the stock in trade was made to the defendants by Hotchkiss & Sons with intent to defraud the latter's creditors, plaintiff prays judgment against the defendants for the delivery to him of the stock in trade, or sufficient thereof to satisfy his judgment against Hotchkiss & Sons, or, in case delivery cannot be made, for judgment against the defendants, and each of them, for the amount of his judgment against Hotchkiss & Sons, with interest, etc.

The defendant Denehy Mercantile Company interposed a demurrer upon the grounds: (a) That the complaint did not state a cause of action; (b) that several causes were improperly united; (c) that they were not separately stated; and (d) that the complaint was ambiguous, unintelligible, and uncertain. The action is clearly in the nature of a "creditors' bill," and we can see no valid objection to the complaint.

[1] We are satisfied that only one cause of action is attempted to be stated. The alleged facts show plaintiff to be a judgment creditor, who has attempted unavailingly by legal methods to satisfy his judgment, and then invokes the equitable power of the court to subject to his claim the property of the judgment debtor which has been fraudulently conveyed to another party. The allegations in reference to the garnishment and proceedings under execution have no legal relation to a separate cause of action, but are simply indicative of the efforts made by

plaintiff to avoid the necessity for resorting to the equitable action. Indeed, it has been held in this state that such attempt must be made before the creditor is in a position to attack the fraudulent conveyance. In *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204, it was said:

"A fraudulent sale cannot be attacked by a creditor merely from the fact that he is a creditor, but only when he has a judgment establishing his debt, and an execution issued thereon, or has some process regularly issued, as in the case of attachment, authorizing a seizure of the property."

The complaint herein having set forth the judgment and the return of execution nulla bona, it was not necessary to allege the attachment proceeding, but, of course, it could do no harm. The special demurrer for uncertainty, etc., was based upon the same contention that different causes of action had been commingled, and it is equally without merit.

[2] As to the general demurrer, we may say that no material facts seem to be omitted from the complaint. The general rule is, no doubt, that, since the statute provides for proceedings supplementary to execution (sections 717 to 720, Code Civ. Proc.), resort must be had to such proceedings before a creditors' bill will lie. But if said statutory proceedings do not afford an adequate remedy, as where there has been a void transfer of personal property by the debtor and the transferee claims the title, said supplementary proceedings do not supersede the remedy by action. *Rapp v. Whittier*, 113 Cal. 429, 45 Pac. 703; *Phillips v. Price*, 153 Cal. 146, 94 Pac. 617. This case falls clearly within the exception, as the complaint alleges:

"That said defendants \* \* \* denied and now deny that they had, or have, any property in their possession belonging to said M. Hotchkiss & Sons, and assert the fact to be that said stock in trade belongs to them, the said defendants, and that they have title thereto."

[3] However, it is due respondent's counsel to say that they do not specifically make this objection. The only reason they advance for their position as to the insufficiency of the complaint is found in this statement:

"If it is an action against defendant, as the vendee of M. Hotchkiss & Sons, for purchasing the stock of goods without giving the notice required by section 3440 of the Civil Code, it fails to state a cause of action. The effect of that statute is simply to make such sale void and leave the title to the property in the vendor so far as the creditors are concerned. In other words, the plaintiff could have levied his execution or attachment upon these goods while they were in the hands of M. Hotchkiss & Sons, and this sale without notice did not prevent him from following the goods and levying upon them in the hands of the vendee of

said M. Hotchkiss and Sons. The remedy of the plaintiff, if defendant purchased the stock of goods without giving the notice required by section 3440 of the Civil Code, was to follow and seize the goods."

The foregoing may be considered as a suggestion that the complaint should show the said steps to have been taken. So considered, it is sufficient to say that therein it clearly appears that just that course was pursued. It appears:

That the property was in the possession of said defendant D. S. Denegy Mercantile Company—the only defendant that has appeared in this court—and that the sheriff levied upon said property the writ of execution. "That after the levy of said writ of execution upon said defendant D. S. Denegy Mercantile Company, it neglected, failed, and refused, and still neglects, fails, and refuses, to deliver over to said sheriff, for the plaintiff, the aforesaid stock in trade, or any part thereof, so received by it as aforesaid from said M. Hotchkiss & Sons, or to pay to said sheriff the value thereof, or any part thereof, or to pay unto said sheriff the amount named in said writ of execution, or any part thereof." That the plaintiff did not take actual possession of the property was due to the action of the company in refusing to permit it, and, of course, it cannot attach any saving virtue to its own wrong.

It may be added that, if respondent company had not interfered, no doubt the sheriff would have taken the property into his possession and sold it to satisfy the demand, and this action would never have been brought. Nor do we think there is any merit in the claim that it does not appear but that the property at the time of the beginning of the action was in the possession of some other party, and, if so, the action would not lie against these defendants. But this is a mistake, both as to the fact and as to the law. The fact is alleged as follows:

"That at all times herein mentioned, and since the 30th of April, 1918, said defendant D. S. Denegy Mercantile Company, Incorporated, has had sole, exclusive, continuous, and unqualified possession of all the goods, wares, and merchandise belonging to said M. Hotchkiss & Sons, and now is the sole and exclusive and unqualified possessor of said stock of merchandise, and the whole thereof."

Moreover, if the company had transferred the property, the fraudulent vendee would still be liable for the value of the property to the creditors of the vendor. Swinford v. Rogers, 23 Cal. 234; 20 Cyc. p. 630.

We are satisfied that the ruling of the trial court was erroneous, and the judgment is therefore reversed, with directions to overrule the demurrer.

We concur: NICOL, Presiding Judge. pro tem.; HART, J.

(48 Cal. App. 46)

**BOYD v. BEARCE et al. (Civ. 2168.)**

(District Court of Appeal, Third District, California. June 2, 1920.)

1. Bills and notes  $\Leftrightarrow$ 523—Evidence held to show fraud in procuring possession of note.

In an action on a note, evidence held sufficient to support the finding of the trial court that a fraud was perpetrated on plaintiff by the maker's codefendant, as alleged in the complaint, in securing possession of the note from plaintiff.

2. Bills and notes  $\Leftrightarrow$ 155—Provision for acceleration of time of payment on default renders note nonnegotiable.

A note having a provision for acceleration of time of payment of the principal if any installment of interest was not paid was nonnegotiable, and any subsequent purchaser or holder is held to stricter accountability as to notice of any infirmity in the title of the one transferring it than in case of a negotiable instrument.

3. Bills and notes  $\Leftrightarrow$ 354—Inadequacy of consideration evidence as to holder's good faith.

Inadequacy of consideration paid for a note is a circumstance proper to be considered in determining the question of good faith on the part of the person who takes it.

4. Bills and notes  $\Leftrightarrow$ 354—Maker of nonnegotiable note must inquire into right of person offering to surrender note for half its face value.

Where the maker of a nonnegotiable note has a good deal of paper out, and a third party offers to sell him his own nonnegotiable note for less than half its face value, he is under duty to make some inquiry as to why the third party makes such concession, and under what circumstances he came into the possession of the instrument.

5. Bills and notes  $\Leftrightarrow$ 525—Evidence held to show purchase of note by maker was not in good faith.

In an action on a nonnegotiable note delivered by the payee to a third party and by him sold to the maker for less than half its face value, evidence held to support the trial court's finding that the note was not purchased by the maker in good faith.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Josephine P. Boyd against Byron A. Bearce and M. P. Fries. From judgment for plaintiff, defendant Bearce appeals. Affirmed.

Arthur L. Levinsky, of Stockton (Clarence E. Fleming, of Stockton, of counsel), for appellant.

Harris & Hayhurst, of Fresno, and C. W. Miller, of Stockton, for respondent.

BURNETT, J. The appeal is from the judgment rendered in favor of plaintiff by

the superior court of San Joaquin county. The defendant Bearce was indebted to plaintiff in the sum of \$2,958.68, evidenced by his promissory note in that amount, dated April 22, 1916, bearing interest at the rate of 7 per cent. per annum. Said note required the "interest to be paid annually, and, if not so paid as it becomes due, to bear interest at the same rate as said principal sum, but if default be made in the payment of interest, then the principal sum of this note shall immediately become due at the option of the holder hereof." The first year's interest on the note was not paid, and plaintiff's attorneys wrote to defendant Bearce on May 11, 1917, demanding payment of the interest, and again on May 18th following, notifying said defendant that the plaintiff elected to declare the whole of said note due and demanding payment of the sum. On May 22, 1917, defendant wrote to said attorneys that he had paid the note in full, having purchased the same from the defendant M. P. Fries on or about the 18th day of May, 1917. About the 15th day of May, 1917, defendant Fries called upon plaintiff for the purpose of inducing her to let him have the Bearce note for collection. After some conversation Mrs. Boyd delivered the note to Fries and he in return gave her his note for \$1,600, and for security gave her 3,200 shares of the capital stock of Shasta National Copper Company and an agreement in writing as follows:

"Fresno, Cal., May 15, 1917.

"Mrs. Josephine P. Boyd, Fresno, Calif.—  
Dear Madam: In addition to the secured note given you this date, I hereby promise and agree to pay all money collected on the Byron A. Bearce note given me this day, over and above the sum of \$1,600. M. P. Fries."

On May 15th Fries, at Fresno, called Mr. Bearce, at Stockton, by telephone and asked him what he would pay for the Boyd note. Mr. Bearce finally agreed to pay 50 cents on the dollar and wired Fries to that effect. Several days later Fries came to Stockton with the note and Mr. Bearce, according to his testimony, on seeing that the same was properly indorsed, gave Fries a check for \$1,350 and credited him with \$250 on account of money which Fries at that time owed to Mr. Bearce. On November 6, 1917, Fries sent Mrs. Boyd a check for \$56 in payment of the sum semiannually due on his note for \$1,600. This check was received by Mrs. Boyd and delivered to her attorney, Judge Harris, who on November 7th returned the same to Mr. Fries with the statement that Mrs. Boyd had not accepted Fries' note. About six months later Fries sent another check to Mrs. Boyd for \$112, covering the first year's interest on his note for \$1,600, and this was likewise returned to Fries. Thereafter Mrs. Boyd brought suit against

Bearce for the full amount of the note, and the court gave her judgment for said full amount, together with \$300 attorneys' fees. Fries was never served and did not appear at the trial. Plaintiff claimed in her complaint that Fries fraudulently obtained possession of said note and that defendant Bearce paid no consideration for it, and that at the time it was delivered to him he was familiar with the facts constituting the fraud consummated by Fries and that said defendant Bearce was not a purchaser in good faith. The court found that the fraud was perpetrated by Fries as alleged in the complaint, and, furthermore, as to Bearce, that it is not true that he paid no consideration for said note—

"and that it is not true that at the time it was delivered to said defendant Bearce he knew of the facts, and circumstances of the loaning of said note to said defendant Fries by plaintiff, or the manner in which said defendant Fries came into the possession thereof, or that the plaintiff was the owner of said note, or entitled to the possession thereof, and in that behalf the court finds that the defendant Bearce paid for said note the sum of \$1,350, and no more, and gave said defendant Fries in addition to said sum a credit for \$250, and no more; that while defendant Bearce did not have actual knowledge of the facts and circumstances of said note as aforesaid and the manner in which said defendant Fries came into possession thereof, said defendant Bearce had sufficient information to put a reasonable person upon inquiry, and such inquiry would have disclosed the fact that said Fries got possession of said note through fraudulent representations; that said note was not indorsed by said plaintiff; that said Fries never had title to said note and never had right of possession thereof, and never had the right or authority to transfer or dispose of or to collect said note or any part thereof."

[1] As to the first of these considerations, it may be said that the finding of the court is abundantly supported. The testimony of plaintiff and her husband, or of either, is sufficient for that purpose. It may be admitted that the transaction as detailed by plaintiff presents a somewhat peculiar aspect, but her account is not inherently improbable, and we cannot say that the lower court was not justified in believing her. The trial judge, of course, had the advantages that go with a personal contact with the witnesses, and having been convinced that plaintiff was "an elderly woman, unskilled in the ways of the world, and apparently an easy prey," he had no difficulty in reconciling her eccentric conduct with the theory of her veracity and entire innocence of any wrongdoing. Indeed, the sufficiency of the showing as to this first branch of the case does not seem to be seriously disputed.

[2] The other question is more worthy of careful consideration. In viewing it, the

trial judge in the first place had regard to the fact that the note, having a provision for acceleration of the time of payment of the principal if any installment of interest was not paid, was nonnegotiable. *Wetzel v. Gale*, 175 Cal. 208, 165 Pac. 692. Therefore, under the decisions, any subsequent purchaser or holder is held to a stricter accountability as to notice of any infirmity in the title of the one transferring it than in case of a negotiable instrument. This circumstance is of some moment in testing the sufficiency of the showing made to justify the court's conclusion that appellant was not an innocent purchaser.

[3] One fact to which great significance was attached is that appellant paid only about 42 cents on the dollar for his note. There is no evidence that he was insolvent or unable to pay the full amount due, and the circumstances that he was thus permitted to purchase it at such a discount would naturally excite the suspicions of an honest man, and should have led to an inquiry as to the circumstances under which Fries secured possession of the note. Inadequacy of consideration is, indeed, not conclusive, but the authorities generally hold that it is a circumstance proper to be considered in determining the question of good faith. It is so held in *Clark v. Troy*, 20 Cal. 220. The question was carefully considered by the Supreme Court of Tennessee in *Oppenheimer v. Bank*, 97 Tenn. 19, 36 S. W. 705, 33 L. R. A. 767, 56 Am. St. Rep. 773, wherein is quoted with approval section 291 of Tiedeman on Commercial Paper, from which we make the following extract:

"And it may be stated, subject to an explanation of terms, that an inadequate price always puts the person upon inquiry and may, certainly, along with other suspicious circumstances, charge him with notice of existing defenses. But every price is not inadequate which is less than the face value of the instrument purchased. Commercial paper of every kind has its commercial value, rising above or falling below par, according to the financial credit of the person liable on it. Only that price is inadequate which falls below the market value, and if the disproportion between the price paid and the market value be very great, it is fair and just to presume that the purchaser had reasonable grounds for suspecting fraud or some other defense to the instrument. Each case must, therefore, stand on its own merits. One-half the face value may, under some circumstances, be a grossly inadequate price, while, under different circumstances, it may be greatly in excess of what the instrument is worth on the market."

[4] Herein, there is no direct evidence of the market value of said note, but it is fair to assume that, if appellant had been insolvent or unable to pay his debts in full, he would have made some showing to that effect. He did testify that a good deal of his

paper was out, but he did not claim that he was financially embarrassed in any way. Under such circumstances, where a third party offers to sell to the maker the latter's own note for less than one-half its face value, is it not just to exact of him some inquiry as to why the vendor makes such concession and under what circumstances he came into possession of the instrument? We think the transaction would naturally excite the suspicion of the average man, and his impulse would be to make inquiry of the payee of the note. But, as far as the record shows, appellant did not even question Fries as to any of the circumstances connected with his possession or asserted ownership of the instrument. This conduct was rather singular upon the theory of the good faith of appellant.

Moreover, there are other circumstances in the case "of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder on inquiry," adopting the language of Judge Story in his work on Promissory Notes, § 197.

Among these is the fact that appellant had reason to believe that Fries was impecunious. Appellant had been compelled to sue him for a debt and had recovered judgment, but had not been able to satisfy it. At the time of this transaction Fries owed him about \$1,500. It also appears that Fries by his conduct in selling "Tidewater" stock had discredited himself with appellant, and it seems improbable that with this relation existing between the two appellant should have calmly taken it for granted that Fries had become the bona fide holder of the note.

Again, appellant testified that Mrs. Royd had promised him that she would not transfer the note, and two or three days before said transaction, with Fries appellant received from Mrs. Royd's attorneys a letter containing the following statements:

"Mrs. Josephine T. Boyd has handed to us your note dated April 22, 1916, for the principal sum of \$2,598.68, payable to her at the city of Fresno, on or before three years after date. The interest on this note fell due on April 22d of this year, but she has not received the same. She advised us that she wrote you a letter a short time before it was due, requesting payment, but that she never received any reply. Will you please send this interest to us for Mrs. Boyd?"

These circumstances would naturally inspire caution in considering the proposition of a stranger to sell said note for less than 50 per cent. of its face value.

[5] Moreover, appellant was contradicted in some material respects and, in a legal sense, this would justify the trial court in discrediting his testimony. The fact, also, that he did not attempt to take the deposition of Fries in corroboration of his own testimony and his manner upon the stand as

a witness may have been deemed significant by the trial judge. We mention the foregoing, not as indicative of any opinion of our own as to the credibility or good faith of appellant, but to demonstrate that the case is one falling within the familiar rule as to the province of the trial court in determining the probative force of the evidence.

It is suggested by appellant that the decision is unjust, because thereby respondent secures the full payment of her note from appellant in addition to having the note of Fries for \$1,600. However, the circumstances are such as to create the suspicion, if not to justify the conviction, that said note of Fries, together with the stock pledged to secure its payment, is altogether worthless. At any rate, respondent offered to surrender them to appellant and is willing to do so now.

As we view the record, we think the judgment should be affirmed; and it is so ordered.

We concur: HART, J.; NICOL, Presiding Judge, pro tem.

(48 Cal. App. 29)

#### KEELER v. BAIRD. (Civ. 3345.)

(District Court of Appeal, First District, Division 1, California. June 1, 1920. Hearing Denied by Supreme Court July 30, 1920.)

#### 1. Executors and administrators §437(4)—Action on claim after dismissal of former as premature held not barred by limitations.

Where plaintiff's action to establish a claim against the estate of her father, which she elected, under Code Civ. Proc. § 1498, to treat as rejected, was dismissed as premature because the writing on which it was based provided for payment on distribution, a subsequent action brought six months after distribution was not barred by section 1498, requiring action on a rejected claim to be begun within three months after notice of rejection; the fact that plaintiff in the first action elected to treat the claim as rejected not starting the running of limitations, as the action was premature.

#### 2. Appeal and error §842(2)—Conclusion that former action on claim started limitations one of law.

A conclusion of the trial court that a former action on the claim against the estate of decedent started the running of limitations is one of law rather than fact, and where erroneous may be disregarded and corrected by the decision of the appellate court on the facts found.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Florence Gall Keeler against Mary Frances Baird, as executrix of the estate of B. M. Baird, deceased. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

Geo. Cosgrave, of Fresno, for appellant.  
W. P. Thompson and J. P. Bernhard, both of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in an action instituted by the plaintiff against the said defendant, as executrix of the estate of B. M. Baird, deceased, to establish a claim against said estate.

The facts out of which said claim arose may be briefly summarized as follows: One Alfred Baird was for many years a resident of Fresno county, where he had amassed a considerable amount of property, chiefly in the form of real estate. Several years before his death, which occurred in 1914, he undertook to make a division of certain of his lands between his two children, Florence Gall Keeler, the plaintiff in this action, and B. M. Baird, her brother. In his effort to accomplish this purpose he caused several deeds to be made and placed in escrow, to be delivered at his death. In the deed to plaintiff there was included certain land which he afterward determined to convey to his son, B. M. Baird, and he therefore requested the plaintiff to execute a deed back to him of said particular piece of land. She complied with this request by executing a quitclaim deed on September 24, 1907, conveying the land in question to her father, who on the same day conveyed the same to B. M. Baird, his son. At the same time and as a part of the same transaction Alfred Baird required his said son to execute an agreement in writing by which, in consideration of the conveyance of said land to him, B. M. Baird agreed to pay to the plaintiff "out of his share of his father's and mother's estate, when the same is distributed to him, money or property of the value of \$2,000 in lieu of said land." Later on Alfred Baird changed his mind in regard to the deeds which had been placed in escrow, and withdrew and destroyed them, and thereupon made a will by which he divided the remaining portion of his property between the plaintiff and his son, B. M. Baird. By the terms of this will, and apparently having in mind the fact that the plaintiff retained the aforesaid agreement, Alfred Baird directed in his said will that the sum of \$2,000 should be paid to his said son; the same being in excess of the portion coming to his daughter under the will. Alfred Baird died on November 22, 1914; his said will was duly offered and admitted to probate, but before the distribution of his estate thereunder his son, B. M. Baird, also died, and the defendant herein, Mary Frances Baird, was appointed executrix of his estate. Plaintiff presented to the latter her claim against the estate of B. M. Baird, deceased, on May 3, 1916, which claim was founded upon the aforesaid written agreement. The ex-

executrix took no action in regard to this claim in the way of either allowing or rejecting it. On February 18, 1918, plaintiff commenced an action to compel the allowance of the claim, basing her said suit upon her alleged election to consider the claim rejected. At the time of the institution of this suit distribution had not been made of the estate of Alfred Baird, and said action, being therefore determined on a demurrer to the complaint to have been prematurely brought, was dismissed by the plaintiff. The decree of distribution was entered in the estate of Alfred Baird on March 29, 1918, and thereafter and on October 28, 1918, the plaintiff commenced the present action.

Among other defenses, the defendant pleaded that said action was barred by the provisions of section 1498 of the Code of Civil Procedure.

Upon the trial of the cause the court made its findings in favor of the plaintiff so far as the facts attending the creation and presentation of said claim are concerned; but the trial court further found that the plaintiff, by the institution of her former action upon said claim, had thereby elected to treat her claim as having been rejected on February 18, 1918, the date of the institution of said former action; and the court therefore concluded and found that the present suit, not having been commenced until October 28, 1918, was barred by the provisions of section 1498 of the Code of Civil Procedure. Judgment was accordingly rendered in the defendant's favor, and from that judgment this appeal is taken.

The sole contention of the appellant upon this appeal is that the trial court was in error in its conclusion that this action was barred by the provisions of said section of the Code of Civil Procedure.

In order to determine this question several sections of said Code, with relation to the presentation and rejection of claims and to institution of actions to establish the same, must be considered and construed.

By the terms of section 1496, Code of Civil Procedure, when a claim has been presented to the executor or administrator of an estate he must allow or reject it, and his allowance or rejection thereof must be indorsed upon said claim with the day and date thereof, and the claim bearing this indorsement must be presented to the judge for approval, and if approved by him must be filed with the clerk. The said section further provides that—

In case "the executor or administrator refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, or if the judge refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day."

Section 1498, Code of Civil Procedure, provides that—

"When a claim is rejected either by the executor or administrator, or a judge of the superior court, written notice of such rejection shall be given by the executor or administrator to the holder of such claim or to the person filing or presenting the same, and the holder must bring suit in the proper court against the executor or administrator within three months after the date of service of such notice if the claim be then due, or within two months after it becomes due; otherwise the claim shall be forever barred."

[1] It was the conclusion of the trial court, as expressed in its findings, that the institution by the plaintiff of her former action to establish her said claim against the estate of B. M. Baird, deceased, constituted an election on her part to consider said claim as having been rejected by the executrix of said estate, and that she was bound by such election, notwithstanding her dismissal of said former action after the trial court had ruled upon demurrer that the same had been prematurely brought. We are unable to agree with this conclusion. It would seem to be clear from the other findings of the court that said first action was prematurely brought, for the reason that at the time of its institution there had been no distribution to B. M. Baird or his successors in interest of his share in his father's estate, and hence that the claim of the plaintiff was, by the express terms, of the writing upon which it was predicated, not then due. *Miller v. Miller*, 171 Cal. 269, 152 Pac. 728. By the dismissal of the action thus prematurely brought, the plaintiff, in our opinion, placed herself in the same position as though such action had not been commenced, and, in substance and effect, by the dismissal of said action withdrew her option to consider her claim as having been rejected by the executrix of said estate. While no authority has been presented on either side directly construing those provisions of the foregoing sections of the Code of Civil Procedure, which deal with the election of the claimant to deem a claim which has not been acted upon by the executor or administrator of an estate as having been rejected, we think a clear analogy exists between the option which a claimant against an estate may exercise in that regard, and the option which a creditor in an obligation may have to consider the whole sum named in said obligation to be due upon the debtor's failure to pay an installment of the principal or interest thereon. In such a case it has been held that the dismissal of the creditor's action upon the exercise of such option amounted to a withdrawal and waiver of the option. *Moore v. Russell*, 133 Cal. 297, 85 Pac. 624, 85 Am. St. Rep. 166; *Cal. Safe & Loan Society v. Culver*, 127 Cal. 107, 59 Pac. 292.



The same principle would seem to be applicable to claims against an estate. The language of section 1498 of the Code of Civil Procedure lends strength to this conclusion, since it is therein expressly provided that the time within which a claimant must bring suit against the executor or administrator of an estate to establish such claim is three months after the date of service of the written notice of the rejection of the claim, if the claim be then due, or within two months after it becomes due; otherwise the claim shall be forever barred. The clear intentment of this section is that it is the giving of said notice of the rejection of the claim by the executor or administrator which sets in motion the limitation of the time within which an action must be brought to establish the claim, and that the option which the claimant has under the preceding section of said Code to consider his claim as having been rejected for the purpose of enabling him to bring an action thereon is not such as in the event of the dismissal of such action shall operate to set in motion the provisions of the later section, so as to bar said claim in the event that no action to establish the same is not commenced within the periods named therein.

[2] The conclusion of the trial court embraced in its findings, to the effect that the plaintiff's institution of the former action was to be deemed such a rejection of the claim as to set the statute in motion, was in the nature of a conclusion of law rather than a finding of fact; and, that being so, this court is in a position, in disagreeing with this conclusion, to consider the other findings in the case sufficient to sustain a judgment in the plaintiff's favor without a retrial of this cause.

It is therefore ordered that the judgment herein be reversed, and that the trial court be and is hereby directed to render and enter a judgment in favor of the plaintiff in the action.

We concur: WASTE, P. J.; KOFORD, Judge pro tem.

(47 Cal. App. 623)

PYPER v. JENNINGS, Justice of Peace.  
(Civ. 3332.)

(District Court of Appeal, Second District,  
Division 2, California. May 21, 1920.)

**1. Discovery §97(6)—Proof precedent to requiring delivery up of private paper.**

It is a condition precedent to the right of a court to require a person to deliver up a private book or paper for examination that it be made to appear by clear and unequivocal proof that the book or document contains evidence relevant and material to the issues before the court, and that the precise book, paper, or

document containing such evidence has been so designated or described that it may be identified.

**2. Libel and slander §54—Defendant must justify in sense in which innuendo explains words.**

Where the defendant in a libel case sets up the truth as a defense, he must justify the words in the sense in which the innuendo explains them, assuming, of course, that the words are capable of the meaning imputed to them by the innuendo.

**3. Libel and slander §94(1)—Plea of justification must be as broad as charge.**

The general rule is, in a libel case, that the plea of justification must be as broad as the charge, and in point of law must be identical with it.

**4. Evidence §106(5)—Witnesses §37(4)—Reputation not to be established by proof of specific misconduct.**

Reputation, or, as it is sometimes called, character, is a fact to be proved by testimony of witnesses who know it, and not by proof of specific instances of misconduct which may or may not have affected it injuriously.

**5. Libel and slander §86(2)—Innuendo held not justified.**

A publication concerning mayor of city, "They were surprised you ever put him in office, dumfounded at his re-election, and amazed beyond measure that you continue to put up with him," did not justify an innuendo to the effect that he was not worthy of the confidence of the electors.

**6. Libel and slander §54—Charge of bad reputation rather than dishonesty.**

An article concerning the mayor of San Diego that he might obtain 100 citizens from Tia Juana (in Mexico) to stand by him to suppress crime, was a charge that the reputation of the mayor in such place was such that the dissolute characters there would stand by him in what they would believe to be a simulated effort to suppress crime, and the defendant could not justify by proving specific misconduct on the part of the mayor.

**7. Libel and slander §86(2)—Innuendo held not justified by language used.**

A statement in writing that the mayor had a bad reputation among certain persons, and that the chief of police of city deserved credit for having control of his temper and must be worthy of the confidence expressed on all sides, did not justify an innuendo that the mayor was not worthy of such confidence.

**8. Libel and slander §86(1)—Innuendo may explain but cannot enlarge charge.**

The defendant in a libel action may justify the substance of a publication in the sense in which the innuendo explains it, if it explains it fairly, but the import of the words used in the publication cannot be enlarged, extended, or changed by the innuendo, and, if it is, the innuendo, to the extent that it is not borne out by defamatory words will be rejected as surplusage.

9. Contempt  $\S$  63(4)—Order punishing witness for refusing to produce document must recite facts showing pertinency.

An order punishing a witness for contempt for refusing to produce a book or other document must recite the facts that constitute the contempt and confer jurisdiction upon the court to make the order, and for this purpose must recite facts showing that the document contains evidence pertinent and material to the issue to be tried.

10. Libel and slander  $\S$  110(3)—Evidence of misuse of trust funds inadmissible to prove charge of gambling.

Where the defamatory words in a libel case charged one with the gambling habit, the truth of the charge could not be proved by evidence that libeled person had misused trust funds.

Application by Alexander C. Pyper for writ of prohibition prayed to be directed to Lacy D. Jennings, Justice of the Peace in and for the Township of San Diego, County of San Diego, State of California, to restrain enforcement of a judgment of contempt. Application granted.

Morganstern & Dorn, of San Diego, for petitioner.

Curtis Hillyer and Wright & McKee, all of San Diego, for respondent.

FINLAYSON, P. J. This is an application for a writ of prohibition to restrain respondent, Justice of the peace for the township of San Diego, from enforcing a judgment of contempt rendered by him in an action for criminal libel then pending in his court and entitled "The People of the State of California, Plaintiff, v. The San Diego Sun Publishing Company, a Corporation, and R. A. Lacy, Defendants."

The criminal action, in the course of which the contempt proceedings arose, is based upon a defamatory article alleged to have been published of and concerning Louis J. Wilde, mayor of the city of San Diego. The defendants in the criminal action undertook to prove the truth of the libelous charge. For that purpose they sought to cause to be produced in court certain books in the possession of the petitioner here. These books, so it is claimed, show the payments into and disbursements from a certain trust fund, under the control of Wilde, known as the Community Oil Well Fund. As a basis for their claim that the books contain evidence relevant and material to the issues presented by the complaint in the action for criminal libel, the defendants in that action contended, as does the respondent here, that the entries in the books show that Mayor Wilde was not a man of integrity, in this, that they disclose that he had applied some of the moneys in the Community Oil Well Fund to uses foreign to the purposes for which that trust fund had been created. The fund is one in which private persons only are interested.

While a witness in the justice's court, petitioner was ordered by respondent to produce the books. Upon his refusal to comply with that order petitioner was adjudged guilty of contempt of court and sentenced to imprisonment in the city jail for one day.

Respondent has demurred to the petition, and, at the same time, has filed a written answer. It was stipulated at the hearing that, in so far as the averments of the answer are allegations of fact and not mere conclusions of law, its averments are true. We therefore deem it not only the more expeditious course, but proper, to dispose of the case on its merits, and, for that purpose, to consider the case in its entirety—the facts averred in the answer as well as those alleged in the petition for the writ.

[1] It is the established rule that, as a condition precedent to the right of a court to require a person to deliver up a private book or paper for examination, it must be made to appear, by clear and unequivocal proof: (1) That the book or document contains evidence relevant and material to the issues before the court; and (2) that the precise book, paper, or document, containing such evidence, has been so designated or described that it may be identified. *Ex parte Clarke*, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176; *Kullman, etc., Co. v. Superior Court*, 15 Cal. App. 276, 114 Pac. 589; *Funkenstein v. Superior Court*, 23 Cal. App. 663, 139 Pac. 101. For the purpose of this decision we shall assume that, by evidence properly adduced in the justice's court during the trial of the criminal action, the books themselves, and so much of their contents as the defendants in that action sought to introduce in furtherance of their declared purpose to show that Wilde had improperly used certain moneys of the Community Oil Well Fund, were identified with all the particularity required for compliance with the constitutional guaranty against unreasonable searches and seizures. Under the rule just adverted to, however, there was this further requisite: It was essential, as a condition precedent to the right of the justice's court to require petitioner to deliver the books up for examination, that it be made to appear, by clear and unequivocal proof, that the books contain evidence relevant and material to the issues in the criminal action. In our opinion the entries in the books, assuming that they do show that at times Mayor Wilde misused or misapplied certain of the moneys of the trust fund, are not material to any issue in the criminal action. Conceding to the defendants in that action all that they there claimed respecting the nature of the book entries, the entries, nevertheless, would not tend to prove the truth of any of the defamatory matters in the alleged libelous article as charged in the criminal complaint.

The alleged libelous article, published in

the San Diego Sun, a newspaper printed and published in that city, is as follows:

"Editor Sun: Having come from a northern city where one of your city officials is only too well known, it was with considerable amusement that I read an article by him in a morning paper some few days ago. Hearing the public on every hand referring to same as another 'Brain Storm,' proved San Diegans are 'next,' but truly it is said your northern neighbors are not aware of this. They were surprised you ever put him in office, dumfounded at his reelection and amazed beyond measure that you continue to put up with him. San Diego must be virtuous if patience is anything to go by; but there comes a time when patience ceases to be a virtue. According to his own statements in the Sunday paper the 100 citizens didn't show up. Why doesn't he go to Tia Juana? He might get 100 there to stand by him, even though it is said there is honor among thieves. The ungentlemanly remarks and foul language he allows to come in print above his name must disgust even the worst. Although hearing the best reports of the San Diego police department, and personally knowing of some very efficient work done by same, I can speak only in terms of the department. If, however, your police chief is anything like your mayor described him he must be Wilde's twin brother, for he surely drew his own picture to perfection. What I can't understand is that the alleged ungovernable temper of your chief hasn't let loose and made a large and rather dirty grease spot in your city hall. He surely deserves credit for having control of that ungovernable temper (which is more than we can say of some folks), and must be worthy the confidence in him which I can find expressed on all sides. I do feel, however, your mayor is to be pitied rather than censured, but it is a shame that your lovely city must be the goat and suffer such humiliations. You are laughed at, but what can you expect with your jazz cat gambles and brain storms? You have an exceptional council; get rid of your Wild mayor and San Diego will take her place in the top ranks. Yours, from the north, R. A. Lacy, Gen. Del."

While this defamatory article may have a tendency to expose Mayor Wilde to public ridicule, it will be noticed that nowhere does it make any direct charge of dishonesty—certainly none of the character sought to be proved by the books that petitioner refused to produce—though, of course, it is possible that some passages of the letter published in the Sun may have a covert meaning, which, read in the light of such extrinsic circumstances as formerly it was the office of the inducement to narrate, may be susceptible of a construction imputing to the mayor dishonesty in financial transactions. But, unless, by way of innuendo, there is some averment in the criminal complaint that properly places such a construction upon the words of the defamatory article, the defendants in the criminal action cannot adduce evidence of any specific misappropriation of trust funds.

[2] The rule is that where the defendant in

a libel case sets up the truth as a defense, he must justify the words in the sense in which the innuendo explains them, assuming, of course, that the words are capable of the meaning imputed to them by the innuendo. *Snyder v. Tribune Co.*, 161 Iowa, 671, 143 N. W. 519; note to *Hutchins v. Page*, 31 L. R. A. (N. S.) 140; 25 Cyc. 460; *Newell on Slander and Libel*, p. 793. In *Snyder v. Tribune Co.*, supra, the court said:

"A proper plea of justification either expressly or impliedly admits the truth of the innuendo [for the purpose of the justification]; and, where the defendant sets up the truth, he must justify the words in the sense in which the innuendo explains them, unless the words used in the innuendo enlarge the natural and ordinary sense of the language or otherwise place a false construction thereon."

The complaint in the action for criminal libel, after setting forth the libelous article in *hæc verba*, proceeds, by the averment of what the pleader deemed to be appropriate innuendoes, to explain certain passages by alleging the meaning that the defendants intended to convey to readers thereof. It is claimed by respondent that these innuendoes give to the libelous article such a meaning that the defendants in that action, for the purpose of proving the truth of the libelous charges, may rightfully show any specific act of dishonesty on the part of Mayor Wilde, and that, for that purpose, the books showing Wilde's disbursements from the Community Oil Well Fund were admissible in evidence.

Taking up now the particular innuendoes relied upon by respondent to justify his order adjudging petitioner guilty of contempt: By way of innuendo, the complaint in the criminal action alleges that—

"By and through the said letter above set forth the said defendants then and there intended to convey to any and all persons who read the same, by the use of the words 'where one of your city officials is only too well known,' that he, the said Louis J. Wilde, was, in the said northern city, unfavorably known, and was not entitled to the respect of those with whom he was acquainted in said northern city because he, the said Louis J. Wilde, lacked integrity."

We have italicized the words of this innuendo upon which respondent particularly relies.

[3, 4] The words used in the alleged defamatory article, "a northern city where one of your city officials is only too well known," at most can import no more than that among the inhabitants, or some of them, of a city north of San Diego, Mayor Wilde bears an unsavory reputation. An odious reputation in some unidentified northern city is therefore the gist or sting of the libelous charge. The defamatory charge implies no particular act committed by Wilde. Nor does it impute a reputation for the commission of any par-

ticularly improper, immoral, or criminal act; but only that, in the estimate of the public in some unnamed city, his reputation is bad—that his good name, credit, or honor, as derived from public opinion in that northern city, is to some extent impaired. The general rule is that the plea of justification must be as broad as the charge, and, in point of law, must be identical with it. Here, in order to justify, by proof of the truth of the words "a northern city where one of your city officials is only too well known," it would be necessary to show that in the northern city referred to by the author of the article, or which the readers understood to be the city referred to, Mayor Wilde's general reputation is not good. Reputation, or, as it is sometimes called, character, is a fact to be proved by the testimony of witnesses who know it, not by the proof of specific instances of misconduct which may or may not have affected it injuriously. Every man is bound, and is supposed to be always prepared, to answer and repel imputations upon his general reputation whenever that reputation is by the rules of law assailable in court, but not to answer specific charges of misconduct where no specific charge is imputed by the defamatory article of which he complains. Particular instances of misconduct on the part of a plaintiff in a civil action for libel, or of the complaining witness in an action for criminal libel, have no necessary connection with his reputation. It may not be known or believed that such specific acts of misconduct have in fact occurred, and so their occurrence may have produced no effect upon the public mind, and, consequently, have nothing to do with the good or bad reputation of the person libeled. Here the defamatory article merely implies that San Diego's mayor has acquired, in some unnamed community, a bad reputation, or at least that his general reputation in such community is, to some extent, impaired. But that is a matter that rests upon public opinion, and may exist without any just foundation. It is the existence of the public opinion, and not the foundation on which that opinion rests, that is the fact put in issue. There is therefore no necessary connection between any specific act of misappropriation of trust funds, such as may be disclosed by the entries in these private books of account, and a loss of Wilde's good reputation in some unidentified city where, it is charged, he "is only too well known." The case of *Swift v. Dickerman*, 31 Conn. 285, 293, is somewhat instructive in this connection. It was held in that case that where the libelous article reflects upon the general professional reputation of a physician, evidence of specific instances of mistakes in his treatment of his patients is not admissible. The general line of reasoning pursued by the Connecticut court in that case is applicable here. See, also, *Cooper v. Greeley*, 1 Denio (N. Y.) 347, 365. For these rea-

sons we hold that the order directing petitioner to produce the books of the Community Oil Well Fund was not warranted by anything alleged in the innuendo that seeks to give point to the charge that Mayor Wilde "is only too well known" in the northern city referred to by the author of the defamatory article.

[5] It next is sought to justify the contempt order by this averment of the criminal complaint, alleged by way of innuendo:

"By the use of the words 'They were surprised you ever put him in office, dumfounded at his re-election, and amazed beyond measure that you continue to put up with him,' it was intended to convey to the persons who read said letter that said northern neighbors could not understand how the people of San Diego would re-elect said Louis J. Wilde to the office of mayor of the said city of San Diego, and that he, the said Louis J. Wilde, was not entitled to be re-elected, *nor was he worthy of the confidence of the electors of said city.*"

It is the last clause of this averment, italicized by us, upon which respondent relies to justify his order adjudging petitioner guilty of contempt. But this innuendo, if respondent's interpretation of it be accepted as that intended by the pleader, is much too broad. As construed by respondent to justify his order to produce the books, this part of the innuendo gives to the language of the defamatory article a forced and unnatural meaning. The language of the alleged libelous article is:

"They [your northern neighbors] were surprised you ever put him [Mayor Wilde] in office, dumfounded at his re-election and amazed beyond measure that you continue to put up with him."

These words, read in the light of their context, can only mean that the "northern neighbors," whoever they may be, by reason of Mayor Wilde's reputation as they know it, were surprised, dumfounded, and amazed. It may well be that in the opinion of these northern neighbors, and solely because of the reputation that he bears among them, Wilde was not entitled to be re-elected and is not now worthy the confidence of the electors of San Diego. But this is not tantamount to a charge that Mayor Wilde, in fact, was not entitled to be re-elected, or that, in fact, he is not worthy the confidence of his San Diego constituents. The gist or sting of the charge is that Mayor Wilde bears a poor reputation among the members of some northern community—that his reputation among them is so poor that they were surprised that the electors of San Diego put him in office, etc. So here again, the fact put in issue is the state of the public mind in some unnamed northern city. The truth of the charge can only be shown by direct evidence of Mayor Wilde's general reputation for trustworthiness in the particular northern city that the

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author of the defamatory article had in mind when he wrote the letter to the San Diego Sun. Such evidence can be given only by those who can testify that they know Wilde's reputation in the northern city referred to by the author of the article. To give to that part of the innuendo italicized by us—the part upon which respondent relies to justify his order—an interpretation consonant with the obvious meaning of the defamatory words sought to be explained thereby, it must be construed as meaning that San Diego's northern neighbors, because of what they believe Wilde to be, could not understand how or why he was entitled to be re-elected, or how or why he should be worthy the confidence of the electors of San Diego.

[6] It is alleged in the complaint in the criminal action, by way of innuendo, that by the words "according to his own statements in the Sunday paper the 100 citizens didn't show up. Why doesn't he go to Tia Juana? He might get 100 there to stand by him, even though it is said there is honor among thieves"—the defendants in the criminal action intended to convey to readers of the article that Mayor Wilde had been unable to obtain 100 citizens of San Diego to assist him in suppressing crime in that city, and that therefore he should go to Tia Juana, Mexico, where he would find 100 men who might be willing to assist him in an apparent effort to suppress crime in San Diego, but that they would not make any bona fide effort to suppress crime, because they are men of dissolute character and would be in sympathy with Mayor Wilde and would be guided by him in anything he undertook, "because of the fact that he, the said Louis J. Wilde, was not a citizen of good morals or integrity, or good character, and was not acting in good faith in his declared purpose to suppress crime in San Diego." The sting of the libelous words, as explained by this innuendo, is that Mayor Wilde's reputation among the habitués of Tia Juana is such that they, or 100 of them, would be willing to stand by him in a simulated effort to suppress crime, and would be guided by him in anything he undertook. It is what the 100 denizens of Tia Juana think of Wilde, and not what he actually is, that will determine their attitude toward him and his official conduct. He may or may not be honest in fact. But whether he be in fact a man of integrity or the reverse, the 100 dissolute characters of Tia Juana will be guided by him because, and only because, of what they believe him to be.

The publishers of the defamatory article, in almost every instance throughout their attack upon Wilde, have screened their assault behind either a direct or a veiled reference to Wilde's reputation among persons of a certain community or among those of a certain class. First, there is the reference to Wilde's reputation among the people of a northern city—San Diego's northern neighbors. Now

there is a reference to the dissolute characters of Tia Juana, and their attitude toward Wilde—based, necessarily, upon what they think of him. By the defamatory words which we at present are considering, the publishers of the article screen their attack with the veiled implication that Wilde's reputation among the habitués of Tia Juana is such that they believe that he is "not a citizen of good morals or integrity, or of good character, and is not acting in good faith in his declared purpose to suppress crime," and that because they so believe they will be willing to stand behind him and be guided by him. This, manifestly, is the meaning intended. For obviously the 100 frequenters of Tia Juana will be guided by what they believe Wilde to be, not what he may in fact be. Therefore it is his reputation among the men of Tia Juana that Wilde must come prepared to defend, not his innocence of any and every specific charge of dishonesty that defendant may unexpectedly spring at the trial. We are not to be understood as holding that where some specific act of wrongdoing is the sting of the charge the defendant in a libel action cannot justify by proof of the truth of such specific act of misconduct, even though such wrongful act be covertly conveyed to the readers of the article as an implicit concealed in some reference to the reputation of the person libeled. What we do hold is that where, as here, the libelous article, without imputing any specific act of dishonesty, seeks to blacken the good name of the object of the defamatory words by vague references to some ill-defined opprobrious opinion others have of him, without conveying to the readers any sharply edged delineation of that opinion, the defendant can only justify by direct proof of bad, or at least impaired, reputation in the community or among the class of persons referred to in the defamatory article.

[7, 8] It is alleged in the criminal complaint that, by the use of the words "he [the chief of police] surely deserves credit for having control of that ungovernable temper (which is more than we can say of some folks), and must be worthy the confidence in him which I find expressed on all sides," it was intended to convey to readers of the article that the chief of police of San Diego had proper control of his temper and was worthy the confidence of the people of San Diego, but that Wilde "was not worthy of such confidence." This averment also is relied upon by respondent to justify his order directing petitioner to produce the books. But the innuendo, in so far as it undertakes to explain the libelous words by ascribing to them the meaning that Wilde is not worthy the confidence of the people of San Diego, is not supported by the libelous language that it seeks to explain. The innuendo improperly enlarges the plain and unambiguous meaning of the words of the article. The words of

the defamatory article are: "He [the chief of police] \* \* \* must be worthy the confidence in him which I find expressed on all sides." This language cannot be made to carry the covert charge that Mayor Wilde does not deserve the confidence of the people of San Diego. An innuendo seeking to give to the words of the published article any such meaning enlarges the natural and ordinary sense of the words. Without doubt, the ascription to one person of some particular virtue may be made in such a manner as to imply that another, at whom the blow is indirectly aimed, is lacking in that virtue. But here the libelous article affords no basis for the claim that any such contrasting of the two men was intended. It is made sufficiently apparent from the context that praise of San Diego's chief of police cannot be regarded as an indirect reflection upon the mayor. At any rate, the praise of the former cannot be regarded as carrying the imputation that the latter has forfeited his title to confidence by reason of any act of dishonesty. The defendant in a libel action may justify the substance of the publication in the sense in which the innuendo explains it, if it explains it fairly, but the import of the words used in the publication cannot be enlarged, extended, or changed by the innuendo, and, if it is, the innuendo, to the extent that it is not borne out by the defamatory words, will be rejected as surplusage. We think that that part of the innuendo that ascribes to the words of the libelous article the meaning that Wilde is not worthy the confidence of the people of San Diego places a false and unwarranted construction upon the words of the published article, and should be rejected as surplusage.

[9, 10] Finally, it is claimed by respondent that the entries in the books of the Community Oil Well Fund, showing, so it is claimed, the misuse of trust funds by Wilde, are relevant to the issues presented by these averments of the complaint in the criminal action:

"By the use of the following words, 'I do feel, however, your mayor is to be pitied rather than censured, but it is a shame that your lovely city must be the goat and suffer such humiliations. You are laughed at, but what can you expect with your jazz cat gambles and brain storms?' it was intended to have the readers of said letter understand that he, the said Louis J. Wilde, was mentally irresponsible, and that by reason thereof he was to be pitied rather than censured, and that it was a shame that San Diego was made to suffer because of the fact that Louis J. Wilde was the mayor of said city, and that he, the said Louis J. Wilde, was causing persons residing outside the city of San Diego, and therein, to laugh at San Diego, because he, the said Louis J. Wilde, was engaged in gambling, and that he was suffering from mental unsoundness."

Here the stings of the publication are that Wilde is mentally unbalanced and that he

has been engaged in gambling. We do not know whether the books of the Community Oil Well Fund show that Mayor Wilde has been engaged in gambling. But, if they do, that fact can afford no foundation for the order adjudging petitioner guilty of contempt. The rule is that an order punishing a witness for contempt for refusing, in open court, to produce a book or other document must recite the facts that constitute the contempt and confer jurisdiction upon the court to make the order. For this purpose the order must recite facts showing that the document contains evidence pertinent and material to the issue to be tried. *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372. Here the order adjudging petitioner guilty of contempt, a copy of which is annexed to respondent's answer, contains no recital that the books of the Community Oil Well Fund show that Wilde has ever been engaged in gambling. The most that the order attempts to show is that the books disclose that Wilde has misused the moneys of a fund intrusted to him. A charge that Wilde "was engaged in gambling" is not a charge of dishonesty of the character involved in the misuse of trust funds. Without enlarging upon the iniquity of gambling, suffice it to say that, however much moral obliquity may inhere in that vice, its unethical features are not of the character that distinguishes such downright acts of dishonesty as the misappropriation of trust funds. Where a charge is made in general terms imputing to another a habit or custom of wrongdoing, it has been held that particular acts of misconduct of the same character as the offense charged are admissible in evidence as tending to prove the truth of the charge; but never has it been held that wrongful acts of an entirely dissimilar character may be given in evidence in proof of the charge. 17 R. C. L. 413. It follows, therefore, that where the defamatory words charge one with the gambling habit the truth of the charge cannot be proved by evidence that the libeled person has misused trust funds.

For the foregoing reasons, we are of the opinion that Wilde's wrongful appropriation of the moneys of the Community Oil Well Fund, if, in fact, he did misappropriate them, was not relevant to any issue presented by the complaint in the criminal action, and that therefore the books that this petitioner was directed to produce contain no evidence pertinent or material to the issues before the justice's court.

Our conclusion is that respondent was without jurisdiction to make the order adjudging petitioner guilty of contempt of court, and that the order is therefore void.

Let the peremptory writ issue as prayed.

We concur: THOMAS, J.; WELLER, J.

(44 Nev. 157)

**AZPARREN v. FERREL, Sheriff, et al.**  
(No. 2446.)

(Supreme Court of Nevada. Aug. 8, 1920.)

**1. Replevin §8(4)—Plaintiff must be entitled to immediate possession.**

To maintain an action in claim and delivery, it is necessary for plaintiff to show that he is entitled to the immediate possession.

**2. Replevin §4 — Does not lie to recover property in custody of law.**

While replevin lies to recover personal property unlawfully detained, property in custody of law cannot be so secured.

**3. Replevin §4—Liquors seized for use in prosecution for violating prohibition law cannot be replevied.**

Where plaintiff, in transporting intoxicating liquor from one point in California to another, proceeded by the usual route, which lay in part through the state of Nevada, and was arrested, and the liquor being seized and held for use in the prosecution for violating the Nevada Prohibition Law, plaintiff cannot secure possession of the liquor by claim and delivery, but the prosecuting officers may hold the same until disposition of the criminal proceedings, for the common law as well as the common practice allow articles, which supply evidence of guilt of one accused, found in his possession or control, to be taken by the officers of the law and held for introduction in evidence.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Proceeding in claim and delivery by Joe Azparren against C. P. Ferrel, Sheriff of Washoe County, Nev., and others. From a judgment for plaintiff and an order denying new trial, defendants appeal. Reversed, with directions.

Lester D. Summerfield, Dist. Atty., and W. M. Kearney, Asst. Dist. Atty., both of Reno, for appellants.

Moore & McIntosh, of Reno, for respondent.

**SANDERS, J.** This is a proceeding in claim and delivery to recover the possession of 20 cases of intoxicating liquors and one bottle of "Sunnybrook" whisky. The cause was tried before the court without a jury. The defendants appeal from the judgment in favor of plaintiff, and from an order denying their motion for new trial.

The undisputed facts are as follows:

One Joe Azparren, while traveling by automobile upon the public highway in the nighttime, on June 27, 1919, was halted by C. P. Ferrel, sheriff of Washoe county, and his deputies, Carter and Nichols, at the point of two sawed-off shotguns and an automatic pistol in the hands of said officers. The automobile contained 20 cases of intoxicating liquors and 1 exposed bottle of whisky. Az-

parren was placed under arrest, the liquors taken into the possession of the officers, and brought to Reno, Nev., where a criminal complaint was lodged against Azparren and his traveling companion by C. P. Ferrel, sheriff, before a justice of the peace of Reno township, charging Azparren with the crime of having intoxicating liquor on a public road. The accused were admitted to bail, and while the criminal accusation was pending and undetermined, this action of claim and delivery was commenced by Azparren against said sheriffs and Lester D. Summerfield, district attorney of Washoe county, for the possession of said liquors.

A second amended complaint was filed in the action on January 20, 1920. The defendant sheriffs, by their answer, justify the apprehension and arrest of plaintiff and the seizure of the liquors upon the ground that they acted in an official capacity, in the performance of an official duty. The defendant Lester D. Summerfield, by the same answer, admits that the liquors are held and detained by him, under his control and dominion, for the purpose, and that purpose alone, to be offered as evidence against the accused plaintiff at the trial of the criminal action pending and undetermined against plaintiff.

The trial court, in substance and effect, finds as facts that on the 27th day of June, 1919, Joe Azparren, the plaintiff, was traveling upon a public highway in Washoe county, by automobile, from the town of Chilcoot, in the state of California, across the state of Nevada to the town of Masonic, in the state of California; that at the time the plaintiff was, and had been, employed to haul and convey 20 cases of liquors from Chilcoot, Cal., to Masonic, Cal., by a third party, and that in the performance of his employment he followed the customary and usual route from Chilcoot by crossing the state of Nevada to reach the town of Masonic. The court further found that on said date it was lawful and legal, under the laws of California, to transport and convey intoxicating liquors over the public highway within said state, and that it was lawful and legal for plaintiff to transport said liquors over a public highway across Nevada in traveling from one point in California to another point therein. It further found that said sheriffs, unlawfully, without authority of law, and without the consent of plaintiff, seized and took into their possession said liquors, and that the same are now unlawfully detained, and that the claim of Lester D. Summerfield that said liquors are held as evidence to be offered in the criminal charge pending against plaintiff is without merit and unlawful, and specifically found that the averment of defendant sheriffs that plaintiff was apprehended and arrested in their official capacity is untrue; that plaintiff was not lawfully arrested, and that said

liquors were not lawfully seized by said officers, or either of them.

Upon these and other findings not material here the trial court rendered and caused to be entered its judgment and order that said 20 cases of liquors and the 1 bottle of "Sunnybrook" whisky be delivered forthwith to plaintiff, and that in the event said delivery be not forthwith made that plaintiff have judgment against said defendants, and each of them, in the sum of \$900 (the alleged value of said liquors).

We are of the opinion that the finding and the conclusion of law deducible therefrom that Lester D. Summerfield's claim and interest in and to said liquors (that interest being that such liquors are held for the purpose of use as evidence in the criminal case pending against Joe Azparren is without merit and unlawful) is against law.

Of such importance as it may seem to appear for some justiciable pronouncement to be made as to the power and limits a peace officer may go in the enforcement of the Prohibition Law of this state, a question of equal importance is whether or not a writ of replevin may be employed as an instrument to defeat the administration of the criminal law, and whether this can be done with impunity. The record discloses the fact that the liquors are held and detained by Lester D. Summerfield as the prosecuting officer of the state of Nevada, in and for the county of Washoe; that the liquors are under his control and direction, and are detained for the purpose only to be offered by him as evidence against plaintiff at the trial of the criminal action pending and undetermined before said justice of the peace.

[1] To sustain an action in claim and delivery, it is necessary for the plaintiff to show that he is entitled to the immediate possession of the property. *Hilger v. Edwards*, 5 Nev. 85.

[2] Furthermore, the rule is universal that replevin lies to recover personal property unlawfully detained, provided the property is not in the custody of the law. *Buckley v. Buckley*, 9 Nev. 373.

[3] We are of the opinion that where personal property is withheld by a district attorney as evidence against persons charged with crime, the accused has not the right to regain possession of the property by claim and delivery. The seizure and retention of the liquors in this case by the district attorney in no manner denies or affects the title of the true owner, or the ultimate right of his agent or servant to their possession, but simply postpones his right until the exigencies of the prosecution are satisfied. The plaintiff has shown no right to the immediate possession of the property as against the power of the magistrate's court for police purposes.

The proceedings for the claim and delivery of personal property were not intended to re-

peal or render nugatory the police power of retention for purposes of public justice, and the owner's right of possession, his agent's or servant's, cannot be enforced while the circumstances justify such retention. *Simpson v. St. John*, 93 N. Y. 363. Say the court:

"It is not only the common practice, but the requirement of the common law, that articles which may supply evidence of guilt of a party accused, found in his possession or under his control, may be taken in possession by the officer officiating in making the arrest; and, indeed, it is the duty of such officer to take into his possession and retain such articles, subject to the power and direction of the court or justice having cognizance of the alleged crime. This principle is one of necessity in the administration of the criminal law, and it is generally recognized by the courts of the country with few, if any, exceptions." *Commission & Stock Co. v. Moore*, 13 App. D. C. 78; *Comm. v. Dana*, 2 Metc. (Mass.) 329; *State v. Robbins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68; *McDonald v. Weeks*, 2 Tenn. Civ. App. 600; *United States v. Wilson* (C. C.) 163 Fed. 338; 24 Am. & Eng. Ency. of Law, 505.

The production and identification of the seized liquors are essential to the conviction of the accused plaintiff upon the charge of having intoxicating liquors upon a public road. If, by this proceeding, the liquors are to be taken by judicial process from the officer, upon whom rests the duty of prosecuting the offender, it would be possible for the accused to put out of the way evidence necessary to his conviction. But it is strenuously objected that the particular liquors held to be offered as evidence in the pending prosecution against plaintiff were obtained and are held in ruthless violation of the law without a warrant, either for the arrest of plaintiff, the automobile, or its contents. These are questions that may properly be presented for deliberative consideration when the liquors are offered as evidence. We advance no opinion as to the competency of the evidence under the existing facts and circumstances under which they are held, but simply decide that a writ of replevin cannot be converted into a process to render nugatory the administration of the criminal law. We decline to take from the Prohibition Act, conceded to be difficult of enforcement, aught that will diminish its efficiency. While at no time should the act be given a construction that will make it an instrument of dishonesty, of oppression, and an object of odium, still we shall not suffer one charged with its violation in a proceeding under claim and delivery to defeat the whole object and intention of the law.

The judgment is reversed, and our order is that the case be remanded, with directions to the lower court to suspend any further proceedings therein until such time as the trial of the case of the State of Nevada against Joe Azparren, pending in the justice's court



(191 P.)

of Reno township, Washoe county, has been finally determined.

COLEMAN, C. J., and DUCKER, J., concur.

(44 Nev. 148)

**NICHOLS v. WESTERN UNION TELEGRAPH CO. (No. 2347.)**

(Supreme Court of Nevada. Aug. 2, 1920.)

1. Appeal and error  $\S$ 193(9) — Failure of complaint to state cause of action properly raised first on appeal.

In an action against a telegraph company to recover damages for mental anguish caused by failure to promptly deliver a death message, where it appeared from the complaint itself, and from the evidence, that the message was interstate in character, it became the duty of the Supreme Court on appeal to apply the federal law applicable to that kind of a message, and, if under the law applicable thereto the complaint failed to state a cause of action, it was the duty of such court to reverse the judgment, though the question was presented for the first time on appeal.

2. Commerce  $\S$ 8(7) — Federal law governs damages for failure to deliver interstate message.

Since the amendment of June 18, 1910, to the Interstate Commerce Act, which operated to extend the federal authority over telegraph companies as to their interstate business, no recovery can be had in a state court for damages sustained for mental anguish suffered for negligent delay in delivering a death message, when unaccompanied by physical injury.

3. Telegraphs and telephones  $\S$ 65(6) — Federal law controlling, though not pleaded.

In an action in state court for damages for mental anguish from delayed delivery of a death message, it is the duty of the court to apply the federal Interstate Commerce Act, as amended by Act Cong. June 18, 1910, if the evidence establishes that the message was an interstate one, though the complaint does not plead an interstate message; the federal law being supreme and superseding all state law.

4. Statutes  $\S$ 278 — Interstate Commerce Act to be applied by state court, though not pleaded.

In an action to recover for mental anguish caused by failure to promptly deliver an interstate death message, a state court should apply Interstate Commerce Act, as amended by Act Cong. June 18, 1910, extending the federal authority over telegraph companies as to their interstate business, though not pleaded in the answer.

Appeal from District Court, Esmeralda County; J. Emmett Walsh, Judge.

Action by Marie A. Nichols against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

H. H. Atkinson, of Tonopah, and Beverly L. Hodghead, of San Francisco, Cal., for appellant.

M. A. Diskin, of Reno, A. E. Barnes, of Goldfield, and Augustus Tilden, of Reno, for respondent.

COLEMAN, C. J. This is an action instituted by the respondent in the district court of Esmeralda county to recover damages in the sum of \$2,900 for mental anguish, alleged to have been suffered because of the failure of the appellant to promptly deliver a death message sent from Cold Spring, N. Y., to the respondent at Goldfield, Nev. Paragraph 8 of the complaint is in the following words and figures:

"That on, to wit, the 17th day of December, 1913, plaintiff's father, one Charles Stonebridge, resided near said town of Cold Spring in the state of New York, and was on said day fatally ill, and on said day died near said Cold Spring, and on the 18th day of December, 1913, plaintiff, by her agent, her brother, one Augustus Stonebridge, made and entered into a contract with defendant at said Cold Spring, by which, in consideration of the sum of, to wit, \$1, to it then and there prepaid by plaintiff by her said agent and received and accepted by defendant, defendant promised and agreed to transmit from said Cold Spring to plaintiff at said Goldfield, and deliver to plaintiff at her said dwelling house in Goldfield, with reasonable diligence, a certain telegraphic message in the words and figures following, to wit, 'Cold Spring, Putnam County, N. Y. Dec. 18, 1913. Mrs. Marie A. Nichols, Goldfield, Nev. Father died yesterday. Gus.'"

Among other things, the complaint alleges the negligent and malicious failure of the appellant company to promptly deliver the message mentioned; that respondent suffered great mental anguish because thereof, and that she was damaged because of such negligent and malicious conduct. An answer to the complaint was filed, which consisted of matter negating the allegation of negligence and malice contained in the complaint. The case was tried before a jury, and verdict rendered for the plaintiff. A motion for a new trial having been denied, the defendant has appealed to this court.

The evidence on the part of the plaintiff showed the message to be interstate in character. Appellant contends that it is the rule of law in the federal courts that no recovery can be had for damages sustained for mental anguish suffered, when unaccompanied by physical injury (*Southern Express Co. v. Byers*, 240 U. S. 612, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A, 197), and that since the amendment of June 18, 1910, to the Interstate Commerce Act (chapter 309, 36 Stats. 539-545), which operated to extend the federal authority over telegraph companies as to their interstate business and contracts,

Congress has occupied the field, and thus excluded all state legislation and state rules of construction as to the right to recover for mental anguish caused by the negligence of telegraph companies in conducting their interstate business. *Postal Tel. Cable Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 40 Sup. Ct. 69, 64 L. Ed. —; *W. U. T. Co. v. Boegli*, 251 U. S. 315, 40 Sup. Ct. 167, 64 L. Ed. —.

It is conceded by counsel for respondent that this contention would be sound had the defense urged been pleaded in the answer, it being insisted that it is the law of this state that recovery can be had for mental anguish caused through the negligence of another, and defendant, not having pleaded the act of Congress above mentioned, waived its right to rely upon that point.

While counsel for respondent have presented their views in a very masterful manner, we are unable to accept the idea urged upon us. We take it that the law of a case must control, no matter in what way it is brought to our attention.

[1, 2] It appears from the complaint itself, as is shown by the language quoted therefrom, and from the evidence, that the message is interstate in character. This being true, it becomes our duty to apply the law applicable to that kind of a message; and if under the law applicable thereto the complaint falls to state a cause of action, it is our duty to reverse the judgment, though the point urged is presented for the first time on appeal (*Nielsen v. Rebard*, 43 Nev. 274, 183 Pac. 984), accepting the rule declared in *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. If the federal statute is applicable, the state law is excluded by reason of the supremacy of the former.

In view of the allegations of the complaint and the evidence in the record showing the interstate character of the message, a failure to apply the federal statute would constitute such error as would necessitate a reversal by the Supreme Court of the United States. That court, in *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 35 Sup. Ct. 306, 59 L. Ed. 671, in dealing with a similar question, said:

"But a controlling federal question was necessarily involved. For, when the plaintiff brought suit on the state statute the defendant was entitled to disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And if without amendment the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the federal statute, it was error not to apply and enforce the provisions of that law." (Italics ours.)

[3] This language is plain and unmistakable. It is the last word from the highest tribunal in the land, and its interpretation of

the Acts of Congress is binding upon us. Even had the complaint in this case not pleaded an interstate message, when the evidence established that such was the character of the message, it became the duty of the court to apply the federal law to the case, because it is the supreme law of the land and supersedes all state law which would be applicable to the facts had Congress not spoken upon the subject.

[4] It is insisted by counsel for respondent that under authority of *N. C. O. Ry. Co. v. Burrus*, 244 U. S. 103, 37 Sup. Ct. 576, 61 L. Ed. 1019, and *Atlantic Coast Line Ry. Co. v. Mims*, 242 U. S. 532, 37 Sup. Ct. 188, 61 L. Ed. 476, we cannot apply the act of Congress, since it was not pleaded in the answer. In our opinion, neither of those cases sustains the contention. In the *Burrus* Case the complaint did not show on its face, as in the instant case, certain matters which the defendant contended would bar a recovery, and during the trial an application to amend the answer so as to plead those matters was denied, and the Supreme Court of the state (38 Nev. 156, 145 Pac. 926, L. R. A. 1917D, 750) sustained the ruling of the trial court. On error to the Supreme Court of the United States, that court refused to disturb the judgment, saying: "We perceive no reason why this court should interfere with the practice of the state." The difference between the two cases is that there was nothing in the pleading in the *Burrus* Case to permit of the admission of evidence on the part of the defendant to show its own failure to comply with certain federal regulations, whereas in the instant case both the pleading and the evidence of the plaintiff bring the case squarely within the terms of the act of Congress, necessitating the application of the federal law. In other words, in the *Burrus* Case the point involved was as to the propriety of allowing an amendment to the answer so as to permit of proof, while in the instant case it is merely a question of applying the act of Congress to the facts pleaded in the complaint and proven on the trial.

Nor is the case of *Atlantic C. L. R. Co. v. Mims*, 242 U. S. 532, 37 Sup. Ct. 188, 61 L. Ed. 476, in point. The complaint in that case alleged that the line of railway upon which plaintiff was injured was owned and operated "wholly within the state of South Carolina." The railroad company filed an answer, admitting the allegation of the complaint. It appears from the opinion in that case that upon the second trial, up to the time the plaintiff rested her case, no claim had been made by defendant, and no facts had been pleaded or evidence offered from which it could be inferred that the deceased at the time of his death was engaged in interstate commerce, or that the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) was in any way applicable to the case. Upon this (second) trial the defendant for the first

time, in presenting its case, sought to show that the train which killed the deceased "was engaged in interstate commerce, and that the deceased was in this respect and otherwise engaged in interstate commerce." The trial court refused to admit the evidence, upon the ground that it came too late and did not tend to sustain any issue raised. The Supreme Court of South Carolina (100 S. C. 375, 85 S. E. 372) sustained a judgment in favor of plaintiff, and on error to the Supreme Court of the United States the writ of error was dismissed. In that case the court said:

"While it is true that the reports show that in *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, and in *Toledo, St. L. & W. R. Co. v. Slavin* [supra] the federal act was not specially referred to in the pleadings, yet they were in such form that the trial court, either without objection or over objection which the Supreme Court of the state refused to sustain, admitted testimony making it necessary to apply the federal act in deciding each case."

In the instant case the complaint showing the interstate character of the message, and the evidence on the part of the plaintiff being in accord therewith, the *Mims Case* is authority for the applying of the act of Congress to the facts as pleaded and proven.

For the reasons given, it follows that the judgment must be reversed; and, since no judgment can be entered in favor of the plaintiff under the pleadings and evidence, judgment should be entered by the trial court in favor of the defendant. It is so ordered.

SANDERS and DUCKER, JJ., concur.

(107 Kan. 368)

STRONG v. THURSTON et al. (No. 22780.)

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

1. Courts  $\S$  107—Decision held net to qualify rule as to estoppel by receipt without objection of letter of confirmation.

The rule that in certain circumstances the receipt without objection of a letter of confirmation undertaking to state the terms of an oral contract may estop the recipient to question its accuracy was not qualified by a decision affirming a judgment appealed from upon the ground, among others, that error against the appellant had been committed by the giving of an instruction that the jury might consider confirmations sent to and received by him in determining whether or not oral contracts had previously been entered into.

2. Contracts  $\S$  333(2)—Petition held not defective as not showing whether pleader regarded contract as one in writing.

It is not a valid objection to a petition declaring upon a contract originating in an oral agreement confirmed by a written statement of

its terms that it does not clearly show whether or not the pleader regarded the contract relied upon as one in writing. It is held that the meaning of the written confirmation here involved is not so obscure as to interfere with its enforcement.

3. Contracts  $\S$  245 (2) — Person receiving without objection letter confirming oral contract cannot avoid its effects by claiming variance.

One of the parties to an oral contract, who receives from the other without making objection thereto a letter of confirmation undertaking to state its terms, where the circumstances are such that his assent is to be implied, cannot avoid the effect of any of the provisions of the writing on the ground that they differ from those of the oral agreement as pleaded by the adverse party, or relate to matters that were not mentioned therein.

4. Gaming  $\S$  12—Contract for sale of grain held not objectionable as mere wager.

A provision of a contract for the sale of grain, to the effect that, if delivery is not made at the date named, the deal shall be considered open until the seller gives notice to the contrary, and that in the meantime, upon the seller offering to deliver, the buyer may elect to accept or refuse, is not open to the objection that it amounts to a mere wager.

5. Sales  $\S$  89—Contract for sale of grain held supported by consideration.

Under such a contract as that referred to in the foregoing paragraph, where after the seller's default the buyer gives written notice of an extension under such circumstances that the seller's assent thereto is to be implied, the resulting contract extending the time of delivery is supported by a sufficient consideration.

Appeal from District Court, Labette County.

Action by H. L. Strong against G. W. Thurston and another. Judgment for plaintiff, but on the ground that an erroneous measure of damages was applied he appeals. Modified and affirmed.

Campbell & Campbell, of Wichita, and P. H. Kimball and W. W. Kimball, both of Parsons, for appellant.

Pile & Goodrich, of Parsons, for appellees.

MASON, J. H. L. Strong sued Thurston & Son for damages upon two grain contracts, one for oats and one for corn. As the questions raised regarding the former include all those relating to the latter, as well as some others, only the oats contract will be discussed.

The plaintiff arranged with the defendants by telephone for the purchase from them of a car of oats for shipment on or before November 6, 1917. He immediately sent a written confirmation, which, among other things, included a provision that, if the grain was not shipped within the time fixed, the

contract should remain open until shipment was made, or the plaintiff canceled it, or bought in for the defendants' account. The defendants failed to ship within the original time, and the plaintiff sent three notices of extension, the last expiring December 10, 1917, and then, getting no word from the defendants, bought elsewhere, and sued for the difference between the market and the contract price. The plaintiff recovered; the amount awarded him being based upon the market price on November 7. He appeals on the ground that under the special findings of the jury his recovery should have been based upon the market price on December 11, after the expiration of the last extension, the difference amounting to 14½ cents a bushel.

The defendants contest this point, and also complain of the judgment rendered, and ask that it be entirely set aside, principally upon the ground that the written confirmation had not been assented to by them, that it did not confirm an existing contract, but undertook to make a new one, and that in any event it was unenforceable, because of some of its provisions.

[1] 1. The jury, in answer to special questions, found that a custom existed among grain dealers, which was known to the defendants, for purchasers of carload lots by telephone to send written confirmations to the seller; that the confirmation relied upon by the plaintiff was sent by him to the defendants and received by them without objection. This confirmation concluded with a provision that in the absence of a notification to the contrary it should be understood as accepted and binding in all its terms. In this situation the failure of the defendants to make objection was tantamount to an acceptance of the letter as a statement of the terms of a binding contract. *Strong v. Ringie*, 96 Kan. 573, 152 Pac. 631; *Wallingford v. Grain Co.*, 100 Kan. 207, 164 Pac. 275. The doctrine of the cases cited is in no sense qualified by anything said in *Cardwell v. Uhl*, 105 Kan. 249, 182 Pac. 415. There the seller complained of an instruction to the effect that, in determining whether or not oral contracts had been entered into, the jury might consider letters of confirmation sent to him, and this court held merely that no error had thereby been committed.

[2] 2. The defendants complain that the petition left it uncertain whether the plaintiff was suing on an oral or a written contract, or upon several contracts of a like undefined character. The criticism is largely verbal. Where the parties to an oral contract expressly or by fair implication agree that its terms are stated in a writing subsequently made, it is of no practical consequence whether or not the entire transaction is spoken of as the entering into of a written agreement. Nor is it important that an extension of the time of performance of

a contract, like any other change in its terms, may be said in a sense to create a new contract. There was no opportunity for the defendants to be in any way misled to their prejudice by the form of the pleadings.

The defendants, by inquiring what is meant by the following phrases used in the confirmation, suggest that they were obscure:

"Basis—f. o. b. your track." "Billing—Load and call at our expense for billing. Dest. Ry. Katy."

We do not regard them as unintelligible; but, as the result of the case does not depend upon it, we see no occasion for undertaking their interpretation.

[3] 3. The defendants assert that the written communication sent to them changed some of the terms of the oral contract pleaded, and added new ones, and therefore was not a confirmation at all. The oral contract set out in the petition as amended was for a car of 1,250 bushels of No. 3 or better mixed oats at 56 cents, track Parsons, shippers' affidavit weights, federal grades, to be billed out by November 6. The confirmation reserved to the plaintiff the right to change the destination. The provision of the oral contract implied that a shipment was to be made to some point unnamed, and the confirmation merely stated—what was doubtless to be inferred—that the buyer was to give directions concerning this. The confirmation contained a provision, which was a part of the printed blank used, that the contract was not complete until shipments were received, graded, and weighed at final destination. This was obviously rendered inapplicable by the insertion of these words, which conformed to the oral contract, in a blank left to show the agreement as to weight—"shipper's reliable affidavit." Various statements in the confirmation as to shipment, payment, and demurrage, which are referred to as changes, are mere details, in no way inconsistent with the general scope of the oral contract.

The provision of the confirmation which is most plausibly urged as a departure from the oral agreement read in part as follows:

"Grain not shipped in contract time will be considered as open contracts until shipped, or you are advised we have canceled same, or bought in for your account."

This was a matter not touched on in the telephone conversation, but the question as to what the relations of the parties should be in the event shipment was not made within the time stated was one about which there might be a difference of opinion. Conceding that the law would define their rights with exactness, in the absence of an express provision, they were privileged to make such agreement in that respect as they saw fit. The explicit statement of the effect of a fail-

ure of the seller to comply strictly with his agreement as to time was entirely pertinent to the subject, and was in the nature of an added detail of the transaction. It is a proper function of the confirmatory letter to afford assurance, not merely that there has been no mistake by either party in catching the words of the other, for instance, concerning prices and amounts, but that they have the same understanding as to the obligations in detail which each has assumed. The benefit to the business world of the employment of such a device would be largely curtailed, if the recipient of a purported confirmation of an oral agreement for purchase and sale could remain silent, and later successfully deny any force to one of its provisions, on the ground that the matter to which it relates had not in fact been previously mentioned.

[4] 4. To the provision of the confirmation which has just been quoted was added:

"If unable to ship in contract time, phone or wire us, and secure our further instructions before loading and shipping, and we will then advise if we can still use on contract."

The defendants claim that this addition converted the transaction into a wagering agreement, unenforceable because of that feature. Neither this provision, nor anything else in the contract, appears to us to suggest that an actual delivery of the oats was not intended. We take the effect of the provision under consideration to be this: If the defendants failed to make shipment within the time set, they remained under an obligation to tender performance on their part at such time as they should select (unless sooner notified that the plaintiff had canceled or bought in), which offer the plaintiff might accept or reject; his election in this regard being likely to be influenced by the then state of the market. If he accepted it, the deal would be concluded by a shipment. If he rejected it, he thereby relieved the defendants from any liability for damages for breach of the contract. He could not, after receiving such offer, insist upon the defendants paying him the difference between the contract and market price and prevent their satisfying their obligation by actual delivery of the grain. The transaction, therefore, did not fall within the condemnation of either the common law or the statute. It was competent for the parties by agreement to make the right of the buyer to refuse the grain when offered one of the consequences of the sellers' default.

[5] 5. From November 6, the date originally fixed for shipment, until November 17, the contract stood without action by either party; then, according to the plaintiff's evidence, he by telephone, at the request of the defendants, extended the time of shipment to November 25, sending a written confirma-

tion, to which no reply was made. Subsequent extensions were made to December 3, and December 10; confirmations being mailed and received. The jury found specifically that the plaintiff had extended the time within which the defendants might make shipment up to December 10; that the market value on November 7 was 59½ cents and on December 11 was 74 cents; and that the defendants never notified the plaintiff that they were not going to ship the oats. All conflicts of testimony on the issue regarding the extensions are therefore disposed of, and they must be regarded as effective, unless some legal principle would thereby be invaded.

We see no obstacle to holding the extension agreements valid. The course of the defendants in failing to object in any way to the supplemental confirmations sent them was plainly adapted to induce the plaintiff to believe that they acquiesced in them, and they must be held to have intended the natural result of their conduct. The original confirmation contained a provision that any change might be a part of the contract, if incorporated in a written supplement, but that any verbal understanding, not written in the (original) confirmation, should be of no effect. We regard the incorporation of the terms of the extensions in written statements sent to the defendants, and received by them without objection, as amounting to their incorporation in a supplement, and as giving them the force of written agreements.

Each extension operated to the advantage of the defendants. By their failure to meet their obligation with promptness they had already incurred a liability to the plaintiff for damages. His forbearance gave them renewed opportunity to discharge all their obligations by performance. If they had at any time concluded that a further rise in price was probable, they could have brought matters to a head, and avoided the risk of an increase in the amount of their loss as then indicated, by buying at the market and filling the order. They could perhaps have accomplished substantially the same result by merely notifying the plaintiff that they would not make delivery, creating an immediate breach of the contract, for which the measure of damages would turn upon the then state of the market. Note, L. R. A. 1917A, 1004, 1005.

The situation is not the same, however, as that presented in *Flour Mills Co. v. Dirks*, 100 Kan. 376, 164 Pac. 273, where the original contract in so many words gave the buyer the right to make extensions, or in *Wichita Mill & Elevator Co. v. Liberal Elevator Co.*, 243 Fed. 99, 155 C. C. A. 629, where a rule of the Kansas Grain Dealers' Association, which was made a part of the contract, authorized such an extension by including it as one of the options given to

the buyer upon the seller's default. But here the extension contracts, the terms of which were evidenced by the supplemental confirmations, were supported by a sufficient independent consideration in the mutual agreements of the parties. The plaintiff waived his right to close the deal before the date named, and the defendants substituted for their existing obligation to make delivery at some indefinite time to be selected by them a promise to deliver within the new period fixed.

As against the complaint of the defendants, the action of the trial court is affirmed. A modification is ordered in accordance with the contention of the plaintiff; the amount of the judgment to be increased to correspond with the state of the market as it was found to be on December 11.

All the Justices concurring.

(107 Kan. 329)

**BRACKVILLE v. SOUTHWESTERN BELL TELEPHONE CO. (No. 22731.)**

(Supreme Court of Kansas. July 10, 1920.  
Opinion Denying Second Motion for Rehearing, July 19, 1920.)

(*Syllabus by the Court.*)

**1. Former ruling adhered to.**

The ruling on a motion to set aside service is adhered to.

**2. Appearance  $\Leftrightarrow$  24(13)—Defendant on appeal held not seeking affirmative relief so as to waive defeat of service.**

A defendant who moves for a judgment in his favor on the special findings of the jury, and upon appeal asks this court to direct the sustaining of the motion, is not to be regarded as thereby seeking affirmative relief and so forfeiting his right to ask a review of the overruling of his objection to the sufficiency of the service upon him.

Appeal from District Court, Wyandotte County.

On motion for rehearing. Motion denied.

For former opinion, see 107 Kan. 130, 190 Pac. 773.

MASON, J. [1] In a motion for a rehearing the defendant, among other things, urges that, in holding the service of summons to have been sufficient, the court has misinterpreted the effect of the taking over of the telephone lines by the government and has departed from its own prior rulings. The basis of the decision may perhaps be made clearer by a brief addition to the original opinion. We do not question the completeness of the government's control of the telephone systems while public management was in force, nor do we suggest that during

that period the situation was such as to render the business amenable to state regulation or subject the corporations owning the property to liability for its negligent operation. We regard the terms of the President's order, in providing for the conduct of the business by the Postmaster General through the owners, directors, and officers, as well as the employes, of the systems, as indicating the retention to some extent of the corporate organization; but the affirmance does not depend upon the correctness of that view.

As pointed out in the original opinion (107 Kan. 130, 190 Pac. 773), the statute here involved (Gen. Stat. 1915, § 8961) is quite different from that relied upon in *Chillett v. Railway Co.*, 102 Kan. 297, 171 Pac. 14, L. R. A. 1918C, 1147. It applies to corporations generally, irrespective of their character or their active engagement in business. It provides for the service of summons upon officers because of their relation to the corporation, not because of their being at the time actually performing a particular kind of work in connection with a public utility. The officers of the defendant corporation did not cease to be such upon the taking over of its telephone system by the government, whatever may have been the case with mere employes. From the statutory classification of a managing agent with the officers of a corporation it is to be presumed that the relation to the defendant of the person described by that title in the sheriff's return continued notwithstanding the change in the control of its property—a presumption not overthrown by the affidavit attacking the service, which stated no evidential fact as distinguished from a mere legal conclusion. We hold the delivery of a copy of the summons to him to have been sufficient to bring the defendant into court, not because the character of the work he was then doing under the government necessarily qualified him to receive it, but because it was not proved that the relation he had sustained to the corporation at the time the Postmaster General took charge had ever been terminated.

[2] 2. In behalf of the plaintiff an argument is renewed which was urged at the original hearing, but not mentioned in the opinion, to the effect that the defendant lost its right to a review of the ruling on its objection to the service by moving for a judgment in its favor on the special findings and by asking this court to remand the case with directions to enter judgment in its favor. It is argued that, inasmuch as a judgment of that character would put an end to the litigation and operate as a bar to any further prosecution of the plaintiff's claim, the defendant in asking it is seeking affirmative relief. As we view it, the motion for a judgment on the findings, although affirmative in form, was in effect a request

that the court decide that as a matter of law the facts found prevented any recovery by the plaintiff. The relief asked was substantially the end sought in any defense on the merits, and the making of such defense did not involve the abandonment of the jurisdictional question. See *Shearer v. Ins. Co.*, 106 Kan. 574, 189 Pac. 648.

Other questions reargued have been given further consideration, but the court adheres to the views originally announced.

The motion for a rehearing is overruled.

All the Justices concurring.

#### Opinion Denying Second Motion for a Rehearing.

The appellant has tendered and asked leave to file a second motion for a rehearing based upon the ground that a part of the reasoning upon which the decision of the court was rested is inapplicable because the defendant, being a Missouri corporation, cannot be brought into a Kansas court by service here upon one of its officers or agents unless it is engaged in business in this state. The leave asked is granted, but the motion for a rehearing is denied for the reasons that, irrespective of the merits of the contention in other respects, the motion to set aside the service was not based upon the defendant being a foreign corporation, and the abstract does not disclose that it was shown to the district court that the defendant was a Missouri corporation or that it was not a domestic corporation.

All the Justices concurring.

(107 Kan. 290)

VAIL v. MARSHALL MOTOR CO. et al.  
(two cases). (Nos. 22657, 22606.)

(Supreme Court of Kansas. July 10, 1920.)

(*Syllabus by the Court.*)

1. Former decision followed.

The rule of *Howard v. Motor Co.*, 106 Kan. 775, 190 Pac. 11, followed.

2. Master and servant §330(3) — Municipal corporations §706(5) — Evidence held to warrant recovery for injuries to third persons by colliding automobiles driven for owners.

The evidence examined, and held to be sufficient to support the findings and verdict of the jury to the effect that the driver of the automobile which caused injury to the plaintiffs was engaged in the service of the defendants at the time, and that the injuries were sustained through the culpable negligence of the defendants.

Appeal from District Court, Sedgwick County.

Separate suits by Lucia S. Vail and Walter Scott Vail against the Marshall Motor Company and another. Judgment in each case for plaintiff, and defendants appeal. Affirmed in each case.

Stanley, Stanley & Hegler, Geo. Siefkin, and Forrest Siefkin, all of Wichita, for appellants.

Matson & Stearns, of Wichita, for appellees.

JOHNSTON, C. J. These appeals bring up for review two judgments rendered against the defendants for personal injuries sustained by plaintiffs through the negligence of defendants.

[1, 2] The assignments of error made by defendants raise substantially the questions that were presented here in the case of *Howard v. Motor Co.*, which were determined at the May session of the court. 106 Kan. 775, 190 Pac. 11. As the result of a collision of two automobiles, one of which was driven by an employé and agent of the defendants, Lucia S. Vail, Walter Scott Vail, as well as Fanny Howard, were severely injured. It was alleged that the accident and injuries resulted from driving this car at an unlawful rate of speed and in such a way as to constitute reckless and wanton negligence. The plaintiffs in these cases were near together upon the sidewalk when the collision occurred and when one of the colliding cars was thrown with great force upon the sidewalk and against the plaintiffs. The testimony as to the agency of Miller who was driving one of the cars, and as to the circumstances of the injuries, was substantially the same in these cases as in the one already determined. The errors assigned in the instant cases are those that were urged in the *Howard Case*. A repetition of the objections made and of the reasons for overruling them would serve no good purpose. The evidence is deemed to be sufficient to sustain the finding that Miller, the driver, was engaged in the service of his employers when the accident occurred and the injuries were inflicted. Defendants renew their attack upon the plaintiff's evidence and point out inconsistencies and portions of it that seem to them to be unreasonable and incredible, but these are matters which were properly left to and have been determined by the jury. The testimony of Miller upon which the verdicts largely rest is of itself sufficient to sustain the verdicts.

We have examined all the evidence and have no hesitation in holding that the findings and verdicts are sufficiently supported by the evidence.

The judgments in both cases are affirmed.  
All the Justices concurring.

(107 Kan. 365)

**WILSON et al. v. JONES. (No. 22771.)**

(Supreme Court of Kansas. July 10, 1920.)

*(Syllabus by the Court.)*

**Judgment**  $\S$  143(1)—Refusal to set aside judgment against defendant personally served held not abuse of discretion.

The proceedings examined, and held, the court did not abuse its discretion in refusing to set aside a judgment regularly rendered against the defendant, who, though personally served, did not plead or appear.

**Appeal from District Court, Saline County.**

Action by J. M. Wilson and another, partners as the Wilson Realty Company, against Horace Jones. Judgment for plaintiffs, on default, and, from a refusal to set the judgment aside, defendant appeals. Affirmed.

H. C. Tobey, of Salina, for appellant.

David Ritchie, of Salina, for appellees.

**BURCH, J.** The appeal was taken from an order of the district court, refusing to set aside a judgment, the journal entry of which reads in part as follows:

"The plaintiff shows to the court, and the court finds, that the defendant has been duly and personally served with summons in the above-entitled cause, and that he has failed to answer, demur, or otherwise plead herein, and is in default.

"Thereupon the said plaintiff waived a jury, and presented his evidence to the court, and after hearing the evidence, and the court being fully advised in the premises, finds that the said defendant is justly indebted to said plaintiff in the sum of \$575, upon the cause of action set out in the plaintiff's petition."

The defendant was served on April 14. The answer day was May 14. The judgment was rendered on May 31. On June 7 the defendant filed his motion to set aside the judgment, and tendered an answer.

The suit was one for a real estate agent's commission. The tendered answer was that the plaintiffs were not the defendant's agents, and that the sale of his land was made by another person as his agent, who had been paid a commission. After the defendant was served he moved to another county. After removal he mailed the summons to the agent whom he recognizes, with a letter requesting the agent to see that a defense was interposed. The defendant filed an affidavit that the request was based on a previous arrangement with the agent that, if a suit of this kind were brought, the agent would secure counsel for the defendant, and see that a defense was interposed. The affidavit contains this statement:

"Affiant has been informed and believes the fact to be that Eberhardt received such letter in due course of mail."

The agent was not called as a witness, and his testimony was not taken.

The application is based on the provision of the Civil Code authorizing the granting of a new trial for unavoidable casualty or misfortune preventing a party from prosecuting or defending. Gen. Stat. 1915,  $\S$  7500 (Code Civ. Proc.  $\S$  596). In the case of *Welch v. Challen*, 31 Kan. 696, 3 Pac. 314, the syllabus reads as follows:

"Where the plaintiff resides in Kansas and the defendants reside in another state, and the defendants employ an attorney in Kansas to file an answer and to attend to the case, but the attorney never files such answer, but before the time for filing the same has expired, leaves the state of Kansas and never returns, and no answer is ever filed in the case, and after more than four months have elapsed after the defendants have made default by not filing an answer, a judgment is rendered by default, in favor of the plaintiff and against the defendants, in accordance with the prayer of the plaintiff's petition, and the defendants have no knowledge of the negligence of their attorney, or of the rendition of such judgment, until a long time after both have occurred, and the attorney is insolvent, and the defendants have a good defense to the action, held that neither the negligence of the attorney nor his insolvency, nor the defendants' want of knowledge, nor all combined, can be considered such an 'unavoidable casualty or misfortune preventing the party from prosecuting or defending' the action that the defendants may have the judgment vacated under section 568 of the Civil Code, and they be let in to defend." 31 Kan. 696, 3 Pac. 314.

District courts are usually quite liberal in vacating judgments taken in the absence of a party who is in default, with or without imposition of terms as circumstances may suggest, because the result is simply a full investigation of the controversy on its merits; but they are not obliged to ignore crass negligence, and they are entitled to be assured that justice will be best subserved by another trial. In this instance the defendant was negligent in any event, and he was entitled to no favor at all, unless his agent were guilty of misconduct, or inattention amounting to that. The showing in that respect was too meager and indefinite. Doubtless the court was impressed by the defendant's failure to call the agent as a witness, and by a few questions clear up the whole matter, and show that a fair probability existed the ends of justice had not been attained.

The defendant says casualty and misfortune may result from negligence, which is true; but in this case there was nothing but negligence. The defendant cites the case of *Sanders, Adm'r, v. Hall*, 37 Kan. 271, 15 Pac. 197. In that case the defendant was guilty of no laches, and was misled by a statement of the trial judge in regard to the



course the proceeding would take. The defendant also cites the case of Patterson v. Oil Co., 101 Kan. 40, 165 Pac. 661. In that case the defendant's attorney relied on what he understood to be a custom whereby he would be notified of the setting of his case for trial, and he was ready to attend on receipt of notice by telephone or telegraph. It was held he was negligent, and his negligence would be imputed to his client; but because of the peculiar character and importance of the case the slight showing made by the successful party at the trial, and some other matters indicated in the opinion rather than expressed, this court was convinced the case required further consideration.

In this instance the court is not able to say that the district court abused its authority, and its judgment is affirmed.

All the Justices concurring.

(107 Kan. 245)

**ROYCE v. FARMERS' LIFE INS. CO.\***  
(No. 22583.)

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

**1. Insurance**  $\S$ 84(6)—Petition in action for compensation for services held sufficient.

The petition of the plaintiff herein examined, and held to be sufficient to warrant a recovery for the services rendered by him to the defendant under a written contract which was pleaded, and further that the allegations were sufficient to admit of evidence that the parties treated the contract as a continuing one, and justified a recovery for services rendered beyond the term specified in the written contract.

**2. Insurance**  $\S$ 84(6) — Evidence sustaining findings for plaintiff in action for services.

The evidence is held to be sufficient to sustain the findings of the jury and the judgment of the court.

**3. Evidence**  $\S$ 244(5)—Admissions by director as to terms of employment held admissible in action for services.

Under the objection that was made, it is held that the questioned testimony of statements and directions given by the secretary of the defendant company, who was a director and member of the executive committee of the company, as to plaintiff's employment was admissible.

**4. Evidence**  $\S$ 354(7) — Admission of check stubs held not error.

The admission of stubs of checks, which corresponded with the checks themselves, that had already been received in evidence, was not error.

**5. Evidence**  $\S$ 271(19) — Letter by defendant's officer to its attorney held properly excluded.

No error was committed in excluding a letter written by an officer of the defendant to its

own attorneys respecting a pleading filed in the case.

**6. Evidence**  $\S$ 271(18)—Self-serving declaration in corporate minutes not admissible against persons not privies.

Self-serving declarations in the minutes of a private corporation are not admissible in its favor as against third parties not privies to the entries.

Appeal from District Court, Sedgwick County.

Action by John Q. Royce against the Farmers' Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Vermillion, Evans, Carey & Lilleston, of Wichita, H. A. Hicks, of Denver, Colo., and W. E. Stanley and Arnold C. Todd, both of Wichita, for appellant.

Matson & Stearns, of Wichita, for appellee.

**JOHNSTON, C. J.** This is an action by John Q. Royce to recover compensation for services rendered by him for the defendant, in which he obtained a judgment for \$3,338.37, from which defendant appeals.

It appears that on April 1, 1914, the parties entered into a written contract under which plaintiff was employed for a term of one year as superintendent of agents. It was stipulated that he was to assist the general manager in managing and superintending agents and solicitors of insurance, subject always to the orders and instructions of J. A. O'Shaughnessy, the general manager, and also of the executive committee of the defendant company. It was recited that he was to devote all of his time and energies to the discharge of his duties, which were to be performed at the home office in Denver, except such as were to be performed in the field in the training and direction of agents. For his services he was to receive a salary of \$3,000 per year, payable in monthly installments of \$250, and the company was also to pay his necessary expenses when he was on duty in the field. From April 1, 1914, to September of that year, plaintiff worked for the defendant in Colorado and received the stipulated compensation. About September 23, 1914, the defendant sent him to Kansas to assist in the purchase of smaller insurance companies and the transfer of their assets and business to the defendant company. At that time a question arose as to the compensation to be paid to him. It was alleged, and there was testimony tending to prove, that the officers of the defendant desired that the work should be done for a commission; but plaintiff told them that his circumstances would not permit him to take the chances of changing from a salary to commission basis, and it was agreed that he should proceed with the work, and should later determine whether he would take the salary or the commission, and sub-

sequently he exercised the option, and elected to take the salary. He continued with the defendant beyond the term named in the contract, and until September, 1915, when a dispute arose in the adjustment of his compensation. In his petition plaintiff asked to recover the salary stipulated in the contract, and in a second count he asked for the value of the services rendered, which was placed at the same amount claimed to be due as salary. The court, however, excluded proof under the quantum meruit count, and the recovery had was based on the salary fixed in the contract.

[1] It is insisted by defendant that the amended petition did not warrant the admission of the testimony offered under it, or the findings and the verdict that were rendered. It is said that the plaintiff pleaded a contract which stipulated for services to be performed in Colorado, and which by its terms expired on April 1, 1915, while the greater part of the services for which he recovered was rendered in Kansas, and that he was awarded compensation for a period much beyond the term fixed in the contract. It is also urged that the award was made upon a separate oral agreement, not pleaded, which changed the character of his work, fixed a new field of operations, and allowed a recovery in the theory of an extension of the time of employment not alleged in the petition.

The pleading, though not as full and specific as it might have been made, did base plaintiff's claim upon the written contract of April 1, 1914. It did not allege in so many words an extension of the time of employment, but in effect it did state an extension or rather that the work was continued under the written contract, in the allegation that the contract remained in full force and effect to the end of the service, and that he had complied with the letter and spirit of the contract, and had performed the duties assigned to him by the defendant under the contract during the entire period of time he was at work for the company.

[2] There was proof tending to sustain the theory of the plaintiff that, while his duties were changed to some extent, they were performed under the contract, and under the instructions and directions of the defendant; also that he was permitted to choose whether he would work under the contract for the specified salary or for a proposed commission, and that he elected to work for the salary fixed in the contract. There was sufficient evidence to show that the officers of the defendant stated and treated the contract as a continuing one, and that they proceeded on the theory that the life of the contract was extended. He continued to work for the defendant until September, 1915, and the defendant availed itself of the benefit of his services.

The fact that the duties performed by him differed to some extent from those specifically enumerated in the written contract did

not defeat a recovery, as the contract itself recognized that he was subject to the orders and instructions of the officers and the executive committee of the defendant. It is suggested that the plaintiff acted as an officer of the Anchor Insurance Company, for a time and should look to that company for his compensation; but that was the company whose assets and business he was sent to Kansas to purchase, and he was acting for the defendant in that purchase, and all he did in that respect was done under the direction and for the benefit of defendant, and therefore he had a right to look to it for the payment of his salary.

The holding that the pleading was sufficient to warrant a recovery upon the theory that the contract was a continuing one, and that the services for which the plaintiff sues were performed under it, disposes of a number of the objections raised by the defendant.

[3] Complaint is made of the admission of the testimony to the effect that, when the period named in the contract was about to expire, plaintiff called the attention of one Sabin, the secretary of the company, to the fact, and was then told by Sabin that the contract was a continuing one, and to proceed with his work as before. It is now contended that Sabin had no authority to speak for or bind the company. He was not only the secretary, but was a director, of the company, and a member of the executive committee, which directed its business. More than that, the defendant allowed the plaintiff to proceed with his work as if the contract was still in force. Furthermore, the objection made to the admission of the evidence was that the plaintiff was then serving under a new contract, which had not been pleaded, and not that Sabin was without authority to bind the company by his action or direction. The exclusion of the testimony is not a ground for reversal.

[4] Objection is also made as to the admission of certain stubs of checks that had been issued. It appears that these correspond with checks that had been properly received in evidence, and, even if they were not properly admitted, their reception is not deemed to be material error.

[5] There was no error in excluding a letter written by the secretary of the company to its own attorneys in respect to a pleading which they had filed in this case. Nothing material to the case is found in the letter, and besides the defendant could not help its case by a declaration of one of its officers to its own attorneys.

[6] Neither was error committed in excluding the minutes of the executive committee relating to a proposition that plaintiff should work for defendant, in the exchange of the stock of the Anchor Company for that of the defendant, upon a commission basis. The minutes of a corporation may be offered in evi-

dence in controversies between members of a corporation, or against a corporation, but not in favor of it, as against third parties. The plaintiff was a stranger to the defendant corporation, and had nothing to do with the writing of the minutes, and the defendant could not bind him by what it entered in its books. As against him the recitals in the minutes were self-serving declarations, and not admissible in evidence. *Dolan v. Wilkerson*, 57 Kan. 758, 48 Pac. 23; *Trust Co. v. Loving*, 71 Kan. 558, 81 Pac. 200; note, 125 Am. St. Rep. 858.

Errors are assigned on instructions refused and given. An examination of these objections shows that they are based upon the theory that under the pleadings plaintiff could not recover upon the written contract; but, as we interpret the allegations in plaintiff's petition, the instructions as given were pertinent and proper.

The findings appear to be supported by the evidence, and, finding no substantial error in the rulings, the judgment is affirmed.

All the Justices concurring.

(107 Kan. 375)

ANDERSON et al. v. SOUTHERN SURETY CO. (No. 22789.)\*

(Supreme Court of Kansas. July 10, 1920.)

(Syllabus by the Court.)

1. Insurance §514½, New, vol. 11A Key-No. Series—Indemnity insurer held liable for negligence in improperly conducting defense of suit against employer.

Where an insurance company insures an employer of labor against loss or damage on account of injuries sustained by his employes, takes charge of a defense in an action brought by an injured workman, and through negligence in not properly conducting the defense judgment is obtained against the employer for an amount in excess of that named in the policy, the insurance company is liable to the employer for the damages thus occasioned.

2. Insurance §514½, New, vol. 11A Key-No. Series—Violation of statute not available to insurer sued for improperly defending action against insured.

In an action brought by such an employer to recover from the insurance company the damages thus sustained, where the company could have set up as a defense in the action by the employe that he and the plaintiffs were engaged in using dynamite in a coal mine in violation of law, and that the injury to the employe was thereby occasioned, that fact cannot be set up by the insurance company as a defense.

3. Insurance §514½, New, vol. 11A Key-No. Series—Employer suing insurer for improperly defending suit held not guilty of contributory negligence.

The employer is not guilty of contributory negligence where he employed an attorney to

assist in the defense who had no control over the litigation, and who only did those things he was required to do.

4. Pleading §369(3)—Causes of action for negligence not inconsistent when one does not defeat the other; "inconsistent causes of action."

Causes of action based on acts of negligence alleged in a petition are not inconsistent with each other when they can stand together, when one does not defeat the other, and the truth of one does not disprove the truth of the other.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Inconsistent Causes of Action.]

Appeal from District Court, Labette County.

Action by William S. Anderson and another against the Southern Surety Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Owen & Davis, of Joplin, Mo., F. S. Jackson, of Topeka, W. E. Ziegler and A. M. Etchen, both of Coffeyville, and John P. McCammon, of Springfield, Mo., for appellant.

Denison & Kirkpatrick, of Kansas City, Mo., and E. L. Burton, of Parsons, for appellees.

MARSHALL, J. The defendant appeals from a judgment for damages on account of its negligence in conducting the defense in an action against the plaintiffs. Elaborate findings of fact were made by the court, a brief summary of which is as follows:

Plaintiff William S. Anderson was engaged in mining coal from a strip pit coal mine. He obtained a policy of insurance from the Missouri Fidelity & Casualty Company, insuring the plaintiff in the sum of \$5,000 against loss or damage on account of accidents resulting in bodily injury to any one person employed in the operation of the mine. Afterward plaintiff Charles Sweeney, with the knowledge and consent of that company, became a partner of plaintiff William S. Anderson in the operation of the coal mine, and later the defendant succeeded to the rights and obligations of the Missouri Fidelity & Casualty Company under the policy. William Henry Marshall was employed by the plaintiffs as shot firer in their coal mine. He performed his work in the following manner: After the surface earth and stone had been removed from the coal, a hole was drilled through the coal to a depth of about 26 inches, into which a piece of dynamite was placed and exploded by detonation, after which a quantity of black blasting powder was poured into the hole, and that powder was exploded by ignition. Marshall was injured by an explosion of black blasting powder in a hole into which he had poured the powder after he had exploded a piece of dynamite therein.

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 29, 1920.

Marshall sued the plaintiffs for damages. Under the terms of the policy the defendant had the right to defend in that action and did conduct the defense. The defendant's attorneys in that action prepared the answer, but they did not plead that Marshall was using dynamite in the mine in violation of sections 6326 and 6328 of the General Statutes of 1915. Trial was had, which resulted in a verdict in favor of the plaintiff for \$4,500. That verdict was set aside, and a new trial was granted. Before the action was again tried the plaintiff offered to compromise and settle his claim for \$4,500, but the defendant refused to settle for that sum. The action was again tried and resulted in a judgment for \$8,650. That judgment was affirmed in *Marshall v. Anderson*, 98 Kan. 573, 158 Pac. 1116. The defendant paid \$5,415.09 on that judgment. The plaintiffs paid the remainder of that judgment. They then commenced this action to recover from the defendant the sum of \$3,000 as the damages sustained by them on account of the defendant's negligence in failing to in any way set up the illegal act of Marshall in using dynamite in the coal mine as a defense in the action brought by him, and in failing to compromise and settle the claim of Marshall for \$4,500.

[1] 1. The petition in *Marshall v. Anderson Coal Co.*, the action out of which the present one arose, alleged that Marshall was injured by an explosion of black blasting powder in a hole in which he had just prior thereto exploded dynamite in violation of the laws of the state of Kansas. The laws referred to are sections 6326 and 6328 of the General Statutes of 1915, which are as follows:

"It shall be unlawful for any person or persons engaged in coal mining to use or cause to be used dynamite or other detonating explosives in the preparation of any blast or shot in any coal mine within the state of Kansas: Provided, however, that dynamite or other detonating explosives may be used under such rules and regulations as may be agreed upon between the employer and the employes, same to be approved by the state mine inspector. All rules, regulations and permits to use dynamite or other detonating explosives, as herein provided, shall be in writing." Gen. Stat. § 6326.

"Any person or persons violating the provisions of section 1 of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding twenty-five dollars." Gen. Stat. § 6328.

That petition also alleged that no written rules or regulations for the use of dynamite in the mine in which Marshall was working had been agreed upon between the Anderson Coal company and its employes, nor had any rules and regulations been approved by the state mine inspector. This court had occa-

sion to pass on these statutes in *Richards v. Coal Co.*, 104 Kan. 330, 179 Pac. 330, where this court said:

"The act applies to strip pit coal mines." Syllabus 2.

"A shot firer in a strip pit coal mine comes within the provisions of the act making it unlawful for any person engaged in coal mining to use dynamite in the preparation of any blast or shot in any coal mine within the state." Syllabus 3.

"Such a shot firer, using dynamite in the preparation of a blast in violation of the act, cannot recover damages for injury sustained by him in the explosion of dynamite with which he was working, if it is necessary for him to prove its illegal use as a part of his case." Syllabus 4.

If a demurrer to the petition in *Marshall v. Anderson Coal Co.* had been interposed, it should have been sustained. An answer could have been filed in which the unlawful use of dynamite could have been pleaded as a defense, and if proved it would have been a complete defense. If the evidence of Marshall introduced on the trial had disclosed that he was using dynamite in violation of law at the time he was injured, a demurrer to his evidence should have been sustained. None of these things were done. That it was negligence on the part of the defendant not to do one of these things cannot be successfully disputed. In *Attleboro Mfg. Co. v. Frankfort M. Acc. & P. G. Ins. Co.* (C. C.) 171 Fed. 495, it is held that—

"Where an insurer under an employers' liability policy on being notified of an action for injuries to insured's servant assumed the defense thereof, and was negligent in conducting the suit, to the loss of the employer, the latter was entitled to sue the insurance company for breach of its implied contract to exercise reasonable care in conducting the suit or in tort for negligence." Syllabus 2.

In that case the limit of liability was \$5,000. On account of the negligence of the insurance company judgment was obtained for \$17,343.81. The action was commenced to recover \$12,343.81. Judgment was rendered for \$5,437.17, and an appeal was taken to the United States Circuit Court of Appeals, First Circuit, where it was held that the insurance company was liable for negligence in its defense in the action, but the judgment was reversed and remanded for further proceedings on other grounds. *Attleboro Mfg. Co. v. Frankfort Marine, etc., Ins. Co.*, 153 C. C. A. 377, 240 Fed. 573. The opinion of the United States Circuit Court of Appeals is also reported in 17 N. C. C. A. 1068, where a note is found on the "liability of indemnity insurance company for negligence or bad faith in defending or settling action against insured." See, also, *Getchell & Martin L. M. Co. v. Employers' Liability Assurance Cor.*, 117 Iowa, 180, 90 N. W. 616, 62 L. R. A. 617.

[2] 2. To avoid the consequences of its negligence in defending the former action, the defendant argues that the plaintiff cannot recover in this action, for the reason that they were permitting Marshall to use dynamite in violation of law when he was injured. The present action does not arise out of the violation of law, but arises out of the negligence of the defendant in not setting up the violation of law as a defense in the former action. While defending in the former action, the defendant should have in some way made this defense known to the court, and it cannot now set up the matter to relieve itself of the payment of the damages caused by its negligence.

[3] 3. Another reason advanced by the defendant for its nonliability is that the plaintiffs employed able counsel of their own to represent them in the former action, and that they were therefore guilty of contributory negligence because their attorney did not set up this defense. The trial court found that—

"Under the terms and provisions of said policy of insurance plaintiffs Anderson and Sweeney, at their own expense, and with the knowledge and consent of defendant, employed one John J. Campbell, to co-operate with and render all reasonable assistance to defendant's attorney, R. M. Sheppard, in the defense or settlement of said action for damages, \* \* \* and that he rendered such services and assistance from time to time as he was called upon by said Sheppard to render."

There is nothing in the findings to show that the defendant in the present action did not take complete control of the defense in the former one. There is in the findings of the court that which indicates that the plaintiffs' attorney had no control over the litigation whatever, that he was hired to do what he was told to do, and that he was not hired to do anything except what he was told to do. There was nothing in the employment of the attorney for the plaintiffs nor in the service rendered by him in the litigation that sustains a charge of contributory negligence against the plaintiffs.

The defendant had an opportunity to settle Marshall's claim for \$4,500, but it refused to settle for that amount, although it seems that its attorney had taken the matter up with it and that the attorney for the plaintiff was urging a settlement. The defendant elected to fight. It could have fought successfully; through its negligence it did not, and lost, and now it must bear the consequences.

[4] 4. At the opening of the trial the defendant moved the court to require the plaintiffs to elect on which act of negligence alleged in the petition it would proceed to trial. That motion was denied, and the defendant complains of the order denying the motion. The defendant argues that the two acts of negligence alleged were inconsistent with each

other. Causes of action are inconsistent with each other when they cannot stand together; when if one is true the other cannot be true; when one defeats the other. 4 Words and Phrases, p. 3511; 2 Words and Phrases, Second Series, pp. 1013, 1014. The same rule applies to defenses. The two acts of negligence alleged by the plaintiffs were not inconsistent with each other; they could stand together; one did not defeat the other. The truth of one did not disprove the truth of the other; both might have been true. The defendant could have been negligent in either or both of the instances alleged—in failing to present the illegal act of Marshall as a defense and in failing to accept the compromise offered by him. It was therefore not error for the court to deny the defendant's motion.

Other questions have been presented. They have been examined, but there is nothing in them that justifies further discussion.

The judgment is affirmed.

All the Justices concurring.

(107 Kan. 423)

STATE ex rel. COURT OF INDUSTRIAL  
RELATIONS et al. v. HOWAT et al.  
(No. 23013.)

(Supreme Court of Kansas. July 19, 1920.)

(Syllabus by the Court.)

1. Mines and minerals §86—Power of Legislature to create body to investigate conditions in mining industry, etc., stated.

The Legislature may create an administrative body and empower it to investigate conditions existing in the mining industry, make findings and reports, and establish rules with reference to the operation thereof, designed, among other purposes, to promote the health and safety of employes and the continuity of production, so long as the regulations are reasonable and not upon some special ground obnoxious to constitutional provisions.

2. Statutes §64(3)—Unobjectionable portions of statute creating court of industrial relations enforceable regardless of remainder of act.

In view of the provision of the statute creating the court of industrial relations that if any part thereof shall be held to be invalid it shall be conclusively presumed that the Legislature would have passed the act without it, any portions thereof which are not objectionable in themselves must be enforced regardless of whether or not other portions may be open to constitutional objections.

3. Constitutional law §42—Courts §42(8)—Right of one adjudged guilty of contempt in refusing to appear before court of industrial relations to attack validity of act stated; act creating court of industrial relations held valid.

The provisions of the statute creating the court of industrial relations authorizing that

body to conduct investigations of the character indicated in the first paragraph of this syllabus are valid, and one who refuses obedience to an order of the district court requiring him to appear as a witness in such an investigation cannot be heard, in a proceeding against him for contempt on account thereof, to question the validity of other portions of the act because of constitutional guaranties which are not invaded by the requirement made of him.

4. Witnesses ¶21—Evidence held to sustain finding that order requiring witnesses to appear before court of industrial relations had been disobeyed.

The finding that the defendants disobeyed the order of the district court is held to have been warranted.

5. Constitutional law ¶74—Witnesses ¶21—Statute relating to contempt in refusing to appear before court of industrial relations held valid, and court may punish for contempt.

The provision of the act creating the court of industrial relations that in case of the refusal of any person to obey a subpoena issued by that body it may take proper proceedings in any court of competent jurisdiction to compel obedience thereto, authorizes the district court to make an order for the appearance of such person before the industrial court, and to commit him for contempt in case of his refusal. The provision is not open to constitutional objection on the ground that such action of the district court would be nonjudicial.

6. Witnesses ¶21 — Self-incrimination held not to justify disobedience of order requiring attendance before court of industrial relations.

The disobedience of an order to appear as a witness in such an investigation as that referred to in the first paragraph hereof cannot be justified on the ground that questions might be asked the answers to which would tend to self-incrimination.

7. States ¶41—Governor held judge of conditions requiring special session.

Under the provision of the Constitution authorizing the Legislature to be convened by proclamation on extraordinary occasions, the Governor is the final judge of the existence of conditions justifying the calling of a special session. *Farrelly v. Cole*, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464, followed.

8. Constitutional law ¶61—Statutes ¶51, 124(1)—Act creating court of industrial relations held not void.

The act creating the court of industrial relations is held not to be void by reason of any defect in the title, nor because it makes applicable to that body the laws previously relating to the Public Utilities Commission, nor on the ground that it commingles in one body executive, legislative, and judicial functions.

9. Constitutional law ¶56, 61, 90, 238(2)—Statute creating court of industrial relations not void as enlarging jurisdiction of Supreme Court, violating Const. U. S. Amend. 14, nor as involving denial of free speech.

Various objections to the act are held not to be material in this proceeding.

10. Commerce ¶8(1)—Statute creating court of industrial relations not invalid because of occupation of field by Congress.

Legislation by Congress concerning the unlawful restraint of interstate commerce and control of fuel by the government during the war, and the appointment by the President of a commission to hear and determine matters of hours, wages, and conditions in the mining industry, do not so fully occupy the field covered by the act creating the court of industrial relations as to prevent that body from investigating conditions in the mining district of this state, making reports thereon, and exerting some degree of regulation with reference thereto.

(Additional Syllabus by Editorial Staff.)

11. Words and phrases—"Court."

The word "court" is often employed in statutes otherwise than in its strict technical sense, and is applied to various tribunals not judicial in their character (citing Words and Phrases, "Court").

#### Appeal from Court of Industrial Relations.

Alexander Howat and others were adjudged guilty of contempt in failing to obey an order of the district court requiring them to appear as witnesses before the court of industrial relations, and they appeal. Affirmed.

Philip Gallery, of Pittsburg, John T. Clarkson, of Albia, Iowa, and Byron Coon, of Estherville, Iowa, for appellants.

Richard J. Hopkins, Atty. Gen., F. S. Jackson, of Topeka, F. Dumont Smith, of Hutchinson, and A. B. Keller, of Pittsburg, for appellee.

MASON, J. On April 9, 1920, Alexander Howat and three others were adjudged guilty of contempt in failing to obey an order of the district court requiring them to appear as witnesses before the court of industrial relations, in an investigation to be conducted by it relating to the conditions existing in the mining industry in Cherokee and Crawford counties. They were committed to jail until they should submit to be sworn and testify in such proceeding. They appeal.

The investigation originated in complaints of miners who were members of a labor union of which the defendants were officers. It was directed (among other subjects) to working conditions in the coal mines with reference to hours of labor, provisions for safety and sanitary conditions, miners' incomes with relation to living costs, plans of mining as to continuity of production, conditions of the mines with reference to future supply, and the cost of production as compared with previous years, school and church privileges and general social surroundings, and complaints of mine workers, or owners, and of the public. In response to the charge of contempt made against them, the defendants on April 8, 1920, filed in the district court an answer

consisting of 23 paragraphs. The first 21 alleged that the act undertaking to create the court of industrial relations was void because in conflict with various provisions of the state and federal Constitutions, and that therefore that body had no legal existence and the district court was without jurisdiction to enforce attendance upon it. The twenty-second paragraph denied the violation of any lawful order of the district court, and the twenty-third was a general denial. On June 26 the defendants filed in this court a motion, which was granted, for leave to withdraw all grounds of defense based upon the alleged violation of any constitutional rights. On July 2 the defendants asked that the order of allowance be vacated and that they be permitted to withdraw the motion, in order that their contentions as to the invalidity of the industrial court act might be considered. Permission was given to present whatever constitutional questions might affect the disposition of the case, the court suggesting to counsel that the actual question involved appeared to be of a much narrower scope than might be indicated by some of the allegations of the answer. The defendants on June 26 also asked a continuance of the cause from the date to which it had been assigned (July 6), on the ground that by reason of other engagements their attorneys had not had sufficient time for preparation and one of them could not be present on that date, which request was renewed when the case was called for hearing. The applications for a postponement were denied. The only question involved in the present proceeding is whether the defendants may be required to attend as witnesses before the court of industrial relations—a question which involves no difficult or complicated legal problems and to which an early answer should be given, since it involves no more than the right of a witness to refuse obedience to a subpoena. The defendants elected to submit the case on briefs without oral argument, being allowed until July 17 to prepare additional typewritten briefs if desired. On July 16 a brief was filed in their behalf, presenting a number of new propositions, introduced by the statement that the time for filing it had been limited to a brevity out of all proportion to the importance of the case. If the questions argued in the additional brief were required to be determined in this proceeding, ten days would, indeed, have been a very short time in which to prepare it, although it would appear to have been by the defendant's own choice that the preparation was delayed until the case had been reached for hearing. Inasmuch as we regard it as unnecessary to pass at this time upon the more difficult propositions advanced, the time allowed is considered by us to be ample, under the circumstances.

[1] 1. Most of the constitutional objections raised by the defendants are directed to provisions of the act creating the court of

industrial relations, the validity or invalidity of which can in our judgment have no possible bearing upon the disposition of the present case. The statute makes the new body the successor of the Public Utilities Commission, the functions of which are devolved upon it. Laws 1920, c. 29, § 2. It therefore has a legal existence, unless that commission was a nullity, which is not suggested. The Legislature has undertaken to grant it, among other additional powers, those of investigating certain controversies relating to the operation of various industries, including coal mining, and of taking evidence and making findings thereon. Section 7. Its proceedings are required to be reported to the Governor. Section 27. It is clear that it would be competent for the Legislature to authorize an administrative tribunal to make such investigations, findings, and reports even if no further purpose were to be accomplished than to give publicity to existing conditions and provide data upon which subsequent legislation might be based. The act also undertakes to empower the court to make orders with reference to the conduct of the industry—among other things to regulate wages. Section 8. Whether or not the Legislature could confer all the powers so attempted to be given—for instance, that to which specific reference has just been made—we have no doubt whatever that it could invest the industrial court with some of them. The Legislature may, of course, enact statutes designed (for example) to protect the health and safety of miners, and may authorize an administrative body to make rules in that connection having the force of laws. *Richards v. Coal Co.*, 104 Kan. 330, 179 Pac. 380; 12 O. J. 847-853. Regulations of that kind would be within the scope of the act under consideration. Inasmuch as the police power extends to the protection of the welfare and convenience as well as the health, safety, and morals of the public, it may manifestly be invoked, as in the present instance, to prevent the interruption in the production of a commodity so vitally necessary to the people of this state as coal, so long as the means employed are not for some special reason obnoxious to constitutional provisions. There is abundant field for the operation of the act under consideration, even if every portion of it to which a specific objection has been urged were entirely eliminated.

[2] 2. It is quite clear that the part of the act relating to the conduct of an investigation could be upheld, although some of the attempted grants of power should be held void, even if the statute contained no reference to the effect of partial invalidity. However, one section of it reads as follows:

"If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the Legislature without such

invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court." Laws 1920, c. 29, § 28.

The rule is familiar that a part of a statute which is unobjectionable in itself may be enforced notwithstanding another part is adjudged unconstitutional, if it appears that the void portion was not an inducement to the enactment of the rest—that the Legislature desired the unobjectionable part to become a law irrespective of the validity of the remainder. Here the express declaration disposes of any possible doubt that might otherwise exist as to the legislative intent, and requires the court to give effect to all portions of the statute that do not in themselves violate some constitutional provision. *State v. Wilson*, 101 Kan. 789, 806, 168 Pac. 679, L. R. A. 1918B, 374.

[3] 3. No reasons are suggested, and none occur to us, why the Legislature may not authorize the court of industrial relations to conduct an inquiry into conditions existing in the mining field and in furtherance of that inquiry require the attendance of witnesses. Much of the argument in behalf of the defendants is based upon objections to the provisions of the statute undertaking to restrain the conduct of employes in the mining industry and others classified with it. As already indicated, the validity of those provisions is not and could not be involved here. It is elementary that a statute can be attacked on constitutional grounds only by one whose right, as guaranteed by the constitutional provision invoked, is being assailed under color of the statute. The defendants, in their character as witnesses whose attendance before the court is sought in order that they may give information concerning the subject of inquiry, have no standing to question the validity of any provisions of the statute other than those directly involved, for they could suffer no possible injury therefrom in this proceeding. The constitutionality of a statute is inquired into by a court no further than is necessary to a determination of the case before it. These familiar principles preclude any consideration at this time of most of the objections to the judgment upon constitutional grounds which the defendants first urged, then withdrew, and later renewed. Counsel for the state have shown a readiness to meet upon the merits the objections made to various provisions of the statute, but until these provisions are attacked by some one competent to question their validity—by some one whose rights in respect to the subject-matter of the litigation are injuriously affected by them—any expression of opinion by the court would be dictum.

[4] 4. It is suggested that the evidence did

not warrant a finding that the defendants had refused to testify. It was shown without contradiction that after they had been served with an order of the district court to appear forthwith before the court of industrial relations to give their testimony they were in another room of the building where that court was sitting, and told the sheriff, who came to them on account of an inquiry by the presiding judge, that they were having a little meeting of their own and would be through in about ten minutes; that they did not then appear and at no time showed any disposition to obey the process; that the defendant Howat said they would not come unless they were taken. Any defect that may exist in the way of formal proof on the subject is rendered entirely immaterial by the objections the defendants are still urging to the validity of the law, and by the fact that, as already stated, they were committed only until such time as they should submit to be sworn and testify, so that they could at any moment have obtained their liberty by signifying their willingness to do so.

[5] 5. The occasion for the aid of the district court being invoked to require the attendance of witnesses before the court of industrial relations arises from the well-understood fact that the latter body, in spite of its name, is an administrative and not strictly a judicial tribunal, and is therefore regarded as incapable of enforcing its own process. In *re Sims*, Petitioner, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. Rep. 261; In *re Huron*, 58 Kan. 152, 48 Pac. 574, 36 L. R. A. 822, 62 Am. St. Rep. 614. The defendants argue that the district court, under the statute, is without authority to compel the attendance of a witness before any other tribunal than itself. The industrial court act, however, contains this provision:

"In case any person shall fail or refuse to obey any summons or subpoena issued by said court [of industrial relations] after due service then and in that event said court is hereby authorized and empowered to take proper proceedings in any court of competent jurisdiction to compel obedience to such summons or subpoena." Laws 1920, c. 29, § 11.

We interpret this language as authorizing the procedure here followed—the issuance and service of an order by the district court requiring the defendants to appear before the court of industrial relations, and their commitment for contempt for refusing to obey that order. The district court, being one of general jurisdiction, is obviously a proper tribunal to which to apply for the needed aid, and the method pursued is one naturally adapted to the end sought. The constitutionality of the provision quoted has not been challenged except by an objection relating to the title, which will be mentioned later. A similar feature of the federal law relating



to the attendance of witnesses before the Interstate Commerce Commission has been upheld against the contention that the action of a court in requiring a witness to appear before an administrative body was nonjudicial. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047; *Id.*, 155 U. S. 3, 15 Sup. Ct. 19, 39 L. Ed. 49. The arguments upon both sides of that question are so fully set out in the opinions cited that further discussion is regarded as unnecessary. We hold the provision to be valid.

[6] 6. The defendants suggest that they are protected by the guaranty of the state Constitution against a witness being required to incriminate himself (Bill of Rights, § 10), because they were among the persons named as interested in the controversy which was the basis of the investigation instituted by the industrial court. It cannot be said that any question that might be put to the defendants as witnesses would necessarily call for a reply tending to incriminate them. Until they had appeared and some question had been asked there could be no basis for forming a judgment as to whether or not they were entitled to refuse to answer.

[7] 7. The point is sought to be made that the Governor had no authority to call the special session of the Legislature at which the industrial court act was passed, because no extraordinary occasion therefor existed. The Governor is the final judge of that question. *Farrelly v. Cole*, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464.

[8, 11] 8. The title of the act under consideration reads:

"An act creating the court of industrial relations, defining its powers and duties, and relating thereto, abolishing the Public Utilities Commission, repealing all acts and parts of acts in conflict therewith, and providing penalties for the violation of this act."

The contention is made that this is insufficient, and the provision of the state Constitution with reference thereto (article 2, § 16) is therefore violated because the title refers to a court, and the body undertaken to be created is not judicial in its character. The word "court" is often employed in statutes otherwise than in its strict technical sense, and is applied to various tribunals not judicial in their character. Instances may be found in Words and Phrases Judicially Defined, of which an illustration is *Aldrich v. Aldrich*, 49 Mass. (8 Metc.) 102, 106.

The provision of the act already quoted, authorizing the district court to aid in requiring the attendance of witnesses before the industrial court, is objected to as foreign to the title. The title includes the words "An act creating the court of industrial relations \* \* \* and relating thereto." The

provision in question certainly has relation to the new tribunal and is pertinent to the subject expressed. Other objections are made on the ground that the title is too restrictive. We think them not well taken, but as the provisions to which they relate could be disregarded without affecting the result of the present case we deem it unnecessary to set them out.

The act (section 2) undertakes to confer upon the court of industrial relations the powers previously vested in the Public Utilities Commission, which it succeeds. It is argued that this method of legislating violates the provision of the section of the Constitution already referred to, which forbids the revival or amendment of a law unless the new act contain the entire act revived, or the section or sections amended. This provision, however, does not prevent legislation by reference (*State v. Shawnee County*, 83 Kan. 199, 110 Pac. 92), and the objection is not sound.

It is contended that the act is void because executive, legislative, and judicial functions are commingled in the grants of power to the court of industrial relations, within the authority of *State v. Johnson*, 61 Kan. 808, 60 Pac. 1068, 49 L. R. A. 662. The opinion in that case was written while the principles controlling the place in government administrative boards was in the process of development. It is possible that language may have been there used which might require some modification before its acceptance as having universal application. But the vital grounds upon which the statute there considered was held void do not exist here. The present law bears internal evidence of having been drawn with a view to avoiding the features of the court of visitation act, upon which the decision cited was based. The function of a tribunal of the general character of the court of industrial relations has become so fully recognized that we do not regard it as necessary to undertake a review of the subject at this time. 6 R. C. L. 179.

[9] 9. It is urged that the following provisions of the act are invalid for the reasons indicated: That authorizing proceedings in the Supreme Court to enforce compliance with the orders of the court of industrial relations, in which new evidence may be admitted (section 12), because this amounts to an attempt to enlarge the original jurisdiction of the former body; that authorizing the Supreme Court to compel the court of industrial relations, under certain circumstances, to enter just, reasonable, and lawful orders (section 12), because this undertakes to confer legislative power on the Supreme Court; that authorizing the court of industrial relations to modify the terms of contracts of employment which are found to be unfair, unjust, or unreasonable (section

9), because it violates the Fourteenth Amendment to the federal Constitution; that forbidding the discharge of an employé because of his testifying before the court of industrial relations, or bringing to its attention any matter of controversy between employers and employés (section 15), for the same reason; that requiring employers to keep a record of wages paid (section 23), for the same reason; that forbidding employés to conspire to quit their employment for the purpose of interfering with the operation of the industry (section 17), for the same reason; that forbidding a conspiracy to do injury to others by picketing on account of anything done by the court of industrial relations, or under its orders, or of its aid having been invoked (section 15), because it involves a denial of free speech.

We think it obvious that none of these matters are involved in the present case.

[10] 10. Finally it is contended that the act is void as an attempt to interfere in matters of purely federal jurisdiction—that the national government has so fully occupied the ground attempted to be covered by the industrial court law that there is no field left in which the latter may operate. The agencies which the defendants regard as bringing about this result are: The entrance into an interstate contract between the international officers of the United Mine Workers of America and the representatives of the Coal Operators' Association of the United States at the conclusion of the coal strike a little over six months ago; the appointment by the President of a commission to hear and determine matters of hours, wages, and conditions in the mining industry in the United States; the Clayton Act (38 U. S. St. at L. 730), relating to unlawful restraints and monopolies in interstate commerce, particularly the portion thereof (section 20 [U. S. Comp. St. § 1243d]) which forbids federal courts to grant injunctions against certain conduct of employés, of which ceasing to perform work is an illustration, and which declares that such conduct shall not be held to be violative of any law of the United States; the Lever Act (40 U. S. St. at L. 276) providing for governmental control of the production and distribution of food and fuel until the termination of the war.

It is quite possible that the scope of the authority of the court of industrial relations may be limited in some respects by these agencies—that a particular order made by that body might be found to be ineffective, for instance, because in conflict with some lawful order of a federal officer or body, or because constituting an undue interference with interstate commerce. We think it too clear to require elaboration that, whatever restrictions may be thus placed on local ac-

tion, it cannot be true that the state has no power to conduct investigations along at least some of the lines indicated and to attempt the remedy of certain classes of abuses that may be found to exist. The suggestion is made that the court should take judicial notice of an injunction granted against the defendant Howat by a federal court, and of a number of matters in connection therewith, and that the judgment of the district court in the present case should be reversed by reason thereof. We are unable to discover that anything in the facts recited either disqualifies the defendants as witnesses or gives them any immunity from testifying. It would be utterly futile, in a proceeding the sole purpose of which is to require obedience to a subpoena, to undertake to determine in detail the effect and validity of the various provisions of the statutes attacked—to attempt to indicate in advance as an abstract matter what decision will be made when an actual controversy shall arise in which the rights of the parties depend upon the soundness of the graver propositions of law that have been advanced by the defendants.

The judgment is affirmed.

All the Justices concurring.

(79 Okl. 59)

**JACKSON et al. v. MOORE et al.**  
(No. 10901.)

(Supreme Court of Oklahoma. July 13, 1920.)

*(Syllabus by the Court.)*

1. Pleading  $\S$ 34(3), 214(1)—On demurrer, petition liberally construed, and its allegations taken as true.

On a demurrer to a petition as defective, in that it does not state facts sufficient to constitute a cause of action, the petition must be liberally construed, and all its allegations taken as true for the purpose of the demurrer.

2. Pleading  $\S$ 205(2)—When demurrer to petition as not stating cause of action may be sustained.

A demurrer to a petition because not stating facts sufficient to constitute a cause of action can be sustained only where the petition contains defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action, and if the facts stated therein entitled plaintiff to any relief, a demurrer for want of sufficient facts should be overruled.

3. Mines and minerals  $\S$ 59—Petition to cancel lease held to state cause of action, and not subject to demurrer for misjoinder.

Record examined, and held, that the trial court erred in sustaining the separate demurrers of the defendants to the petition of the plaintiffs, and the judgment reversed, and the cause remanded, with directions.

Error from District Court, Pawnee County; Redmond S. Cole, Judge.

Suit by S. G. Jackson and others against A. J. Moore and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded, with directions.

W. S. Cline and C. L. Pinkham, both of Newkirk, for plaintiffs in error.

W. J. Gregg, of Tulsa, for defendants in error.

JOHNSON, J. This is an appeal from the district court of Pawnee county, Hon. Redmond S. Cole, Judge.

On May 10, 1919, the plaintiffs in error, who were plaintiffs below, commenced an action against the defendants in error, who were defendants below, to cancel a certain oil and gas lease granted by the defendants Moore to the defendant Twin State Oil Company, covering the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 12, township 20 north, range 7 east, in Pawnee county, and for a receiver and for an accounting of all the oil and gas products on said land, and to recover the proceeds arising from the sale of the same, and for a decree of confirmation of a certain oil and gas lease from the defendants Moore, to the plaintiffs of a prior date and covering said land, and for an injunction against the defendants enjoining them from asserting or claiming any right, title, or interest in said land for the oil and gas produced therefrom, adverse to the plaintiffs, and to have all other equitable relief to which the plaintiffs may be entitled.

From a judgment of the court sustaining the separate demurrers of the defendants to the plaintiffs' petition and dismissing the plaintiffs' suit, with prejudice, the plaintiffs have regularly commenced this proceeding in error by filing petition in error with case-made attached, their assignments of error being:

"(1) The said trial court erred in sustaining the demurrers of the said plaintiffs in error to the plaintiffs in error's petition."

"(2) Said court erred in rendering judgment for the defendants in error on the petition of the plaintiffs in error filed in said court."

The material allegations of the plaintiffs' petition shows, in substance, that on the 12th day of October, 1917, defendants Moore executed to the plaintiff S. G. Jackson an oil and gas mining lease covering the land mentioned, for a period of five years, for a bonus of \$1,200, to be delivered to said Jackson on the 28th day of February, 1918, on the payment of said sum, and that said sum was paid, the lease delivered, and was recorded in book 26 of Miscellaneous Record, of said county, at page 76, and that thereafter on March 6th, the plaintiff assigned an undivided one-fourth interest on the east 40 acres to M. J. Hyland, which assignment was regularly recorded in the office of the county

clerk in said county, and that on the said date the said S. G. Jackson assigned an undivided one-half interest on said 40 acres to B. L. Foerster, which assignment was duly recorded in the office of the county clerk of said county. Copies of said lease and assignments were made exhibits to the plaintiffs' petition, marked A, B, and C.

Paragraphs 4, 5, 6, 7, 8, 9, and 10 of the plaintiffs' petition were as follows:

"(4) Plaintiffs further allege that by the terms and conditions of said lease 'if no well be commenced on said land on or before the 1st day of March, 1918, the lessee on or before said date shall pay or tender to the lessor, or deposit to the lessor's credit in the First State Bank at Teriton, Oklahoma, or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of sixty (60) dollars a month in advance till royalty exceeds rental, which shall operate as rental for one month until a well is commenced on said premises.' That no well was commenced on said land on or before the 1st day of March, 1918, and that in pursuance to the terms and conditions of said lease the plaintiff S. G. Jackson, on the 28th day of February, 1918, paid to the defendants A. J. Moore and Maggie Moore \$60, the rental provided for in the terms of said lease, and that the rentals provided for in said oil and gas lease have all been paid as in said oil and gas lease provided, and all of the terms and conditions of said oil and gas lease have been fully performed and complied with by the said plaintiffs, and that said lease at all times herein mentioned, from the 28th day of February, 1918, to this date, have been, and is, in full force and effect, a binding and subsisting lease in favor of the plaintiffs herein on the land of the said defendants herein described.

"(5) Plaintiffs further allege that, on the 3d day of June, 1918, the defendants A. J. Moore and Maggie Moore made, executed, and delivered to the Twin State Oil Company, a corporation, their oil and gas lease on the said land herein described, and on which they had heretofore given an oil and gas lease to the plaintiff S. G. Jackson, as herein set forth, in disregard and violation of the rights of the plaintiffs acquired by the lease given to the said S. G. Jackson as herein pleaded. That in the leasing of the said land to the Twin State Oil Company the said defendants A. J. Moore and Maggie Moore executed their said lease on the said land as Andrew J. Moore and Lydia M. Moore. The plaintiffs allege that Andrew J. Moore and Lydia M. Moore, lessors in said lease, are the same and identical persons as A. J. Moore and Maggie Moore, the defendants herein. That the said lease to the Twin State Oil Company was filed for record by the Twin State Oil Company on the 14th day of June, 1918, and recorded in Book 5 of Oil and Gas Leases, at page 98, in the office of the county clerk of Pawnee county, state of Oklahoma. A true and correct copy of said lease, with all indorsements thereon, is hereto attached, marked 'exhibit D,' and made a part of this petition.

"(6) Plaintiffs allege that the Twin State Oil Company, a corporation, at the time of the taking and receiving of the said lease from the

said defendants A. J. Moore and Maggie Moore, had actual knowledge, as well as constructive knowledge, by reason of the record of the lease of the said S. G. Jackson, of the said lease.

"(7) Plaintiffs allege that in the payment of the rentals provided in said lease time of the payment of said rentals was not made the essence thereof, and in the transaction between S. G. Jackson and the defendants A. J. Moore and Maggie Moore, leading up to the delivery of the said lease on the 28th day of February, 1918, and in payment of the rental thereafter due under the terms of said lease the defendants A. J. Moore and Maggie Moore led these plaintiffs to believe that the said defendants A. J. Moore and Maggie Moore did not regard time of the payment any part of the consideration for said lease and for the rentals therein provided as of the essence of said lease.

"(8) That the said S. G. Jackson, at the time of the execution of said lease, to wit, on the 12th day of October, 1917, obtained an option for the purchase of said lease for a period of sixty days, the said lease was for the consideration of \$1,200, and said lease was deposited in escrow in the First State Bank at Terilton, Okl., and \$100 in said lease of \$1,200 was on the above date paid to the said defendants A. J. Moore and Maggie Moore, leaving a balance due on said lease in the sum of \$1,100 to be paid in 60 days thereafter. That on the 13th day of December, 1917, an extension agreement was entered into for a period of 30 days, wherein and whereby the said S. G. Jackson paid \$100 to apply on the balance of the purchase price of said lease, and was to pay the balance of \$1,000 in 30 days. That on January 18, 1918, an additional extension of the payment of the balance of said purchase price was obtained, at which time the said S. G. Jackson paid \$100 on the balance of the purchase price, and on February 28, 1918, the said S. G. Jackson paid the balance of the original contract price in the sum of \$900, and on said date paid \$60 rental, being the first rental due under the terms of said lease.

"That on April 1, 1918, the plaintiffs paid rental on said lease in the sum of \$60, all of which payments on the purchase price of said lease and on the rental thereof were received and accepted by the said defendants A. J. Moore and Maggie Moore, although paid out of time; and that by the acts and conducts of the said A. J. Moore and Maggie Moore the said A. J. Moore and Maggie Moore were and are estopped from pleading or otherwise contending that time of payment was the essence of said lease, and all of which facts herein pleaded were known to, or could have been ascertained, by the defendant Twin State Oil Company. That on June 3, 1918, the plaintiffs deposited in the First State Bank at Terilton, Okl., to the credit of the lessors, A. J. Moore and Maggie Moore, \$60 rental for the month beginning with June 1, 1918, and the said plaintiffs have continued to deposit in the First State Bank at Terilton each and every month thereafter down to the present time rentals for the credit of the lessors, A. J. Moore and Maggie Moore, in the sum of \$60 per month.

"That under the terms and conditions of said lease said lease provides for the payment of \$60 for the month beginning March 1, 1918, which shall operate as a rental for the month of March, 1918, and shall pay a like sum in

advance each year beginning with April 1, 1918, until a well is commenced on said premises; that under the terms of said lease the \$60 rental paid April 1, 1918, paid the rental on said lease to April 1, 1919, but that, notwithstanding the terms of said lease, the said plaintiffs have paid, as aforesaid, into the First State Bank at Terilton, Okl., to the credit of the lessors, \$60 per month. That for the month of June, 1918, the \$60 was paid into the First State Bank at Terilton, Okl., for the credit of the lessors on the 3d day of June, 1918, said rental being received and accepted by the said bank on the said 3d day of June, 1918. The plaintiffs allege that S. G. Jackson, one of the plaintiffs, on behalf of the plaintiffs, had paid the rental for the plaintiffs as in said lease provided, and that the plaintiffs M. J. Hyland and B. L. Foerster had given their part of the lease rental money to the said S. G. Jackson on or prior to the 1st day of June, 1918, to be remitted to the said bank for the lessors' credit. That the said S. G. Jackson, by reason of being detained on June 1, 1918, some 8 or 10 miles in the country, and some 8 or 10 miles away from a post office and all other facilities for the transmission of the rental to the First State Bank at Terilton, Okl., was unable and failed to remit said rent on the said 1st day of June, 1918; that by reason of the lessors theretofore dealing with the said plaintiffs in a lenient manner in receiving payments for the purchase price of the lease, and in receiving the rentals for the month of May, 1918, on the 2d day of May thereof, if there was any rental due on said date under the terms of said lease, the said plaintiffs were to believe, and did believe, that the lessors would not exact of them the payment of the rentals on the first day of the month, and did not regard that time was of the essence of said lease. That the plaintiffs had no intention of forfeiting said lease, and which said fact the defendants knew full well. That the defendant Carl D. Smith appeared to have some interest in said lease of the Twin State Oil Company, by reason of an assignment to him of a one-sixteenth interest of the Twin State Oil Company. Said assignment is recorded in Miscellaneous Record 27, page 215, in the office of the county clerk of Pawnee county, Okl.

"(9) That the lessors, A. J. Moore and Maggie Moore, and the defendant Twin State Oil Company, have conspired and contrived to cheat and defraud the plaintiffs out of their lease on the said land. That the plaintiffs' lease on the said land is of great value, and was of great value on the 3d day of June, 1918. That the Twin State Oil Company, in disregard of the right of the plaintiffs herein, have caused to be drilled on said land a well, in which the said Twin State Oil Company is producing oil in some considerable quantity, the exact amount of which these plaintiffs are not informed, and that they are producing gas in large quantities from said well drilled on said land and marketing the said oil and gas, and are receiving great benefits and profits therefrom in disregard and in violation of the rights of the plaintiffs.

"(10) The plaintiffs further charge that the said Twin State Oil Company is continuing, and threatening to continue, to extract oil and gas from the said land covered by the lease of the plaintiffs herein, as aforesaid, to the great

and irreparable loss and damage to the plaintiffs. That the gas and the oil extracted from said land by the Twin State Oil Company is the property of the plaintiffs, and that the same is being converted by the Twin State Oil Company to their own use and benefit. That the plaintiffs are entitled to obtain discovery and to have an accounting in respect to the oil and gas produced and sold in the course of the operations by the said Twin State Oil Company, and to have a receiver appointed to receive and collect for the oil and gas to be hereafter produced by the Twin State Oil Company pending this litigation; and that the lease of the said Twin State Oil Company should be enjoined from, in any manner, interfering with the plaintiffs in the full, complete enjoyment and operation of the said land as in their lease provided."

The plaintiffs' lease contained the following stipulations:

"It is agreed that this lease shall remain in force for a term of five years from this date, and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee, unless the same is sooner surrendered by lessee, and that the consideration above stated is paid and accepted as a good and sufficient consideration for each and every right or privilege granted to lessee herein, including the right to pay rentals in lieu of drilling wells and the right to surrender this lease as hereinafter provided.

"If no well be commenced on said land on or before the 1st day of March, 1918, the lessee, on or before said date, shall pay or tender to the lessor, or deposit to the lessor's credit in the First State Bank at Terilton, Oklahoma, or its successors, which shall continue as the depository regardless of changes in the ownership of said land, the sum of sixty dollars a month in advance till royalty exceeds rental, which shall operate as rental for one month thereafter, and shall continue to pay a like sum each year in advance until a well is commenced on said premises."

The other provisions of the lease were such as for the most part are usually in commercial leases, except as hereinafter noted. This was not an "or" lease, nor was it an "unless" lease, but is self-classified by its own terms. It contained no forfeiture clause. It was a lease for a term of five years, in which the lease agreed that "if no well be commenced on said land on or before the 1st day of March, 1918, the lessee on or before said date shall pay to the lessor's credit (which was payment) in the First State Bank at Terilton, Oklahoma, the sum of sixty dollars a month in advance till royalty exceeds rental which shall operate as rental for one month thereafter, and shall continue to pay a like sum each year in advance until a well is commenced on said premises."

The plaintiffs' petition alleged that no well was commenced on said land by the plaintiffs before the 1st of March, 1918, but that the monthly payments stipulated for in the lease had all been paid, and all the terms and con-

ditions had been performed and complied with by the plaintiffs, and that the said lease, at all times mentioned from the 28th day of February, 1918, to the filing of the petition, had been in full force and effect, binding and subsisting in favor of the plaintiff.

The plaintiffs charge in the fifth paragraph of their petition that on the 3d day of June, 1918, the defendants Moore, in disregard and violation of the rights of the plaintiffs, executed a lease to the defendant oil company, covering the same land, and alleged that the oil company had notice, both actual and constructive, of the plaintiffs' lease by reason of the recordation thereof. The plaintiffs alleged in the ninth paragraph of the petition that the defendants Moore and the defendant Twin State Oil Company have conspired and contrived to cheat and defraud the plaintiffs out of their lease on said land, and that the defendant oil company, in disregard of the rights of plaintiffs, have caused to be drilled on said land a well, which is producing oil and gas in considerable quantities, and are marketing the said oil and gas and receiving great benefits and profits therefor in disregard and in violation of the rights of the plaintiffs, and is continuing, and threatening to continue, to extract oil and gas from said land, to the great and irreparable loss and damage to the plaintiffs.

Counsel for the defendants in error say in their brief:

"The first two grounds of the demurrers will be waived, and the third and fourth may be considered together. They are: 'Third. That there is a misjoinder of causes of action in said petition, it appearing upon the face of plaintiffs' petition that there are several causes of action therein, improperly joined. Fourth. That plaintiffs' petition shows upon its face that the several plaintiffs have no joint cause of action against the several defendants named therein, and are not entitled to a joint judgment against the defendants therein.'"

Rev. Laws 1910, provide:

4690. "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this article."

4691. "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

We think it is clear from an examination of the petition and the exhibits thereto attached, and under the provision of the statutes supra, that the contention, made by the defendants under the third and fourth paragraphs of the separate answers, supra, are without merit. *Burkett v. Lehman Higginson Gro. Co.*, 8 Okl. 84, 56 Pac. 856; *Kolachny v. Galbreath et al.*, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451.

The fifth and last ground of the defendants' separate demurrers is:

"That plaintiffs' petition does not allege a state of facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendants, and to entitle plaintiffs to any judgment against the defendants."

[1, 2] This is a general demurrer, and goes to the sufficiency of the petition of the plaintiffs as a whole. Where a general demurrer is lodged against a petition, the rules of law that govern have frequently been announced by this court, and are clearly stated in the case of *Oklahoma Sash & Door Co. v. American Bonding Co.*, 170 Pac. 511, as stated in the syllabus, and are as follows:

"1. On demurrer to a petition as defective, in that it does not state facts sufficient to constitute a cause of action, the petition must be liberally construed, and all its allegations taken as true for the purpose of the demurrer.

"2. A demurrer to a petition because not stating facts sufficient to constitute a cause of action can be sustained only where the petition contains defects so substantial and fatal as to authorize the court to say that, taking all the facts to be admitted, they furnish no cause of action, and if the facts stated therein entitled plaintiff to any relief, a demurrer for want of sufficient facts should be overruled." *Smith-Wogan Hdw. Co. v. Moon Buggy Co.*, 26 Okl. 161, 108 Pac. 1103.

[3] Applying these rules, we are convinced from an examination of the petition of the plaintiffs that the same stated a cause of action, and that the trial court erred in sustaining the separate demurrers of the defendants, and in dismissing the plaintiffs' suit of prejudice. The judgment of the trial court is therefore reversed and the cause remanded, with directions to overrule the separate demurrers of the defendants.

RAINEY, C. J., and HARRISON, PITCHFORD, and McNEILL, JJ., concur.

(79 Okl. 53)

KERSEY v. McDOUGAL. (No. 10788.)

(Supreme Court of Oklahoma. July 13, 1920.)

(Syllabus by the Court.)

1. Courts §510—Court appointing guardian has exclusive jurisdiction.

By the laws of this state, a general guardian of a minor is a guardian of the person or of all the property of the ward within this state, or of both, and in all cases the court making the appointment of a guardian has exclusive jurisdiction to control him in the management and disposition of the person and property of his ward.

2. Guardian and ward §20, 21—Extent of guardian's power over person and property of ward stated.

A guardian appointed by a court has power over the person and property of the ward unless otherwise ordered, and such power is suspended only by order of the court, or, if the appointment was made solely because of the ward's minority, by his obtaining majority, and, if the guardianship be over the person only of the ward, by the marriage of the ward.

3. Guardian and ward §168—Receipt of foreign guardian held to discharge local guardian only to extent of property removed.

In a general guardianship proceeding regularly pending in the county court in this state, where an order is made removing the personal property of the ward to another state and authorizing the guardian in that state to sue for and receive the same in his own name for the use and benefit of his ward, and the county court in this state by order continues the local guardianship, and the local guardian takes the receipt of the foreign guardian for the personal property delivered to him, and files such receipt with the county court in this state, the local guardian is discharged from liability on account of the property so removed only.

4. Guardian and ward §172—Guardian may appeal from accounting of preceding guardian, though latter required to turn over property to foreign guardian.

While a general guardianship was regularly pending in the county court of Tulsa county, in this state, over the estate of a minor, the guardian, with the consent of said court regularly obtained, removed with said minor to the state of Colorado, where both became personally domiciled in El Paso county, in said state, and thereafter said guardian, who was the father of said minor, procured the appointment of another by the county court of said El Paso county as guardian of said minor. Thereafter such foreign guardian regularly made his application as such guardian to the county court of Tulsa county for an order transferring the personal property situated in this state belonging to the estate of said ward to El Paso county, Colo., and at a time when one M. was the regularly appointed and acting guardian of said minor in the guardianship proceeding pending in Tulsa county, Okl. The foreign guardian's application for the transfer aforesaid was denied. From said order of the county court the applicant appealed to the district court of Tulsa county, which court thereafter granted the application of said foreign guardian and made the order of transfer as prayed for by said foreign guardian. From this order of the district court so made M., the local guardian, appealed to the Supreme Court of this state. Thereafter the local guardian, M., was removed by order of the county court of Tulsa county, and K. and C. were appointed guardians in his stead, who duly qualified as such and entered upon the discharge of their duties. Thereafter the county court of Tulsa county ordered M., the former guardian, to file his final account as such in said court, which he did, to which final account the guardians K. and C. filed written exceptions under which they

undertook to surcharge the former guardian, M., with various items aggregating a large sum. Thereafter, at a hearing in the county court of Tulsa county, an order was made settling said account, from which order the guardians K. and C. appealed, as to both law and facts, to the district court of said county. Thereafter, on the motion of the former guardian, M., said appeal was by said court dismissed for the sole reason that when the county court of Tulsa county made the order to turn over the estate of the minor to the guardian appointed by the court in El Paso county, Colo., the power of the guardians K. and C. terminated, or was destroyed; that they were without capacity to take or prosecute this appeal. *Held*, the district court erred in dismissing said appeal. The judgment is reversed and the cause remanded, with directions.

Error from District Court, Tulsa County;  
Owen Owen, Judge.

In the matter of the guardianship of the estate of Robert Pitman, a minor. An order settling the account of D. A. McDougal, as guardian, was made, and E. Kersey and another appealed to the district court. The appeal was dismissed, and E. Kersey brings error. Reversed and remanded, with directions.

Davidson & Williams, of Tulsa, for plaintiff in error.

McDougal, Lytle, Allen & White, of Sapulpa, for defendant in error.

JOHNSON, J. This is an appeal from a judgment of the district court of Tulsa county, Okl., rendered on the 21st day of May, 1919, dismissing the appeal of the plaintiff in error from a judgment of the county court of Tulsa county, Okl., rendered on the 12th day of June, 1915, settling the account of the defendant in error, as former guardian of the estate of said minor.

Robert Pitman, Jr., is a minor Creek citizen of the half blood, born on the 8th day of August, 1902, according to the enrollment record of the Dawes Commission to the Five Civilized Tribes. He is a son of Robert Pitman, Sr., a noncitizen, and Lucinda Pitman, a full-blood Creek citizen, enrolled as No. 1833, and is on the newborn Creek roll as No. 794.

On November 12, 1906, William H. Roeser, of Tulsa, Okl., was appointed guardian of the person and estate of said minor by the United States District Court for the Western District of Indian Territory, and as such guardian leased the said minor's allotment for oil and gas purposes, under the authority and direction of the United States District Court, by and with the approval of the Secretary of the Interior; the oil and gas leases being in departmental form. Immediately after statehood the guardianship cause was transferred from the United States District Court to the county court of Tulsa county, Okl.; the guardian at that time, as well as

at the time of his appointment, being a resident of Tulsa. On the 15th day of March, 1909, Roeser resigned, and on March 30, 1909, the county court of Tulsa county accepted his resignation and appointed Robert Pitman, Sr., the father of said minor, as guardian of his person and estate. About the 1st of May, 1909, Robert Pitman, Sr., moved from Sapulpa, Creek County, Okl., where he and his family then resided, to Colorado Springs, in El Paso county, Colo., and took with him his wife and family, including the said minor, and established a permanent domicile for himself and family at Colorado Springs. Robert Pitman, Jr., and his mother, Lucinda Pitman, were affected with tuberculosis, and the change of residence was made on that account, upon the advice of physicians; Colorado Springs being a place of high altitude and noted as a tubercular resort.

After the change of residence to Colorado had been effected, Robert Pitman, Sr., applied to the county court of El Paso county, Colo., for appointment as guardian of said minor's person and estate, and was by that court duly appointed as such, and qualified by taking the oath of office and executing bond; but thereafter, during the month of October, 1909, the surety on his bond in the state of Colorado had withdrawn from the bond and Pitman's letters of guardianship had been revoked. On about this date W. P. Moore commenced proceedings in the county court of Tulsa county for the removal of Robert Pitman, Sr., as guardian of Robert Pitman, Jr., and pending the same, and on November 1, 1909, Robert Pitman resigned as guardian of said minor, and D. A. McDougal was appointed as guardian of the estate of said minor by the county court of Tulsa county, and on the 10th day of November, 1910, qualified as such and entered upon the discharge of his duties, and proceeded to loan out the funds of said estate to different parties, aggregating by the 1st of January, 1910, the sum of \$33,000. On the 14th day of January, 1910, O. P. Grimes was appointed guardian of the person and estate of said minor by the county court of El Paso county, Colo., upon a petition and request of the father and mother of said minor, and immediately qualified as such guardian. On the 28th day of January, 1910, Grimes, as said guardian, filed in the county court of Tulsa county, Okl., an application praying that said court make an order authorizing and directing him to take and remove all of the personal estate of said minor from the jurisdiction of the county court of Tulsa county to the jurisdiction of the county court of El Paso county, Colo. This application was resisted by McDougal, the Oklahoma guardian, and upon hearing said application on the 17th day of February, 1910, the county court denied the application of Grimes, whereupon Grimes appealed to the district court of Tulsa county, and upon the hearing of said appeal in said court of

Tulsa county on the 8th day of March, 1913, his application was granted by order of said court.

The essential part of said order is as follows:

"It is therefore ordered, adjudged, and decreed by the court that O. P. Grimes, as guardian of the person and estate of Robert Pitman, Jr., under appointment of the probate court of El Paso county, Colo., be and he is hereby granted leave to take and remove the entire personal estate of the said minor from the state of Oklahoma to the state of Colorado, and he is hereby authorized to sue for and receive the same in his own name for the use and benefit of the said ward; and D. A. McDougal, as guardian of the estate of said Robert Pitman, Jr., under appointment of the county court of Tulsa county, Okl., be and he is hereby directed to forthwith surrender up, transfer, and deliver to the said O. P. Grimes, as such guardian, all personal estate of the said ward and take his receipt therefor.

"And it is further adjudged that the clerk's, sheriff's, and stenographer's costs in this proceeding be paid by D. A. McDougal out of the funds in his hands as guardian of the estate of said Robert Pitman, Jr."

From this order of the district court McDougal, as such guardian, perfected an appeal to the Supreme Court in the month of September, 1913. Pending such appeal Robert Pitman, Sr., as father and next friend of said minor, and M. L. Mott, as national attorney for the Creek Nation of Indians, filed in the county court of Tulsa county in said guardianship proceedings a petition praying for the removal of McDougal as such guardian, charging that he had mismanaged and wasted the estate of the said minor. On the 14th day of November, 1913, upon hearing had, the county court of Tulsa county granted said petition and made an order removing McDougal as such guardian and appointed in his stead, as joint guardians of said estate, E. Kersey and Edward Crossland, who qualified as such on the 17th day of November, 1913, and immediately entered upon the discharge of their duties as such.

In the order removing McDougal, the court ordered him to file his final account within 30 days thereafter, which he failed to do, but instead gave notice of appeal to the district court of Tulsa county from an order of the county court previously made, denying the transfer of the cause to Creek county, and also filed his suit in the district court of Tulsa county, in which he asked for a writ of prohibition against the Hon. Con Linn, as county judge of Tulsa county, and the newly appointed guardians as his successors, and praying for an injunction against the newly appointed guardians, enjoining them from assuming to act for the estate of said minor. Said district court, on the 20th day of December, 1913, sustained a demurrer to this petition. Thereupon the said McDougal dismissed said suit. In the meantime Mc-

Dougal filed in the district court his appeal from an order of the county court denying his application for the transfer of the guardianship cause to Creek county, and the order removing him as guardian and appointing Kersey and Crossland as his successors. Upon a motion of the latter the district court dismissed said appeal on the 13th day of December, 1913.

On the 20th day of December, 1913, Kersey and Crossland, as guardians of the estate of said minor, filed in said guardianship cause an application for a citation against said McDougal to show cause why he had failed to file his final account as ordered by the county court when he was removed. Citation was issued, requiring him to appear and show cause why he had not filed his account as ordered, but before the hearing of said citation McDougal paid over to Kersey and Crossland, as said guardians, the sum of \$16,630.45 in cash, and delivered to them certain notes and mortgages belonging to said estate, and announced that he was ready and willing to file his final account. Thereafter, on the 15th day of January, 1914, McDougal did file in said cause an account denominated his final account. On the 14th day of April, 1914, Kersey and Crossland, as joint guardians of the estate of said minor, filed written exceptions to the purported final account of McDougal, under which they undertook to surcharge McDougal with various items aggregating a large sum. The final account of McDougal and the exceptions to his account were heard in the county court of Tulsa county, and an order made thereon settling said account on the 12th day of June, 1915. From this order Kersey and Crossland, as joint guardians, appealed to the district court of Tulsa county as to both law and facts, and lodged the same in said court on the 17th day of December, 1915.

About the 1st of February, 1914, the appeal in the Supreme Court before mentioned was dismissed upon a stipulation between Grimes, as nonresident guardian, and Kersey and Crossland, as resident guardians, and thereafter on the 20th day of February, 1914, the resident guardians paid over to the nonresident guardian a sum in cash, and delivered to him certain notes and mortgages belonging to said minor's estate and took his receipt therefor, but there remained in the custody and control of the resident guardians the real property belonging to said minor, consisting of his allotment and certain houses and lots situated in the cities of Sapulpa and Tulsa. The minor's allotment had been previously developed for oil and gas under the oil and gas leases heretofore mentioned, and was producing oil in large quantities and has so continued to produce oil.

The Department of the Interior had, prior to the 20th day of February, 1914, released supervision over the allotment of said minor and the oil and gas operations there-



on, save and except as to the homestead allotment and about 32 acres of the surplus allotment which was included in one departmental lease to the Pulaski Oil Company. This lease is still under supervision of the Department, and the royalties therefrom had at all times been run to the credit of the minor at the office of the superintendent of the Five Civilized Tribes at Muskogee, and the accumulations therefrom are being held in said department to the credit of said minor.

On the 20th day of February, 1914, the day upon which the resident guardians turned over to the nonresident guardian the personal property before mentioned, there were three unsatisfied judgments in the district court of Tulsa county, procured by McDougal, as guardian of said minor; one for \$3,339.36 against L. C. Booth, one against the Dewey Park Realty Company for the sum of \$32,456.60, one against J. E. Rice et al. for \$7,486.98, which was a part of the large judgment mentioned, supra, also a judgment in the district court of Creek county against John T. Baldwin and Stella Baldwin for \$1,813, and foreclosing the lien upon property in the city of Sapulpa which was bought in at sheriff's sale by Kersey and Crossland, as resident guardians, for the sum of \$500.

On the 18th day of May, 1914, Kersey and Crossland, as joint guardians of the estate of said minor, filed their first intermediate account, which showed that they had on hand personal property belonging to said minor's estate, the sum of \$3,615.47 in cash, which account was approved by the county court of Tulsa county, on which date the receipt of Grimes, as nonresident guardian, for the personal property transferred to him by the resident guardians, was exhibited to the county court of Tulsa county and deposited therein. On said date the exhibits of their account disclosed that they had in their possession the real estate hereinbefore referred to and the judgments or the property bought at sheriff's sales thereunder.

On the 15th day of June, 1915, Edward Crossland, one of the resident guardians, resigned and his resignation was accepted by the county court, and E. Kersey continued as sole guardian of said estate by order of said court, and since that date said estate had been under the sole management and control of said E. Kersey. The judgment of the county court settling the account of McDougal, as former guardian, from which the appeal was taken to the district court, was rendered on June 12, 1915, and Crossland resigned on the 15th day of June, 1915.

On the 23d day of January, 1918, McDougal filed in the district court in this cause a motion to dismiss the appeal on the ground that upon the personal property being transferred by him pursuant to the decree of the district court rendered on the 8th day of March, 1913, authorizing and directing such

transfer and authorizing the foreign guardian to sue for and receive the personal estate of said minor in the state of Oklahoma, the authority of the local guardians ceased and terminated, and their right to represent the said minor or his estate in the state of Oklahoma or elsewhere ceased. This motion was heard on the 28th day of January, 1918, before Hon. W. J. Campbell, special judge of said court, who overruled said motion, but upon the calling of said cause in the district court before Hon. Owen Owen, as judge, on the 20th day of May, 1918, the movant renewed his motion and the latter judge sustained the same, and the plaintiff in error's appeal from the county court was dismissed.

From that judgment of the district court this appeal has been perfected by the plaintiff in error, whose assignments of error are:

"(1) The said district court erred in sustaining the motion of the said D. A. McDougal to dismiss the appeal of the said Kersey, as guardian of the estate of said minor, and in dismissing said appeal, to which ruling of the court the plaintiff in error at the time excepted.

"(2) The said district court erred in refusing and ruling out competent and legal evidence offered in behalf of the said Kersey, as guardian of the said minor, on the hearing of said motion of the defendant in error, D. A. McDougal, to which ruling of the court the plaintiff in error at the time excepted.

"(3) The said district court erred in overruling the motion of said Kersey, as guardian of the estate of said minor, to set aside and vacate the judgment of said court sustaining the motion of said D. A. McDougal and dismissing the plaintiff in error's appeal and refusing to grant the plaintiff in error a new trial of said motion, to which ruling of the court the plaintiff in error at the time excepted."

Counsel for plaintiff in error say in their brief:

"The assignments of error may best be considered together under two propositions:

"(1) Did the entering of the order of transfer and filing of the foreign guardian's receipt with the county court terminate the guardianship in Oklahoma?

"(2) Did the entering of the order of transfer and the filing of the foreign guardian's receipt with the county court deprive the resident guardians of all interest in the estate of the minor to the extent that they had no right or authority to contest the interest of the minor in the settlement of the account of McDougal, as former guardian?"

"We earnestly contend that the entering of the order of transfer and filing of the foreign guardian's receipt with the county court did not terminate the guardianship in Oklahoma. The order of transfer was made under authority of sections 6574 and 6575 of the Revised Laws of Oklahoma 1910. They are as follows:

"6574. When the guardian and ward are both nonresidents, and the ward is entitled to property in this state which may be removed to another state, territory or foreign country with-

out conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state, territory or foreign country of the residence of the ward, upon the application of the guardian to the judge of the county court of the county in which the estate of the ward, or the principal part thereof, is situated.

"6575. The application must be made upon ten days' notice to the resident executor, administrator or guardian, if there be such, and upon such application the nonresident guardian must produce and file a certificate, under the hand of the clerk, judge, surrogate or other authorized officer, and the seal of the court from which his appointment was derived, showing: First. A transcript of the record of his appointment. Second. That he has entered upon the discharge of his duties. Third. That he is entitled by the laws of the state, territory or country of his appointment to the possession of the estate of the ward; or must produce and file a certificate under the hand and seal of the clerk, judge, surrogate or other authorized officer of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court in such state, territory or country, that by the laws of such country the applicant is entitled to the custody of the estate of his ward without the appointment of any court. Upon such application, unless good cause to the contrary be shown, the judge of the county court must make an order granting to such guardian leave to take and remove the property of his ward to the state, territory or place of his residence, which is authority to him to sue for and receive the same in his own name for the use and benefit of his ward.

"6576. Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the county court the receipt therefor of the foreign guardian of such absent ward."

"The first question that presents itself is, What is the meaning of the word 'discharge,' as used in section 6576 of the statute? Does it mean the termination of the representative capacity of the local guardian, or does it mean the release of the local guardian from all liability for the property paid or delivered to the foreign guardian? It is our contention that it should be given the latter construction."

Counsel concede that the controversy involved in this appeal rests upon the construction to be placed upon these provisions of the statutes, concerning which counsel for defendant in error say in their brief:

"It will be noticed from this motion that the ground for dismissal was that the appeal was not prosecuted by any one having legal authority, or any one having any interest in the subject-matter of the controversy; that E. Kersey, in whose name and by whom the appeal was attempted to be prosecuted, had no interest in the controversy, and had no legal authority to represent the minor in prosecuting the appeal.

"It was the contention of the defendant in error, D. A. McDougal, and he so contends now, that when the estate of said Robt. Pitman,

Jr., was removed from the state of Oklahoma to the state of Colorado, and all the removable property was taken from this state to the state of Colorado by O. P. Grimes, his guardian in Colorado, and said removal being made in conformity to statute of this state, that then all authority and duties of the local guardians ceased and terminated.

"The removal of the estate of the minor is controlled exclusively by the statute, and the determination of the question presented on appeal must depend upon the construction to be given this statute and the orders and judgments of the court in transferring this estate. Section 6574, set out on pages 29 and 31 of plaintiff in error's brief, provided that the property of the minor may be removed. Section 6575 provides the method of removal, and section 6576 determines the effect of such removal. By diligent search we have been unable to find any decision construing this statute, or any that would be of any aid to the court in determining the question presented.

"To sum it up, it is our contention that the removal of the estate from this state to the state of Colorado was a transfer of the control, management, and guardianship of the whole estate; notwithstanding the same real property might be owned by the minor in this state, and notwithstanding the fact that Kersey might be intermeddling in the minor's estate and trying to act as guardian, that this transfer supersedes all authority of the local guardians and deprives them of any duties in regard to this estate, and such duties were transferred to the foreign guardian; and, further, that the statute designates the foreign guardian as the one to maintain any action or proceeding relative to property of this minor which was ordered transferred, and this authority is exclusive, and any one attempting to act as local guardian has no such authority; that this appeal must be prosecuted by the foreign guardian, and that, as no one was prosecuting this case on appeal in the district court, the district court properly entered its judgment and order dismissing the attempted appeal."

Counsel cite no authorities sustaining this contention and frankly say they have been unable to find any.

The trial court made no separate findings of fact. At the close of the hearing of the motion to dismiss, the trial court announced his conclusions in the following language:

"The court is of the opinion, after making the order to turn over the estate of the minor to the guardian appointed by the court in El Paso county, Colo., that under section 6575, Compiled Laws 1910, the power of the guardians, Crossland and Kersey, terminated or was destroyed; that they were without capacity to take or prosecute this appeal. The appeal is dismissed."

To which action of the court the plaintiff in error saved an exception. Thereafter the plaintiff in error's motion for new trial was overruled, and the judgment of the trial court sustaining the motion to dismiss the appeal was rendered.

The order of the district court transferring

the personal property of the minor to the nonresident guardian was made on the 8th day of March, 1913. The foreign guardian's receipt was dated February 20, 1914, and was filed by the plaintiff in error with the county court of Tulsa county on the 7th day of November, 1914.

Edward Crossland, one of the joint guardians, resigned on the 15th day of June, 1915, and the plaintiff in error was, by order of the county court of Tulsa county made on the said date, continued as sole guardian of the estate of said minor. The order of the county court of Tulsa county removing McDougal as guardian of said minor was made on the 14th day of November, 1913, at which time the court appointed E. Kersey and Edward Crossland guardians for said minor, who qualified as such on the 17th day of November, 1913, and immediately entered upon the discharge of their duties as such. The order removing McDougal directed him to file his final account within 30 days thereafter. He filed such account on the 15th day of January, 1914, and on the 15th day of January, 1914, Kersey and Crossland, as joint guardians, filed written exceptions to the same.

[1-4] It is conceded by counsel that, whatever the powers of the foreign guardian, they are fixed by the provisions of the statute, *supra*.

In 12 R. C. L. 1174, it is said:

"Guardianship depends for its validity and legal effect on the law of the jurisdiction by which it was created, and the guardian's authority does not extend beyond the limits of the state. A guardian appointed in a foreign country, or in another state in the Union, cannot demand control of the ward's person, maintain a suit as guardian, sell or lease the ward's property, collect the debts due to him, or demand his distributive share of an estate. But this strict rule of law is much modified in its practical operation by the exercise of the comity which exists between civilized states, particularly between several states of the American Union, and their courts. \* \* \* In some of the states the statutes provide for the filing by a foreign guardian of a copy of his appointment, and thereupon giving him the right to exercise certain powers within the state. In many cases where the removal of the ward to another state, or other circumstances, make the foreign jurisdiction more convenient for the administration of the trust, the court has ordered funds to be transmitted to the foreign guardian. Such order of transmission is the regular practice when the domestic guardianship is merely ancillary, and the principal guardianship is at the domicile of the ward in another state. And where the ward had a guardian of the person in the state of his domicile, and also a guardian in a state in which he had property, the domiciliary guardian has been granted an order requiring the other guardian to pay the expenses of the ward's support and education."

Our statute comes from Dakota, which, in turn, took it from California. In California,

in the case of *McNeill v. First Congregational Society of San Francisco*, 66 Cal. 105, 4 Pac. 1096, the Supreme Court of that state held in 1884 that a foreign guardian had no authority to sell lands belonging to his ward situated in that state. The court said:

"As to the second source which defendants claim title, the deed executed by the mother of Francis W. Paty under the acts of the Legislature was void, because, although she had been appointed guardian of the person of the minor by the probate court of the state of Massachusetts and by the Supreme Court of the Hawaiian Islands, she had never been appointed guardian of his person and estate by the probate court of this state."

And in the case of *Willson v. Hastings*, 66 Cal. 243, 5 Pac. 217, decided in 1884, the Supreme Court of California said:

"The paper admitted in evidence, by which Samuel Woods, as guardian of the minor devisees, appointed and resident in Mississippi, assumed to consent to the probate sale on behalf of his wife and the minor children, devisees, was of no value in this case; at least, so far as the minors were concerned. If he was their guardian, he was such in Mississippi, his and their place of residence—not here; and such guardianship would give him no authority to bind their real estate here."

R. L. 1910, §§ 3339, 3340, and 3341, provide:

"3339. The power of a guardian appointed by court is suspended only: First. By order of the court. Second. If the appointment was made solely because of the ward's minority, by his obtaining majority. Third. The guardianship over the person only of the ward, by the marriage of the ward.

"3340. After a ward has come to his majority, he may settle accounts with his guardian and give him a release, which is valid if obtained fairly and without undue influence.

"3341. A guardian appointed by a court is not entitled to his discharge until one year after his ward's majority."

This court has uniformly held that a succeeding guardian may contest settlement of a former guardian's account and prosecute an appeal from the judgment of the court settling the account.

We think it is clear that the order of the court transferring the personal property of the minor to the foreign guardian, and in filing with the county court the receipt therefor of the foreign guardian of the absent ward, did not suspend the power of the local guardian over the residue of the property of the estate of the minor remaining in Oklahoma in any particular, but that such local guardian remained clothed with all power in relation thereto imposed by the laws of the state upon guardians generally, including that of instituting suits and proceedings for the protection of the property of his ward in this state, and to prosecute the same to a final determination. Sections 3339, 3340, and

3341; *Brewer v. Perryman et al.*, 62 Okl. 176, 162 Pac. 791; *In re Cobb's Estate*, 166 Pac. 885; *Anderson v. Anderson*, 165 Pac. 145; *Stewart v. Sims*, 112 Tenn. 296, 79 S. W. 885; *Hill v. Reed*, 23 Okl. 616, 103 Pac. 855.

From an examination of the record, we are of the opinion that the trial court erred in rendering the judgment complained of, and the same is reversed and the cause remanded, with directions to further proceed in accordance with the views herein expressed.

RAINEY, C. J., and KANE, HARRISON, PITCHFORD, and McNEILL, JJ., concur.

(79 Okl. 118)

**POOS v. KELLY. (No. 9705.)**

(Supreme Court of Oklahoma. Aug. 10, 1920.)

*(Syllabus by the Court.)*

1. **Contracts** ¶123(1)—By officer taking attention from official duties held not against public policy.

A contract entered into by a public official is not against public policy merely for the reason that in the performance of the same he may temporarily fail to give his personal attention to the duties of his office.

2. **Officers** ¶110—Punishment for failure to give personal attention to duties is removal or impeachment.

Section 11 of article 2 of the Constitution provides that a public officer shall give his personal attention to the duties of his office. The punishment for a failure so to do is removal from office or impeachment.

3. **Appeal and error** ¶1005(2) — Approved verdict supported by some evidence not disturbed.

The jury, in an action at law, is the exclusive judge of the credibility of the witnesses and the weight and value to be given to their evidence. If the jury has been properly instructed and its verdict approved by the trial court, the same will not be set aside in this court if there is any evidence reasonably tending to support it.

*(Additional Syllabus by Editorial Staff.)*

4. **Pleading** ¶411—Plaintiff not objecting to counterclaim waives defect.

In an action on a note wherein defendant by cross-petition alleged plaintiff's indebtedness to him and plaintiff did not move to strike the cross-petition or demur thereto but went to trial on it, he waived his right to test the sufficiency of the counterclaim.

Error from District Court, Pawnee County; Conn Linn, Judge.

Action by Henry C. D. Poos against Ed. M. Kelly, with cross-petition by defendant. Verdict and judgment for defendant, and plaintiff brings error. Affirmed.

L. V. Orton, of Pawnee, for plaintiff in error.

Edwin R. McNeill and McCollum & McCollum, all of Pawnee, for defendant in error.

HIGGINS, J. The parties to this suit held the same relative positions in the trial court and will be referred to as plaintiff and defendant in this opinion.

In 1911, defendant executed to plaintiff a promissory note for \$825. In 1915 this note was taken up and a new note given for \$550 on which there was afterwards a payment of \$165 made, leaving a balance due thereon of \$385, for which this suit is brought. The defendant admits execution of the note, but pleads as a set-off to same that plaintiff is indebted to him in the sum of \$512.50 for house rent and the further sum of \$500 for services rendered in making a trip to the state of Washington for plaintiff in a legal matter. The plaintiff in his reply states that the house rent was deducted from the note of \$825 at the time the note in suit was executed, and that he had an agreement with the defendant that he was merely to pay the expenses of the trip to Washington, which he has heretofore done. He further pleads that at the time the trip to Washington was made defendant was court clerk of Pawnee county and under section 11, art. 2, of the Constitution, was required to give his personal attention to the office; and that if such a contract was entered into, which he denies, the same would be against public policy.

There was a sharp conflict in the evidence as to whether or not all differences between the parties were settled at the time the note in suit was executed, the amount of the house rent, if any, due, and whether or not there was a contract as to payment of defendant for his services of the trip to Washington other than the actual expenses. The trial court held that the contract of employment, if any, upon which the defendant made his trip to Washington, was not in violation of section 11, art. 2, of the Constitution. The jury returned a verdict for defendant in the sum of \$272.50, from which judgment the plaintiff appeals to this court.

Plaintiff assigns as error that the court erred in permitting and not permitting certain evidence to be introduced; in refusing to give certain instructions; in holding that a public officer could enter into a contract of employment; and in permitting any evidence to be introduced under the cross-petition for the reason that the plaintiff claims that the note was given in settlement of all existing indebtedness between the parties and could not be attacked other than for fraud, accident, or mistake.

We have examined the record as to whether or not the court erred in not permitting

(191 P.)

certain evidence to be introduced and also in refusing to admit certain evidence and in giving certain instructions, and find no error justifying a reversal of the case.

[1, 2] Under the assignment that the contract for the trip to Washington is against public policy and in violation of section 11, art. 2, of the Constitution, this court has heretofore passed upon that contention in *Young v. Town of Morris*, 47 Okl. 743, 150 Pac. 684, Ann. Cas. 1918B, 450, wherein Judge Sharp, speaking for the court, held that the punishment for failure of an officer to give his personal attention to the office is the power of removal or impeachment as provided by law, citing a long line of authorities in support thereof. We therefore find that the trial court, in holding the contract not against public policy, did not commit error.

[3, 4] The remaining assignment of error is that the court erred in permitting any evidence to be introduced in support of the cross-petition, it being contended by the plaintiff that the note was given in full settlement of all differences between the parties and it could not be attacked in the absence of fraud, accident, or mistake. There was a sharp conflict in the evidence between the parties as to whether or not the note was so given; plaintiff contending that it was so given, and the defendant contending that the note was not given in full settlement of the differences between the parties but that it was agreed and understood between them that they, at some later date, would settle the other matters between them. We have examined the record in the case and find that the court instructed on both theories and that these issues were left as questions of fact for the jury to determine, which it did against the interest of the plaintiff in error.

It is urged in the brief of the plaintiff that the court erred in permitting any evidence to be introduced in support of the cross-petition of defendant for the reason that this evidence seeks to alter or change the terms of the note. The plaintiff cites no authorities directly bearing on the question that pleading an offset, to the note, of an indebtedness due prior to the execution of the note, alters or changes the terms of the contract; and furthermore never, at any time, moved to strike the cross-petition or file demurrer thereto, but went to trial on the same. He therefore has waived his right to test the sufficiency of the counterclaim. *Wyman v. Herard*, 9 Okl. 35, 59 Pac. 1019; *First National Bank v. Colonial Trust Co.*, 167 Pac. 985.

The plaintiff complains quite bitterly that the verdict of the jury is a great injustice to him. The jury is the sole judge of the credibility of the witnesses and the weight and value to be given to their evidence, and,

when it has been properly instructed and its verdict approved by the trial court, this court will not set the same aside if there be any evidence reasonably tending to support it. *Clawson v. Cottingham*, 34 Okl. 493, 125 Pac. 1114; *Wichita Falls & N. W. Ry. Co. v. Stacy*, 46 Okl. 8, 147 Pac. 1194.

Affirmed.

RAINEY, C. J., and HARRISON, JOHN-  
SON, BAILEY, and RAMSEY, JJ., concur.  
McNEILL, J., disqualified and not partici-  
pating.

(79 Okl. 119)

**SOUTHWESTERN BELL TELEPHONE CO.  
v. STATE et al. (No. 11104.)**

(Supreme Court of Oklahoma. May 4, 1920.  
Rehearing Denied Aug. 19, 1920.)

(Syllabus by the Court.)

**Order of Corporation Commission reversed on  
confession of error.**

Record examined. The order of the Corporation Commission, appealed from, reversed, and the cause remanded, with directions.

**Appeal from Corporation Commission.**

Proceeding between the Southwestern Bell Telephone Company and the State and others. From an order of the Corporation Commission, the former appeals. On confession of error by Attorney General. Reversed and remanded, with directions.

S. H. Harris and J. R. Spielman, both of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., for defendants in error.

JOHNSON, J. This is an appeal from an order of the Corporation Commission made on the 21st day of June, 1919, in which it was "ordered and adjudged that the Southwestern Bell Telephone Company, so long as proper traffic arrangements exist, be and is hereby ordered to complete connection at Tecumseh for calls to Shawnee or points beyond, when originating at Asher or other points located on and routed over the toll lines owned and operated by the Tecumseh and Asher companies. From this order the plaintiff in error perfected an appeal on December 18, 1919, by filing its petition in error in this court with copy of case-made attached.

This cause comes on to be heard on a confession of error filed by the Attorney General on April 27, 1920, wherein it is stated:

"That the commission in its order made in said cause, to be found on page 38 of the record filed herein, bases its order and decision on a previous order made by the commission in the

case of Comanche Telephone Company v. Pioneer Telephone & Telegraph Company, from which said order and decision the defendant, Pioneer Telephone & Telegraph Company, appealed to the Supreme Court of Oklahoma; that this court in said cause No. 8023, Pioneer Telephone & Telegraph Company v. State of Oklahoma et al., on the 20th day of January, 1920, reversed the Corporation Commission's order rendered in said cause and remanded the same, with direction to dismiss the complaint filed therein; that the above-entitled cause is identical with the said appeal No. 8023, and the Supreme Court, by rendering said decision, has disposed of all questions involved in the instant case, and appellee, state of Oklahoma, therefore confesses error in this cause, and in the said order No. 1570 issued by the Corporation Commission, and agrees that this honorable court may reverse and remand the same, with directions to dismiss the complaint filed in said cause."

From an examination of the record we find that, as stated by the Attorney General, the questions involved in this appeal are identical with those passed upon by this court in case No. 8023, Pioneer Telephone & Telegraph Co. v. State of Oklahoma et al., 186 Pac. 934, and which was passed upon by this court on the 20th day of January, 1920, wherein the order of the Corporation Commission was reversed and the cause remanded, with directions to dismiss the complaint filed therein, and that the questions of law therein are controlling in the instant case.

The confession of error of the Attorney General is therefore approved, and it is ordered that the orders of the Corporation Commission made in this cause be and the same are hereby reversed and the cause remanded, with directions to dismiss the complaint filed in this cause.

All the Justices concur.

(79 Okl. 111)

### GUINAN v. READDY. (No. 9607.)

(Supreme Court of Oklahoma. May 11, 1920.  
Rehearing Denied Aug. 10, 1920.)

#### (Syllabus by the Court.)

1. Appeal and error  $\S$ 1170(5)—Variance, not causing surprise, held not ground for reversal under statute.

No variance between the allegations, in a pleading and the proof, is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that the party has been so misled, that fact must be proved to the satisfaction of the court, and must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just.

2. Deeds  $\S$ 196(2)—Taking conveyance from feeble-minded person raises presumption of fraud.

Whenever it is shown that a transfer of property was obtained from a person of feeble mind, and that no consideration, or a very inadequate consideration, was given in return, a very strong presumption of fraud arises; and, unless it is successfully rebutted, a court of equity will set aside the deed so obtained.

3. Depositions  $\S$ 11—Perpetuation of testimony permitted only to prevent failure of justice.

Unless the right to perpetuate testimony is absolute the preserving of evidence by deposition in this mode is not favored, and will not be permitted unless where necessary to prevent a failure of justice.

4. Appeal and error  $\S$ 1009(3)—Deeds  $\S$ 211(3)—Judgment in equitable suit affirmed unless conclusively wrong; evidence held to show undue influence.

The judgment of the trial court in an equitable action, where the evidence is conflicting, should be given weight; and, unless the appellate court is satisfied that the conclusion reached by him was wrong, should be affirmed.

Error from District Court, Pawnee County; Chas. B. Wilson, Judge.

Suit by Hans Nellson against Elnora Guinan and another. Plaintiff having died, the cause was revived in the name of Isom Readdy, his administrator. Decree for plaintiff, and defendant named brings error. Affirmed.

Edwin R. McNeill and Redmond S. Cole, both of Pawnee, for plaintiff in error.

Claude C. McCollum, of Pawnee, and Iener W. Nielsen, of Fresno Cal., for defendant in error.

PITCHFORD, J. This action was commenced in the district court for Pawnee county, by Hans Nellson, as plaintiff, against Elnora Guinan and John R. Guinan, as defendants, to have the deed to an undivided one-half interest in a quarter section of land set aside, on the grounds that at the time, he (Nellson) signed the same he thought it was an oil lease. It was alleged in the petition that the plaintiff was aged; that his physical and mental strength had, for the last five years, been impaired and shattered by ill health; that during the last two years, he was almost helpless, both mentally and physically, on account of certain physical and nervous ailments to which he was subject; that his eyesight was not good; that during the latter part of 1914, the defendant, Elnora Guinan, roomed at the same house at which plaintiff roomed; that she, being thus constantly in sight of and in touch with the plaintiff, was well aware of his physical and mental disability; that she pretended to have a sympathy for the plaintiff and to undertake to advise him and

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guide him in business and practical matters, plaintiff reposing special confidence in her integrity and ability, and consulting her in a confidential and fiduciary way for advice in regard to the question of leasing land for oil and gas purposes; that the defendant took advantage of the confidence reposed in her ability and integrity by this plaintiff, and deceived and defrauded him by representing that if he would give her an oil and gas lease on the lands in controversy she would, within a short time, not exceeding six months, drill on said land a well in search of oil and gas; that the plaintiff relied upon the representations so made by defendant, and, so relying, signed his name to a piece of paper, which was represented to him by the defendant to be an oil and gas lease; that he did not read the instrument which he signed, but relied wholly upon the representations of said defendant because of his weakness and helpless condition and because of the special confidence which he had reposed in her.

On the 21st day of February, 1916, a disclaimer was filed by John R. Guinan. On the same date, the defendant Elnora Guinan filed a demurrer, which was by the court overruled. Thereafter, on July 11, 1916, the defendant filed an answer, which was in the nature of a general denial. On the 26th day of August, 1916, the plaintiff died. The cause was revived in the name of Isom Readdy, the duly appointed administrator of the estate of the deceased. On the 24th day of May, 1917, the cause came on for trial. Upon the conclusion of the evidence, the court made the following findings of fact:

"That at the time of the acts complained of by plaintiff's petition, Hans Neilson was an old man, and had been for a long time prior thereto subject to frequent epileptic spells or fits; that at the time of the transaction complained of, and for a long time prior thereto, he had been in a very weak mental condition, which was the result of his old age and diseased nervous condition; that his mental comprehension of the very ordinary affairs of his life were at all times vague, and that at times he was without any intelligent comprehension whatever of the most ordinary things; that at the time he executed the deed sought to be canceled his act in so doing was more mechanical than intelligent; that he was induced to execute the deed by the undue and dominating influence of the defendant, exerted by means of her stronger mentality and dominating personality; that said deed was executed without any consideration whatever to the said Hans Neilson, without any understanding on his part of the nature thereof, and its execution by the said Neilson was induced by the defendant without any consideration therefor being given on her part, with the intention on her part to thereby cheat and defraud said Neilson; she well knowing at the time that said Neilson's mind was in such a condition that he could have no adequate comprehension or understanding

of the nature of the act by which he executed said deed, or of the deed itself."

It was ordered, adjudged, and decreed by the court that the deed be canceled.

The errors assigned for reversal of the judgment of the trial court may be grouped under the following heads: First, that the judgment of the court was against the clear weight of the evidence; second, rejection of evidence, showing that the plaintiff, through his counsel, resorted to the courts, and prevented the taking of the depositions of Hans Neilson.

First. We have examined the evidence carefully, and fail to see wherein the judgment of the trial court is against the clear weight of the evidence. The trial judge had the witnesses before him. He had an opportunity to observe their demeanor while testifying. Under such circumstances, while the evidence might be conflicting and might have authorized the findings in favor of either party, unless this court can see that the findings and judgment of the trial court were against the clear weight of the evidence, it would be our duty to sustain the judgment of the lower court.

In *Deskins v. Rogers*, 180 Pac. 691, it was said:

"In an action of an equitable nature the Supreme Court will weigh the evidence, and will affirm the judgment, unless the same is against the clear weight of the evidence."

To the same effect see *Elliott v. Bond*, 176 Pac. 242; *Bruner v. Oswald*, 178 Pac. 693; *Day v. Keechi Oil & Gas Co.*, 180 Pac. 366; *Robertson v. Robertson*, 176 Pac. 387.

In *Tescier v. Goyer*, 181 Pac. 508, *McNeill, J.*, said:

"A judgment of the trial court in an equity action, where the evidence is conflicting, should be given weight; and, unless the court is satisfied that the conclusion reached by the trial court is wrong, should be affirmed."

The evidence tends to show that the plaintiff, Hans Neilson, went to Pawnee in the fall of 1914. He secured a room at the rooming house conducted by a Mrs. Seivers. At that time he was a physical wreck; weak-minded. At times he seemed to realize his surroundings; at other times he did not. He had epileptic fits; would fall down, and several times hurt himself badly. After these spells he would be in a dazed condition for two or three days. This condition continued during his entire stay in Pawnee, and along towards the last these spells would become more frequent. His condition was the subject of conversation among the roomers at the house. Some of the witnesses testified that they did not consider he was competent in a business way; that he was not rational in his talk.

The defendant, Mrs. Guinan, also roomed at Mrs. Selvers'. Chas. W. Sutherlin, who roomed at the same place, testified that his room adjoined that of the plaintiff; that the stovepipe ran through the partition dividing the two rooms, and the conversations in the room occupied by Mr. Nelson could be heard plainly by one occupying the Sutherlin room. He further testified that on one occasion, about 7 o'clock p. m., he heard Mrs. Guinan, the defendant, coming down the stairs; that she started to the front. Mr. Nelson opened his door, and asked her to come into his room. After she had entered the room, Mr. Nelson was heard to say, "What is this I hear about me giving you a deed?" She said: "You know, Mr. Nelson, you gave me an oil and gas lease, it was not a deed;" and he said: "That is what I thought I was giving you." Sutherlin further testified that on another occasion he heard Mrs. Guinan say to Mr. Nelson:

"There is a whole lot of fellows around town mixing up in this business of ours, and you know you only gave me an oil and gas lease, don't you?" and he answered: "That is what I intended to give you." They went on to say she had a lease for six months, and that she was going to start drilling operations in six months."

It further appears from the evidence of the various witnesses that the plaintiff would at times lose all sense of direction, and would have to have some one show him to his room from the restaurant, only a short distance away, the restaurant being on the west side of the courthouse square, and the rooming house one block south of the square. It further appears that the plaintiff, Nelson, gave the defendant \$35 with which to buy a suit, and in conversation with one of her lady friends, who was commenting upon the fine material and make of the suit, the defendant stated "that she was going, to do the old man for still more; that he was an old fool, and she might as well have his property as any one else."

The doctor who had been treating plaintiff testified that the plaintiff was suffering with senile dementia, which disease had a tendency to render one irresponsible for his acts; that this disease usually resulted in a general decline of the vital powers, being likened unto a lamp that is going out for want of oil, simply a gradual going down and out.

There is evidence on the part of the defendant to the effect that the plaintiff in company with the defendant went to the treasurer's office, and each paid one-half of the taxes on the 160 acres. Defendant says that this was a recognition on the part of the plaintiff of the deed to the defendant. There is also further evidence on the part of the defendant, tending to show that the plaintiff

knew the nature of the instrument he was executing.

Our judgment, however, is that the clear weight of the evidence is in favor of the plaintiff. There is no contention on the part of the defendant that any consideration whatever passed from her to the plaintiff. There is no contention on the part of the defendant that she paid even \$1 for the property, further than the consideration of \$1, expressed in the deed. It is true the deed says "for other valuable considerations," but no other valuable consideration is shown or attempted to be shown.

Section 889, Rev. Laws 1910, provides:

"Conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission without prejudice to the rights of third persons, as provided in the article on extinction of contracts."

Section 906, Id., defined "undue influence" as follows:

"First. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

"Second. In taking an unfair advantage of another's weakness of mind. \* \* \*"

Section 265, Black on Rescission and Cancellation, is as follows:

"When \* \* \* it is shown that a transfer of property or other contract was obtained from a person of feeble mind, and that no consideration, or a very inadequate consideration, was given in return, a very strong presumption of fraud arises, and unless it is successfully rebutted, a court of equity will set aside the deed or contract so obtained."

In view of all the evidence in the case, we are irresistibly drawn to the conclusion that the defendant was simply carrying out her boast to her lady friend when she said:

"I am going to do him for still more; he is an old fool, and I might as well have his property as any one else."

It is contended that, inasmuch as the action was brought by the plaintiff to have the deed canceled on the ground that the defendant represented she was able to and would drill an oil well on the property in question within six months, and that plaintiff relied upon her representation that she was able to drill a well, and intended to drill a well, and that the defendant had no intention of drilling a well, and, in fact, was merely scheming to secure the lease, instead of the deed, and had gotten plaintiff, because of infirmities of eyesight to sign the deed to an undivided one-half interest in the land, thinking it was an oil and gas lease on the entire tract, and that on this



theory the plaintiff brought his suit and on this theory must win or fail, and that if the evidence fails to establish his contention, then he would not be entitled to recover. We do not so understand the petition. The object and purpose of this suit was to have the deed canceled because the same, as charged by the plaintiff, was procured by fraud; that is, that the defendant, knowing the condition of the plaintiff, took advantage of that condition and secured the deed.

[1] There is no material variance between the allegations and the proof. Section 4784, Rev. Laws 1910, states:

"No variance between the allegations, in a pleading, and the proof, is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended, upon such terms as may be just."

And section 4791 provides:

"The court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

[2] This is an equitable proceeding, and in such actions the rules of evidence with reference to fraud are not so strict as in suits of law.

In *Bottoms v. Neukirchner*, 29 Okl. 104, 116 Pac. 434, in delivering the opinion, Kane, J., in answer to the assignment of error "that there was not sufficient evidence adduced at the trial to warrant the court in finding against the defendant on the question of fraud," says:

"On the second point we have examined the evidence with care, and believe that it is sufficient to support the decree of the chancellor. It seems that a lesser degree of proof is required to establish fraud in equity than in law"

—and, further on in the opinion, quotes from *Armstrong v. Lachman et al.*, 84 Va. 726, 6 S. E. 129, as follows:

"It is not safe to undertake to define what degree or kind of proof will justify a court of equity in granting relief against fraud, for the proof must satisfy the conscience of the court, and no man would deem it prudent to attempt to define the extent of that indispensable qualification in a judge or a court."

In *Brooks v. Garner*, 20 Okl. 238, 94 Pac. 694, it was said:

"In the case of *King v. Moon*, 42 Mo. 551-554, the court says: 'While the law will not imply or presume fraud, yet common experi-

ence teaches that it is seldom that any direct or positive proof can be obtained in regard to any given transaction, no matter how fraudulent it may be. Fraud, in common with the highest crimes known to law, is commonly made out by circumstantial or presumptive evidence. The very charge implies color and disguise, to be dissipated by indicia alone. Per Cowen, J., *Waterbury v. Sturtevant*, 18 Wend. (N. Y.) 353. Fraud may be presumed in equity, but must be proved at law. Therefore courts of equity, it is said, will act upon circumstances as indicating fraud which courts of law will not deem satisfactory proofs, or, in other words, will grant relief upon the ground of fraud, established by presumptive evidence, which evidence courts of law would not always deem sufficient to justify a verdict. *Jackson v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; 1 Story, Eq. Jur. arts. 190-193, and cases cited; 3 Greenl. Ev. art. 254. The range of inquiry in the investigation must necessarily be very extensive, and bring within its scope all the circumstances bearing upon the question.'" *Wimberly v. Winstock et al.*, 46 Okl. 645, 149 Pac. 238.

[3] Second. The defendant strenuously contends that error was committed in rejecting the evidence offered to show that plaintiff, through his counsel, resorted to the courts and prevented the taking of the deposition of plaintiff, Neilson. We fail to find anything in the record or in the brief of the defendant wherein or whereby the defendant was injured by the order of the court in granting the order restraining defendant from taking the deposition of the plaintiff. Evidently the judge in granting the injunction must have been satisfied that the defendant was not entitled as a matter of right to take the deposition of the plaintiff. In 13 Cyc. 837, it is said:

"Unless the right to perpetuate testimony is absolute, the preserving of evidence by deposition in this mode is not favored and will not be permitted unless where necessary to prevent a failure of justice."

In *re Davis*, 88 Kan. 408, 16 Pac. 790, it is said:

"The taking of the deposition of a party in a pending case, merely to fish out in advance what his testimony will be, and to annoy and oppress him, and not for the purpose of using the same as evidence, is an abuse of judicial authority and process; and a party committed by a notary public for refusing to give his deposition in such a case will be released on habeas corpus."

The order granting the injunction, contained among other things, the following:

"That Hans Neilson, the plaintiff, being a party to the action, and having disclosed his intention of being present in person at the trial of this case, living and being in Pawnee county and within the court's jurisdiction, and there being no tangible or probable reason why he should not be so present, and testify at the

trial of the cause, the judge of said court finds that said defendant, their attorneys and all other persons or officials acting for them, or at their instance, should be restrained from taking, or attempting to take, the deposition of said plaintiff, Hans Neilson."

We fail to see any error in the court in rejecting this evidence.

[4] In view of the entire record in the case, we conclude that the judgment of the trial court is entirely in accordance with the spirit of justice, and fully justified by the evidence, and are of the opinion that the same should in all things be affirmed; and it is so ordered.

RAINEY, C. J., and KANE, HARRISON, and JOHNSON, JJ., concur.

(17 Okl. Cr. 618)

Ex parte LYDE. (No. A-3766.)

(Criminal Court of Appeals of Oklahoma.  
Aug. 23, 1920.)

(*Syllabus by the Court.*)

1. Habeas corpus  $\S$ 30(1)—Writ deals with errors rendering proceedings absolutely void.

The writ of habeas corpus does not deal with errors or irregularities which render proceedings voidable merely, but such only as render them absolutely void.

2. Habeas corpus  $\S$ 94—Questions on review of judgment of conviction and imprisonment by writ stated.

The review of a judgment of conviction and imprisonment by writ of habeas corpus is limited to the questions: Had the court which rendered the judgment jurisdiction of the offense and of the person convicted? Or did the court in the course of the proceedings which resulted in the judgment lose jurisdiction to render a valid judgment and sentence?

3. Habeas corpus  $\S$ 85(1)—Showing that petitioner is detained by commitment prima facie only, and may be impeached by record showing want of jurisdiction.

Where it is shown by the return that petitioner is detained by virtue of a commitment issued upon a judgment of a court of competent jurisdiction, such showing is prima facie only of the fact, and may be impeached by the record of the case for the purpose of showing that the court or judge was without jurisdiction to render the judgment.

4. Criminal law  $\S$ 987—Defendant's presence in open court essential in felony cases.

In felony cases the defendant's presence in open court when judgment is rendered is an essential prerequisite, and indispensable to the jurisdiction of the court to render a valid judgment. He cannot waive this right and his counsel cannot do so for him.

5. Criminal law  $\S$ 986—Passing sentence on defendant in county jail, in absence of clerk and counsel, held a nullity.

Where, after rendering judgment in open court, in the absence of the defendant, the judge

left the courtroom and proceeded to the county jail, where the defendant was confined, and there, in the absence of the court clerk and the defendant's counsel, again pronounced judgment and sentence, held, that the court was not in session at the county jail, and the judgment and sentence there pronounced is a nullity. Held, further, that all the proceedings of rendering judgment and passing sentence were coram non iudice and void.

6. Effect of holding as to invalidity of sentence in criminal prosecution.

The holding in this case that the proceedings in rendering judgment and passing sentence were void only affects the judgment and sentence, and leaves the verdict and all precedent proceedings in full force and effect. The petitioner is therefore remanded to the custody of respondent pending the rendition of judgment in conformity with law and in accordance with the verdict of conviction.

(*Additional Syllabus by Editorial Staff.*)

7. Habeas corpus  $\S$ 30(1) — "Irregularity," within rule that writ does not deal with irregularities, defined.

An "irregularity," within the rule that habeas corpus does not deal with errors or irregularities which render proceedings voidable merely, is the want of adherence to some prescribed rule or mode of proceeding, and consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Irregularity.]

Petition for writ of habeas corpus by Kearby Lyde. Petitioner remanded.

See, also, Lyde v. State, 187 Pac. 252.

Graham & Logsdon, of Marietta, and Geo. H. Culp, of Gainesville, Tex., for petitioner.

The Attorney General, W. C. Hall, Asst. Atty. Gen., and T. B. Wilkins, Co. Atty., of Marietta, for respondent.

DOYLE, P. J. On behalf of Kearby Lyde, a duly verified petition for writ of habeas corpus was filed in this court, in substance, alleging that he is unlawfully imprisoned and restrained of his liberty by Frank N. Smith, sheriff of Love county; that he is so imprisoned under a commitment issued by the court clerk of said county upon a judgment of the district court of said county; that by said judgment he was adjudged guilty of the crime of rape and sentenced to be imprisoned in the penitentiary for the term of 15 years; that said judgment was rendered and entered in the absence of petitioner; that petitioner was sentenced by the judge of said district court in the county jail of Love county and outside of open court; that for the reasons stated the said judgment of conviction and the commitment which issued thereon, and the detention of the petitioner under

said commitment and judgment of conviction, are illegal and void. A rule to show cause why the writ should not issue was entered and issued, and answer thereto duly made by the said sheriff on the 17th day of May, 1920, at which time the cause was submitted on an agreed statement of facts.

The record discloses, in substance, these facts: Kearby Lyde was convicted in the district court of Love county of the crime of rape, and an appeal from the judgment rendered upon such conviction was attempted to be taken to this court. On motion of the Attorney General, the appeal was dismissed because the purported case-made was settled and signed by a judge who did not try the case, without a showing of the inability of the trial judge to settle and sign the same; said case-made not containing a duly authenticated transcript of the record proper. Lyde v. State, 16 Okl. Cr. —, 187 Pac. 252. The district court of Love county, pursuant to adjournment, convened at Marietta on the 6th day of January, 1919, and after overruling the motion of Kearby Lyde for a new trial, and in the absence of the defendant, Kearby Lyde, entered its judgment in accordance with the verdict. Then the judge accompanied by the sheriff proceeded to the county jail and there pronounced judgment and sentence. The court clerk was not present at the time.

The pertinent part of the journal entry of judgment reads as follows:

"Now, on this 6th day of January, 1919, the above-entitled cause comes on for judgment and sentence in conformity with the verdict of the jury, and defendant's attorneys, Graham & Logsdon, having waived the presence of the defendant upon the argument of the motion for new trial, and comes the sheriff of Love county and informs the court that the above-named defendant, Kearby Lyde, claims that he is unable to appear in open court for judgment and sentence by reason of sickness; that said defendant is confined in the county jail of Love county, said jail being situated upon the courthouse square in Marietta; and thereupon the judge of this court in company with the sheriff of Love county goes to said county jail for the purpose of pronouncing sentence upon the prisoner; that present at the time of pronouncing such sentence in said jail are Hon. W. F. Freeman, district judge, F. N. Smith, sheriff, J. D. Smith, deputy sheriff, the defendant, Kearby Lyde, and the father and mother of the defendant, and no other persons; and no legal cause being shown why judgment and sentence should not be pronounced against him, and none appearing to the court, it is therefore considered, ordered, adjudged, and decreed by the court that the said Kearby Lyde be confined in the state penitentiary at McAlester, in the state of Oklahoma, for a term of 15 years, for said crime by him committed."

The question presented is whether the judgment is illegal and void or merely erroneous and voidable by reason of irregularities shown by the record.

[1, 7] The writ of habeas corpus does not deal with errors or irregularities which render proceedings voidable merely, but such only as render them absolutely void. Such has been the established rule in this court from its inception. An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or improper manner. However, if the petitioner be imprisoned under a judgment of a court which had no jurisdiction to render the judgment complained of, such want of jurisdiction may be inquired into on habeas corpus. Under all the authorities relief can be had by habeas corpus from a void judgment of conviction.

[2] In the case of *In re Wilkins*, 7 Okl. Cr. 422, 115 Pac. 1118, it is held:

"The review of a judgment of conviction and imprisonment by writ of habeas corpus is limited to the questions: Had the court which rendered the judgment jurisdiction of the subject-matter and of the person convicted? And did the court in the course of the proceedings which resulted in the judgment lose jurisdiction to render a valid judgment and sentence?"

[3] In the case of *Ex parte Hightower*, 13 Okl. Cr. 472, 165 Pac. 624, it is said:

"By numerous decisions of this court it is held that the jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is a proper subject of inquiry on habeas corpus, and where it is shown by the return that the petitioner is detained by virtue of a commitment issued upon a judgment of a court of competent jurisdiction, such showing is prima facie only of the fact, and may be impeached by the record of the case, for the purpose of showing that the court or judge was without jurisdiction or power to render the judgment."

Section 20, Bill of Rights, secures to an accused the right to a "public trial," and the right to "be confronted with the witnesses against him," and "the right to be heard by himself and counsel." It is therefore the constitutional right of an accused in felony cases to be present during the whole trial, and if he be absent there is a want of jurisdiction over the person.

Under the provisions of the Code of Criminal Procedure, "if the indictment or information is for a felony, the defendant must be personally present at the trial." Section 5824, Rev. Laws. Other sections read as follows:

"5944. For the purpose of judgment, if the conviction is for a misdemeanor, judgment may be pronounced in the defendant's absence.

"5945. When the defendant is in custody, the court may direct the officer in whose custody he is to bring him before it for judgment, and the officer must do so accordingly."

"5951. When the defendant appears for judg-

ment, he must be informed by the court, or by the clerk under its direction, of the nature of the indictment or information, and his plea and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him."

These provisions of our Code require in felony cases that the judgment should be pronounced in open court, and that the defendant must be personally present when the judgment is rendered.

It was the defendant's constitutional right, that he may not waive, to be present during the whole trial and to be present in open court when judgment was rendered. This is not only the indispensable right of the defendant, but the record must show that he enjoyed that right.

In the case of *State v. McClain*, 156 Mo. 99, 56 S. W. 731, the court says:

"Under the provisions of section 4237, Rev. St. 1889, the prisoner was required to be personally present at the rendition of judgment. But, aside from statutory provisions, upon the principles of the common law, the defendant being absent, the trial court had no jurisdiction over his person, and consequently the proceedings of rendering judgment and passing sentence were coram non iudice. The physical presence of the prisoner is the indubitable prerequisite of jurisdiction, and, without such presence, jurisdiction to render judgment and pass sentence does not exist. On this point a writer of acknowledged authority observes: 'In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment.' Cooley, Const. Lim. (6th Ed.) 388."

In the case of *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262, the Supreme Court of the United States said:

"We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the depriva-

tion of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

[4] It is true that the record shows that counsel for the defendant waived his right to be present when the judgment was rendered. However, in a felony case the defendant's presence when judgment is rendered is an essential prerequisite and indispensable to the jurisdiction of the court to render a valid judgment. The defendant cannot himself waive this right, and his counsel cannot do so for him, nor can they, in his absence, waive any other substantial right that he may have guaranteed him.

[5, 6] Applying these principles on the record in this case, we are of the opinion that, the defendant not being present in open court when the judgment was pronounced, the judgment and sentence of the court is illegal and wholly void. When the judge left the bench and the courtroom the court was necessarily in recess during his absence, and the court was not in session at the county jail. The court clerk was not there present, and the defendant was not there represented by counsel, and we hold that the proceeding there in pronouncing judgment and sentence was not the judgment of any court, but the personal pronouncement of a judge made at a time when he had no power or authority to render a valid judgment. The proceeding at the jail is therefore a nullity. It follows that petitioner is unlawfully imprisoned under said judgment.

It is therefore adjudged and ordered that petitioner be discharged from imprisonment under said judgment and the commitment issued thereon. This determination, however, only affects the judgment and sentence, and leaves the verdict and all precedent proceedings in full force and effect. It is therefore ordered that petitioner be remanded to the custody of the sheriff of Love county pending the rendition of judgment in accordance with the verdict of conviction, and the district court of Love county is directed to render judgment accordingly.

ARMSTRONG and MATSON, JJ., concur.

**WINFIELD v. STATE. (No. A-3364.)**

(Criminal Court of Appeals of Oklahoma.  
Aug. 16, 1920.)

(Syllabus by the Court.)

1. Indictment and information  $\S$  81(1)—Correct statement of defendant's name not essential.

It is not essential to the validity of an indictment or information that the name of the defendant be correctly stated. Any error in pleading the name of a defendant in an indictment or information must be corrected upon the arraignment of that particular defendant, and the record thus made is a protection to every defendant jointly indicted or informed against with such defendant, and would be a complete protection to either or all defendants against a subsequent prosecution for the same offense.

2. Indictment and information  $\S$  189(11)—Robbery in first and second degrees included in offense of conjoint robbery.

Where there is a prosecution and conviction of robbery in the first degree, it is immaterial that the evidence would authorize a conviction of a codefendant of the commission of conjoint robbery, as robbery in either the first or second degree is necessarily included in the commission of a conjoint robbery, and, where the evidence on the part of the state clearly establishes all the essential elements of robbery in the first degree against the defendant on trial, he may be prosecuted and convicted of that included offense; such conviction being a bar to any subsequent prosecution for robbery conjointly committed in the same transaction.

3. Criminal law  $\S$  1186(4)—Admission of immaterial evidence not ground for reversal in absence of prejudice.

The admission of immaterial evidence is not ground for reversal, unless the defendant was prejudiced by its admission.

4. Witnesses  $\S$  350—Question whether witness has been charged with or arrested for crime improper.

A witness may not be asked, for the purpose of discrediting him, whether or not he has ever been charged with or arrested for crime.

5. Criminal law  $\S$  1120(3) — To reverse for exclusion of evidence record must show what such evidence would have been.

When a defendant seeks a reversal on account of an alleged error of the trial court in refusing to admit evidence offered, the record must show what this offered evidence would have been, so that this court may determine whether or not it was material and proper testimony, and as to whether or not the defendant was injured by its exclusion.

6. Witnesses  $\S$  350—Question whether witness has been convicted of felony or misdemeanor which involves moral turpitude proper.

A witness may, on cross-examination, be asked whether or not he has ever been convicted

of a felony, or any misdemeanor which involves moral turpitude.

7. Witnesses  $\S$  345(2)—Assault and battery not a misdemeanor involving moral turpitude.

The conviction of a witness of the crime of assault and battery is not the conviction of a misdemeanor involving moral turpitude.

8. Criminal law  $\S$  1141(2)—Burden is on appellant to show error in excluding evidence offered in connection with cross-examination of witness.

The scope of the cross-examination of a witness is largely a matter of discretion with the trial court, and the burden is upon the appellant to show that the trial court erred in excluding evidence offered in connection with the cross-examination of a witness.

9. Criminal law  $\S$  586, 594(1), 1151 — Continuance within discretion of trial court; denial of continuance not reversible error, in absence of abuse of discretion; denial of continuance in robbery prosecution held not abuse of discretion.

Applications for a continuance are addressed to the sound discretion of the trial court, and a conviction will not be reversed because the trial court overruled such an application unless a manifest abuse of such discretion appears. For reasons holding no manifest abuse of discretion shown in overruling application for continuance in this case, see body of opinion.

10. Criminal law  $\S$  1153(3)—Trial court has discretion to reopen case after both sides have closed.

It is discretionary with the trial court to reopen the case after both sides have closed for the purpose of introducing further evidence; and, unless a clear abuse of such discretion appears, no question is presented for review on appeal.

11. Criminal law  $\S$  511(3) — Evidence corroborating accomplice may be circumstantial only.

Evidence corroborating an accomplice and tending to connect the defendant with the commission of the crime, need not be direct, but may be circumstantial only.

12. Criminal law  $\S$  741(5)—When sufficiency of evidence corroborating accomplice for jury stated.

If the evidence offered in corroboration of an accomplice tends to connect the accused with the commission of the crime, its sufficiency is for the jury to decide, where the law applicable to an accomplice's testimony is fully and fairly covered in the court's instructions.

Appeal from District Court, Pushmataha County; C. E. Dudley, Judge.

C. P. Winfield was convicted of robbery in the first degree, and he appeals. Affirmed.

Warren & Warren and John Cocke, all of Hugo, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Pushmataha county, wherein the defendant, C. P. Winfield, was jointly informed against together with Ida Rankin, A. Baer, and Henry McClair, charged with robbery in the first degree, in that on the 24th day of May, 1917, in Pushmataha county, the said defendant, by the use of certain deadly weapons, etc., put one A. H. Palmer and W. E. Bailey, who were respectively the president and cashier of the First State Bank of Tuskahoma, Okl., in fear of unlawful and immediate injury to their persons, and took from the possession of said parties \$2,000 in money, the property of the First State Bank of Tuskahoma.

The defendant C. P. Winfield demanded a severance, and upon a separate trial was convicted, and the punishment assessed by the jury at five years' imprisonment in the state penitentiary. Upon this verdict, the court pronounced judgment of guilty of robbery in the first degree against the defendant, after overruling defendant's motion for a new trial, and sentenced the defendant to imprisonment in the state penitentiary for the period of five years. From this judgment of conviction the defendant has appealed to this court, and assigns various errors, which will be hereafter considered.

[1] The first error assigned and relied upon for reversal may be summed up succinctly as follows: Error of the court in refusing to direct a verdict of not guilty because of a fatal variance between the allegations in the information and the proof adduced. The information alleged that Ida Rankin, A. Baer, C. P. Winfield, and Henry McClair committed the alleged robbery. Upon the trial, the evidence disclosed that the true name of one of the defendants was not Henry McClair, but Henry Clair, and it is strenuously contended that the proof of the true name of the defendant jointly informed against was a material allegation of the offense, and the failure of the state to prove the true name of the codefendant to be identical as alleged in the information constituted a fatal variance between the allegations and the proof, and entitled the defendant to be acquitted because of said variance. With this contention, we are unable to agree. It is not essential to the validity of an indictment or information that the name of the defendant be correctly stated. If Henry Clair was informed against by a name other than his true name, section 5775, Revised Laws 1910, requires that when arraigned he must be informed of the name by which he is prosecuted, and if such name be not his true name he must then declare his true name, or be proceeded against by the name in the indictment or information; and section 5777, Revised Laws 1910, further provides that if upon arraignment the defendant alleges another name to be his true name, the subsequent proceedings on the indictment or information may be had against him by that

name, referring also to the name by which he is indicted or informed against. It is apparent, therefore, that the defendant Henry Clair could not take advantage of the fact that the pleader had informed against him in the name of Henry McClair. *Williams v. State*, 14 Okl. Cr. 100, 167 Pac. 763.

If it was not material as to Henry Clair that he be informed against in his true name, by what process of reasoning may it be successfully contended that it was material to any other defendant jointly informed against with him, who was a principal in the same transaction? It was not essential, nor was the state required to prove, in order to convict this codefendant separately tried, that the true names of the other defendants were correctly pleaded in the information. Any error in pleading the name of a defendant in an indictment or information is required, under the Criminal Code of this state, to be corrected upon the arraignment of that particular defendant, and the record thus made is a protection to every defendant jointly indicted or informed against with such defendant, and would be a complete protection to either or all defendants against a subsequent prosecution for the same offense.

The conclusion is reached, therefore, that the variance between the allegations of the information and the proof adduced as to the name of the codefendant was immaterial, and not fatal to the conviction of this defendant, and that the trial court did not err in overruling the motion to direct a verdict or the motion for a new trial because of such alleged variance, as this defendant, under the foregoing protective provisions of the Penal Code, could not have been misled as to the identity of the person jointly informed against with him and charged with the commission of this alleged offense.

[2] Furthermore, it is contended:

"A person, not present, aiding another to commit conjoint robbery, cannot be punished for conjoint robbery."

In this connection, counsel for the defendant contend that the offense, if any, charged against the defendant is that of conjoint robbery, and that section 2373, Revised Laws 1910, provides:

"Whenever two or more persons conjointly commit a robbery or where the whole number of persons conjointly committing a robbery and persons present and aiding such robbery amount to two or more, each and either of such persons is punishable by imprisonment in the penitentiary for not less than five years nor more than fifty years."

Had the defendant been charged with and convicted of conjoint robbery, there might possibly be some merit in this contention. The record, however, shows that the defendant was informed against for robbery in the first degree, and that the verdict and judg-

ment rendered against him was for a conviction of robbery in the first degree. The contention is based, therefore, on the false assumption that the defendant was charged with and convicted of conjoint robbery, and the premise taken to that effect not being supported by the record, the contention must fall with it.

Before there can be a conviction of conjoint robbery, as provided for in section 2373, *supra*, the proof must show that there was a robbery committed in one or other of the degrees set out in section 2370. The information in this case does not attempt to charge these defendants with the conjoint commission of the robbery, but does set out facts sufficient to charge them as principals in the commission of a robbery committed in the first degree. While there may be evidence in the record which would authorize the conviction of the defendant Henry Clair of the commission of conjoint robbery, that fact would not preclude the state of the right to prosecute the other defendants for the commission of robbery in the first degree, as the crime of robbery is necessarily included in any event, and the evidence on the part of the state in this case clearly establishes all the essential elements of robbery in the first degree, as defined in the Penal Code.

It is also contended that the trial court erred in admitting the evidence of P. W. Hudson, the court clerk, which was to the effect that upon arraignment of Henry McClair on the 7th day of July, 1917, he had stated in open court his true name to be Henry Clair, and the court had ordered the case to be proceeded against him in the name of Henry Clair, and the minutes of the court in this cause were to that effect.

[3] While this evidence may have been immaterial, it in no way tended to prejudice the substantial rights of the defendant, but, on the contrary, showed conclusively that the codefendant, Henry Clair, informed against in the name of Henry McClair, had some seven months prior to the arraignment of this defendant declared in this proceeding his true name to be Henry Clair, and that this defendant was not, at the commencement of his trial, in any way misled by the mistake in the information as to the name of such codefendant. We find no error prejudicial to the substantial rights of the defendant in the admission of this evidence.

The eighth, ninth, eleventh, twelfth, thirteenth, and fourteenth assignments of error are grouped together and treated in the brief as one assignment. They are as follows:

"Eighth. Because the court erred in refusing to permit the plaintiff in error to show by the witness Ida Rankin, that she was being prosecuted in Choctaw county, Oklahoma, for the crime of receiving stolen property from a bank robbery, and that the case was to be dismissed against her on account of her testifying in this case."

"Ninth. Because the court erred in sustaining the objection of the defendant in error to the question propounded to the witness Ida Rankin by the plaintiff in error, wherein the question was asked, 'That you was not to be prosecuted in this case, or in the case in Choctaw county, in which you are charged with receiving money stolen from a bank robbery.'

"Eleventh. Because the court erred in sustaining the objection of the defendant in error to the question propounded to the witness Ida Rankin, to wit, 'What are you expecting of the officers of this county and of Choctaw county to do with you testifying in this case?'

"Twelfth. Because the court erred in refusing to permit the plaintiff in error to show by the witness Ida Rankin that she had been convicted by the court of Choctaw county of the offense of 'tarring and feathering a woman.'

"Thirteenth. Because the court erred in not permitting the plaintiff in error to show by the witness Ida Rankin that Jimmy Adams had just returned from the penitentiary, and that the witness knew it, and that Adams was staying at her house.

"Fourteenth. Because the court erred in sustaining the objection to the question of the plaintiff in error, propounded to the witness, Ida Rankin, to wit: 'Did you know at the time that you and Shorty Adams and Grover Merrill and Mr. Winfield was having this conversation that Ben Willis was an escaped convict from the penitentiary of McAlester, Okl.?'"

The foregoing assignments of error, which are treated together in the brief of counsel for defendant, all relate to alleged errors of the court in limiting the cross-examination of the state's witness, Ida Rankin, a self-confessed accomplice to the crime.

[4] The eighth assignment of error is without merit for two reasons: (1) Because it has been repeatedly held by this court that a witness may not be asked for the purpose of discrediting him that he has ever been charged or arrested for crime. *Porter v. State*, 8 Okl. Cr. 64, 126 Pac. 699; *Slater v. U. S.*, 1 Okl. Cr. 275, 98 Pac. 110; *White v. State*, 4 Okl. Cr. 143, 111 Pac. 1010; *Mugraves v. State*, 3 Okl. Cr. 421, 106 Pac. 544; *Price v. U. S.*, 1 Okl. Cr. 291, 97 Pac. 1056. (2) As to that feature of the assignment which relates to the question of whether the witness was to receive any immunity from prosecution, either in a criminal cause pending against her in Choctaw county for the crime of receiving stolen property, or from prosecution in this cause in which she was jointly informed against, there was no offer to prove that the witness would answer, if permitted to do so, that she had been promised immunity from either of such prosecutions; while on the contrary, the court did permit the witness to be asked if Mr. Fitzgerald, the sheriff of Choctaw county, had not promised the witness that she would not be punished in this case, or in the case against her in Choctaw county, if she testified against Mr. Winfield in this case, and the witness replied that she had not received any such promise.

[5] This court has repeatedly held, in substance:

"When a defendant seeks a reversal on account of an alleged error on the part of the trial court in refusing to admit evidence offered, the record must show what this offered evidence was, so that this court can determine whether or not it was material and proper testimony, and as to whether or not the defendant was injured by its exclusion." *White v. State*, supra; *Stouse et al. v. State*, 6 Okl. Cr. 415, 119 Pac. 271; *Warren v. State*, 6 Okl. Cr. 1, 115 Pac. 812, 84 L. R. A. (N. S.) 1121.

The ninth assignment of error is covered by what has been said relative to the eighth assignment.

The eleventh assignment of error is without merit, for the reason that the question is purely speculative, and, if intended to elicit evidence which would show the witness' interest in the result of this trial, the question should have been so framed as to call the witness' attention to some definite promise of immunity from prosecution, and it may be further stated in this connection that there was also no offer to prove any specific evidence which would naturally follow as an answer to the question.

The twelfth assignment of error relates to the refusal of the court to permit counsel for the defendant to show by the witness, Ida Rankin, that she had been convicted by the courts of Choctaw county of the offense of "tarring and feathering" a woman. The record relative to this assignment is as follows:

"Q. How long had you known Jimmy prior to the time that he came to board at your house? A. About a week, something like a week or two weeks, something like that.

"Q. Where did you first meet him? A. I met him in Lawyer Cocke's office in Hugo. (At this time the court and counsel confer out of hearing of the jury and court reporter.)

"By Mr. J. H. Warren (at the conclusion of said conference and out of hearing of the jury): Defendant offers to show by this witness that witness has been convicted by the courts of Choctaw county of the offense of tarring and feathering a woman, and the witness will testify, if permitted to testify, that she has been so convicted, which the court overrules, and the defendant excepts."

While no direct question was asked the witness as to whether or not she had been previously convicted of any offense in any court of Choctaw county which was objected to, and the objection sustained by the trial court, nevertheless this assignment will be treated as if such question had been asked and the objection sustained.

[6] This court has repeatedly held that a witness may, on cross-examination, be asked whether or not he has ever been convicted of a felony or any misdemeanor which involves moral turpitude. *Slater v. U. S.*, supra;

*White v. State*, supra; *Nelson v. State*, 3 Okl. Cr. 468, 106 Pac. 647.

There is no offense known to the law of this state designated or defined as "tarring and feathering." Whether the question related to the previous conviction of the witness for a felony or a misdemeanor is not disclosed by the record. In order to discredit a witness because of a previous conviction either for a felony or for a misdemeanor involving moral turpitude, the witness is entitled to be asked the direct question as to his conviction for a certain specific offense, and the court in which he was convicted, in order that the witness may be fully protected in the answer made to the question, and may be fully informed as to what the cross-examiner expects to prove against the witness as to such conviction.

[7] It may be surmised in this instance that the cross-examiner referred to the conviction of the witness of the crime of assault and battery. A conviction of such misdemeanor does not involve moral turpitude. *Gillman v. State*, 165 Ala. 135, 51 South. 722; *Pollok v. State* (Tex. Cr. App.) 101 S. W. 231; *Brittain v. State*, 36 Tex. Cr. 406, 37 S. W. 758; *State v. Prendible*, 165 Mo. 329, 65 S. W. 559.

[8] The burden is upon the appellant to show that the trial court erred in excluding this evidence; and, unless it is made affirmatively to appear that the defendant would have been able to prove that the witness had been previously convicted either of some felony or of some misdemeanor involving moral turpitude, this court cannot say, under such an incomplete record as this, where the scope of cross-examination is so largely a matter of discretion with the trial court that there has been a manifest abuse of such discretion in refusing to permit the defendant's counsel to cross-examine the witness on this subject.

The thirteenth assignment of error relates to the refusal of the trial court to permit counsel for the defendant to show by the witness Ida Rankin that Jimmy Adams (Henry Clair) had just returned from the penitentiary, and that the witness knew such fact, and would so testify, and knowing such fact, witness permitted said Adams to stay at her house for some six weeks prior to the commission of this alleged offense.

The record relative to this assignment of error is as follows:

"Q. You knew at that time that Shorty Adams had served a term in the penitentiary, didn't you? (State objects; incompetent, irrelevant, and immaterial. Which said objection is by the court sustained, to which ruling of the court defendant then and there duly excepted at the time. At this time court and counsel confer out of the hearing of the jury and reporter.)

"By Mr. J. H. Warren (at the conclusion of said conference and out of the hearing of the



jury): Now comes the defendant and offers to show by the witness that Jimmie Adams was or had just served a term in the penitentiary, and had just returned from the penitentiary, and that the witness knew it, and that witness would so testify, and that Adams was staying at her house, and had been for the time she had testified to, she knowing that he was just recently returned from the penitentiary."

It is the opinion of the court that the exclusion of this evidence was erroneous. On cross-examination, a witness may be asked, for the purpose of affecting his credibility, as to his associations with other persons of known bad repute. If a witness knowingly associates with ex-convicts the jury is entitled to know that fact, because the jury is the exclusive judge of the credibility of all the witnesses in a criminal cause.

However, the Legislature of this state, by express enactment, has precluded this court from reversing a cause solely because of the erroneous admission or exclusion of evidence unless this court finds, after an examination of the entire record, that the error has probably resulted in a miscarriage of justice, or has deprived the defendant of some constitutional or statutory right. Section 6005, Revised Laws 1910.

In this instance, the witness sought to be discredited was a self-confessed accomplice to the crime. She admitted that the entire plan to rob the First State Bank of Muskogee was evolved and concocted in her house, and that she was a party to the scheme, and, according to the terms of the conspiracy was to profit from the proceeds of the robbery. Her entire cross-examination discloses her intimate relationship with Jimmie Adams (Henry Clair). She admits that Adams, or Clair, stayed at her house for a period of six weeks immediately preceding the robbery, and that during that time the robbery was there planned and later carried into execution. She fully detailed to the jury her connection therewith, and made a clean breast of her perfidy. The mere fact that the court did not permit her to testify that she knew that Adams, or Clair, was an ex-convict, in the light of the disclosures made by her could have detracted but little from her standing before the jury. Her sworn confession of connection with this robbery branded her as a felon, and an associate of felons of the worst type. From that standpoint she stood fully discredited before the jury, whether or not she knew that Adams, or Clair, was an ex-convict.

The conclusion is reached, therefore, that while the subject-matter of the question was a proper one of inquiry on cross-examination for the purpose of affecting the credibility of the witness, the exclusion of the evidence offered cannot be considered as reversible error in this case, in view of the fact that the witness, by her own confession and admissions stood thoroughly discredited by

questions asked and answers made on similar subjects of inquiry, so that the error complained of, under the express provisions of section 6005, supra, cannot be held to be reversible in this case.

The fourteenth assignment of error is clearly without merit: (1) There was no offer to show that the witness knew that Ben Willis was an escaped convict; (2) on the contrary, the record of the witness' cross-examination discloses that she knew nothing about the antecedents or history of Ben Willis.

The fifteenth assignment of error relates to the cross-examination of one Ben Fitzgerald, a witness for the state, the sheriff of Choctaw county, to whom the accomplice, Ida Rankin, first made her confession. The following question was asked: "Are you expecting a reward should he (defendant) be convicted for this crime?" Counsel for the state objected to the question, and the objection was sustained, to which action the defendant excepted.

There was no offer to prove what the answer of the witness would have been had the court permitted an answer to have been made. The question here involved is considered under the eighth assignment of error, supra. Furthermore, it may be stated that the court permitted the witness Fitzgerald to be examined upon the question of a reward in the event of the conviction of the defendant, and the witness had previously testified that he had received no promise of any reward in the event of the conviction of this defendant. As to whether he expected to receive a reward in the future where no promise of any had been made to him was extremely speculative, in view of the fact that no question was asked as to whether any reward had been offered for the conviction of the defendant, and the action of the court in sustaining the objection to the question under such circumstances was clearly not erroneous.

It is also contended that the trial court erred in overruling the application and motion of the defendant for a continuance of said cause. This application is based on the action of the county attorney in indorsing the name of Ida Rankin, a codefendant, on the information as a witness to be used in chief against this defendant. The name of Ida Rankin was indorsed on the information on the day the case was called for trial, and the defendant claimed that he was surprised thereby, and that the witness Ida Rankin, had theretofore at all times claimed that she knew nothing incriminating against the defendant Winfield; that since her name had been indorsed on the information, counsel for the defendant had learned from the witness Ida Rankin that she expected to swear to enough facts against this defendant to convict him, and that if given an opportu-

ity, the defendant could produce witnesses to disprove the testimony of Ida Rankin, and also could get witnesses to show that the said Ida Rankin was angry with the defendant and his wife, and was thereby personally prejudiced against this defendant.

The record shows that the only witness named by the defendant by whom he expected to contradict the witness Ida Rankin as to any specific testimony of said witness directly connecting this defendant with the commission of the crime was one Gus Ashley, and it appears that the said Gus Ashley was produced and testified in behalf of the defendant. It also appears that other witnesses were produced by the defendant, who testified to statements made by the witness Ida Rankin, which were denied by her, showing her animosity against the defendant and his wife, so that the action of the court in denying the application for a continuance did not operate to deprive the defendant of the evidence which he stated he could obtain had the continuance been granted.

[9] Applications for a continuance are addressed to the sound discretion of the trial court, and a conviction will not be reversed because the trial court overruled such an application, unless a manifest abuse of such discretion appears. *Reed v. State*, 14 Okl. Cr. 651, 174 Pac. 800.

As this record discloses that the defendant was able to produce the only witness named in the application for a continuance by whom he expected to prove facts contradicting the said Ida Rankin, and also as the record discloses that other witnesses not named in the application were produced to prove the other facts which the defendant alleged could have been proven had a continuance been granted, it is clear that the trial court did no prejudice to the defendant in this instance by overruling the motion for a continuance.

It is also contended that the trial court erred in not reopening the case, after both sides had closed, for the purpose of permitting the defendant to introduce one Duff Coker as a witness to contradict the witness Ida Rankin.

[10] It was within the discretion of the trial court to reopen the case for this purpose; and, unless a clear abuse of discretion appears, no question is presented for review on appeal. *Fred Felice v. State*, No. A-3307 (not yet [officially] reported) 194 Pac. 251; *Shires v. State*, 2 Okl. Cr. 89, 99 Pac. 1100; *Hampton v. State*, 7 Okl. Cr. 291, 123 Pac. 571, 40 L. R. A. (N. S.) 43; *Wood v. State*, 11 Okl. Cr. 176, 144 Pac. 391; *Dix v. State*, 15 Okl. Cr. 559, 179 Pac. 624; *Tingley v. State*, 16 Okl. Cr. 639, 184 Pac. 599.

After the close of the case, the defendant offered to introduce the testimony of Duff Coker, and in the offer stated that the defendant knew nothing about the fact that

the said Duff Coker would testify to certain matters contradictory of the witness Ida Rankin until 9 o'clock of the morning of the day on which the witness was offered; that defendant learned of such fact from one of his counsel, and thereafter immediately proceeded to have the said witness called by telephone at his residence at Ft. Towson, Okla., a distance of 35 miles from the city of Antlers, the place of the trial; that the said witness immediately responded, but arrived in court after the case had been closed by both sides.

There is no showing as to how long counsel for the defendant had known of the facts which, it is alleged, the said Duff Coker would testify to. We are of the opinion that no manifest abuse of discretion is shown by the action of the trial court in refusing to reopen the case to permit the defendant to introduce this witness in his behalf, for the reason that no reasonable diligence is shown to procure the attendance of the witness at an earlier time, and for the further reason that the evidence offered is cumulative of other evidence adduced by the defendant tending to contradict the witness Ida Rankin.

It is also contended that the trial court erred in refusing to instruct the jury to return a verdict of not guilty, because the evidence is insufficient to sustain the conviction. The conviction is based largely upon the testimony of Ida Rankin, a self-confessed accomplice to the crime, and it is here contended that the statute requiring the testimony of an accomplice to be corroborated by other evidence tending to connect the defendant with the commission of the crime is not met in this case.

[11] In the case of *Moody v. State*, 13 Okl. Cr. 327, 164 Pac. 676, this court held:

"Evidence corroborating an accomplice and tending to connect the defendant with the commission of the crime need not be direct, but may be circumstantial only."

[12] Furthermore, it has been held:

"If the evidence offered in corroboration of an accomplice tends to connect the accused with the commission of the crime, its sufficiency is for the jury to decide." *Alderman v. Territory*, 1 Okl. Cr. 562, 98 Pac. 1026; *Hill v. Territory*, 15 Okl. 213, 79 Pac. 757; *McGill v. State*, 6 Okl. Cr. 512, 120 Pac. 297.

An examination of the record in this case discloses circumstantial evidence which tends strongly to connect the defendant with the commission of this crime, and also contradictory statements on his part which are indicative of guilt.

The trial court instructed the jury that the witness Ida Rankin was an accomplice, and that no conviction could be had on her testimony alone; that her testimony must be corroborated by other evidence which tended to connect this defendant with the

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commission of the crime. We think the court fully and fairly covered the law applicable to an accomplice's testimony, and the necessity of the corroboration of such a witness, in the instructions given in this case. The question of the sufficiency of the corroboration, the court having instructed the jury properly as to the law, was exclusively the province of the jury, and this court is not authorized to substitute its judgment for that of the jury under such circumstances.

Finding no error in the record sufficiently prejudicial to authorize a reversal of this judgment, it is the opinion of the court that the judgment of the district court of Pushmataha county in this case should be affirmed; and it is so ordered.

DOYLE, P. J., and ARMSTRONG, J.,  
concur.

(111 Wash. 491)

In re WILSON'S ESTATE. (No. 15855.)

(Supreme Court of Washington. July 12, 1920.)

# 1. Charities ⇐31—Bequests favored by courts.

The courts look kindly on legacies and devises to charity, and go to the full length of their ability to fulfill them.

# 2. Wills ⇐489(2)—Extrinsic evidence admissible to explain ambiguity.

The intention of a testator, which Laws 1917, c. 158, § 45, requires to be regarded, is generally to be gathered from the instrument itself, but where there is an ambiguity through misnomer of a legatee, extrinsic evidence is admitted to show the real intent of testator.

# 3. Wills ⇐104—Indefiniteness fatal.

Where there is an ambiguity in a bequest, and there is no extrinsic evidence, or the extrinsic evidence does not directly show intent, the bequest fails for indefiniteness.

# 4. Charities ⇐1—Charitable institution defined.

The question of whether an institution is a charitable one is determined more by its deeds than by its sustaining methods or motives, and an institution operated by municipal corporation by tax-raised funds may nevertheless be a charitable institution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charitable Institution.]

# 5. Wills ⇐515—Bequest to "Tuberculosis Sanitarium" held bequest to city owning hospital.

Where testator made a bequest to each of three named charitable institutions, the third being designated as "Tuberculosis Sanitarium, all located in Seattle or King County, Wash.," and there was evidence that the hospital of the city of Seattle was popularly known as "Tuberculosis Hospital" and "Tuberculosis

Sanitarium," the city, as the owner of such hospital, was entitled to the bequest.

## Department 1.

Appeal from Superior Court, King County; A. W. Frater, Judge.

In the matter of the estate of George R. Wilson, deceased. From a portion of a decree ordering a bequest to be paid to the city of Seattle, the residuary legatee appeals. Affirmed.

Poe & Falknor, of Seattle, for appellant.

Walter F. Meler and Geo. A. Meagher, both of Seattle, for respondent.

MACKINTOSH, J. January 27, 1914, Geo. R. Wilson executed his will, one clause of which provided:

"I give and bequeath five thousand dollars to each of the following named charitable institutions: Washington Children's Home Society, Orthopedic Hospital, Tuberculosis Sanitarium, all located in Seattle or King County, Wash. \* \* \*

On May 26, 1916, the will was admitted to probate, and from the decree of distribution made October 24, 1919, the residuary legatee has appealed, on the ground that the bequest of \$5,000 to the "Tuberculosis Sanitarium" is void for uncertainty, in that no such charitable institution as the "Tuberculosis Sanitarium" existed or exists in Seattle or King county. The decree ordered this bequest paid to the city of Seattle, as the owner of a hospital devoted to the care and cure of persons afflicted with tuberculosis.

[1-3] Unquestionably, courts in the administration of their probate powers look with kindness upon legacies and devises made to the use of charity, and, rather than allow benevolent intentions to prove abortive, go to the full length of their ability to fulfill them. By section 45, c. 158, Laws 1917, we are admonished to have due regard to the direction of the will, and to accomplish the true intent and meaning of the testator. In re Stewart's Estate, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723; Peth v. Spear, 63 Wash. 291, 115 Pac. 164. The intention of a testator is generally to be gathered from the instrument itself, but where there is an ambiguity, such as the misnomer here, extrinsic evidence is admitted to show the real intent of the testator. Where there is an ambiguity and there is no extrinsic evidence, or the extrinsic evidence does not directly show intent, the bequest fails for indefiniteness and uncertainty. Bowman v. Domestic & Foreign Missionary Society, etc., 42 Misc. Rep. 574, 87 N. Y. Supp. 621.

The city claims that the evidence establishes that it was the testator's intention to bequeath to it the \$5,000 for its hospital. It appears that there is no institution in Seattle or King county officially known as the "Tu-

berculosis Sanitarium," but that in July, 1912, the Anti-Tuberculosis League of King county, a corporation, then the owner of a tuberculosis hospital, conveyed the institution to the city, which thereafter has operated it, supporting it by general taxation and rendering free service to those receiving its care and attention. In the winter of 1913-14 the Anti-Tuberculosis League was engaged in an extensive campaign of publicity for the purpose of securing donations to be used for the establishment of a building at the city's hospital devoted to the treatment of children. Mr. Wilson lived north of the city of Seattle, and the hospital was also north of the city limits, though some miles from his residence. The testimony of several witnesses was to the effect that in 1914 the city's hospital was popularly known by several designations, such as "Firlands," being the name of its location, "Pulmonary Hospital," "Pulmonary Sanitarium," "Tuberculosis Hospital," "Firlands Hospital," "Firlands Sanitarium," "Tuberculosis Hospital at Firlands," "Firlands Tuberculosis Hospital," and "Tuberculosis Sanitarium." There existed at the time but one other hospital for tubercular patients, which was not a strictly charitable institution, in that it charged fees to its patients, although the charges were but sufficient to meet the expense of operation. This institution was popularly known as the "Riverton Tuberculosis Sanitarium," or "Riverton Pulmonary Sanitarium (or Hospital)," or "Riverton Sanitarium (or Hospital)."

[4] Appellant advances the argument that the city's hospital does not come within the description of the testator of a "charitable institution," but in this he errs, for, as already adverted to, the services performed are gratuitous, though the source of the maintaining revenue is derived from taxation. The question of whether an institution is a charitable one is determined more by its deeds than by its sustaining methods or motives. A municipality by tax-raised funds may operate a charitable institution. *People ex rel. State Board of Charities v. New York Society for the Prevention of Cruelty to Children*, 162 N. Y. 429, 56 N. E. 1004; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; *State v. Board of Control of State Institutions*, 85 Minn. 165, 88 N. W. 533.

[5] The probate court found that the evidence produced for the purpose of identifying the object of the testator's bounty pointed to the city's hospital and established it as the place for which the testator intended his money to be used. To the same conclusion we are impelled. The hospital was quite generally known by the exact description used in the will, and, moreover, the paragraph of the will which we have before us shows that Mr. Wilson was giving to two other organizations which were devoted to the aid of unfortunate and afflicted children. This,

taken in connection with the campaign in progress at the time the will was drawn, for the benefit of tuberculosis children, would seem to point unerringly to an intention to include, with the other two recipients, a third which was of the same class, i. e., institutions which were performing charitable services for suffering childhood.

The decree may stand as written.

HOLCOMB, C. J., and PARKER, MAIN, and MITCHELL, JJ., concur.

(111 Wash. 483)

**BENNINGTON COUNTY SAVINGS BANK v. FRANCE et al. (No. 15749.)**

(Supreme Court of Washington. July 12, 1920.)

1. Judgment ~~460~~(4)—Facts showing fraud to set aside must be alleged.

Complaint in an action to set aside a judgment on the ground of fraud must allege facts which show that the judgment in the action was induced by fraud.

2. Judgment ~~444~~ — Perjury alone not ground for setting aside.

Perjury alone is not an equitable ground for setting aside a judgment obtained on false testimony, in the absence of extrinsic or collateral fraud.

Department 1.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by the Bennington County Savings Bank, against Rowe France and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James A. Dougan, of Seattle, for appellant. Griffin & Griffin and V. G. Frost, all of Seattle, for respondents.

MAIN, J. The plaintiff brought this action in equity to set aside a judgment claimed to have been induced by perjured testimony. To the second amended complaint, which will be referred to as the complaint, a demurrer was interposed, and sustained by the trial court. The plaintiff refused to plead further, and elected to stand upon the complaint. A judgment was entered dismissing the action, from which the appeal is prosecuted.

The complaint is too long to be here set out in full. The controlling facts therein alleged will be summarized. On May 23, 1916, a mortgage purported to be executed by H. B. Petridge covering certain real property in the city of Seattle was delivered to W. B. Perkins, and on the same day was filed for record, which mortgage will be referred to

as the Perkins mortgage. Subsequently this mortgage was assigned and transferred to the Bennington County Savings Bank, the appellant. On June 20, 1916, H. B. Petridge executed and delivered to Rowe France and others a mortgage, which included the same property covered by the Perkins mortgage. This mortgage was also filed for record, and will be referred to as the France mortgage.

[1, 2] On the 26th day of December, 1916, the action was brought in the superior court of King county to foreclose the France mortgage. The holder of the Perkins mortgage was a party to the action. The controversy there was one of priority. The Bennington County Savings Bank claimed that its mortgage was superior, and the holders of the France mortgage made a like claim as to their mortgage. In that action it appeared that A. C. Petridge, the son of H. B. Petridge, had signed and delivered the Perkins mortgage without the knowledge or consent of his father. H. B. Petridge testified that he had not signed the Perkins mortgage, or authorized it to be signed in his name, and had no knowledge thereof until after he had executed the France mortgage. The trial resulted in a judgment sustaining the priority of the France mortgage. From this judgment no appeal was prosecuted. Subsequently A. C. Petridge was indicted for forgery for signing his father's name to the Perkins mortgage, and tried and convicted. Upon the trial of the criminal action the father testified that he had authorized his son to sign his name to the Perkins mortgage, and that it was done with his consent and approval. The criminal action was appealed to this court, where the judgment of conviction was reversed, and the cause remanded, with directions to dismiss the action. This holding was based largely, if not entirely, upon the testimony of H. B. Petridge, the father, in the criminal action, to the effect that he had authorized the signing of his name to the Perkins mortgage and that he knew all about it. It thus appears that H. B. Petridge testified one way in the civil action and diametrically the opposite in the criminal action.

The complaint charges that the judgment in the civil action was induced by perjured testimony, and was therefore fraudulent. More than one year elapsed after the entry of the judgment of foreclosure before the present action was instituted. To sustain the right to maintain this action it is necessary that the complaint allege facts which show that the

judgment in the action on the mortgages was induced by fraud. If there were fraud, it was in the fact that H. B. Petridge had testified falsely in that action. It is a settled rule in this state that perjury alone is not an equitable ground for setting aside a judgment obtained on false testimony, in the absence of extrinsic or collateral fraud. *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 680, 75 Am. St. Rep. 849; *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490; *Meeker v. Waddle*, 83 Wash. 628, 145 Pac. 967; *Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5, L. R. A. 1916B, 883; *Godfrey v. Camp*, 95 Wash. 874, 164 Pac. 210, 168 Pac. 519; *Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811. In the *Robertson* Case the question was thoroughly re-examined, and the rule of the prior cases adhered to. It was further held in that case that the perjury or false testimony, even if admitted, is not sufficient to relieve a case from the force of the rule.

If it be assumed that H. B. Petridge testified truthfully in the criminal action, and that as a result of such testimony the judgment of conviction was reversed by this court, this amounts to no more than an admission that his testimony in the civil action was false and untrue. The case of *Rowe v. Silbaugh*, 182 Pac. 576, is distinguishable. There there was extrinsic or collateral fraud, which induced the superior court to assume jurisdiction and render judgment in the case. In that case there was an affidavit of nonresidence, which was in fact not true. In both the cases of *Robertson v. Freebury*, *supra*, and *Burke v. Bladine*, *supra*, an excerpt is quoted with approval from *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, wherein there is pointed out what will constitute extrinsic or collateral fraud; one instance being the keeping of the unsuccessful party "in ignorance of the suit." The *Silbaugh* Case falls within that class. There the unsuccessful party was kept in ignorance of the suit, even though residing on the land in controversy.

To hold in this case that the false testimony in the civil case constituted fraud, in view of the course taken by the criminal case, and therefore was not within the rule of the cases above cited, would be to make a distinction where no substantial difference exists.

The judgment will be affirmed.

HOLCOMB, C. J., and PARKER, MAC-KINTOSH, and MITCHELL, JJ., concur.

(111 Wash. 408)

**SCHMELLING v. HOFFMAN et ux.**  
(No. 15771.)

(Supreme Court of Washington. July 7, 1920.)

**1. Judgment  $\Leftrightarrow$  521—Cross-complaint in action to quiet title acquired under a judgment not collateral attack.**

Where an action is brought against the former owner or his grantee to quiet title to property acquired by the deed of a commissioner appointed by the court in a former suit wherein there was no appearance on the part of defendant therein, a cross-complaint by such former owner or his grantee, attacking the validity of that former judgment and commissioner's deed, constitutes a direct and not a collateral attack.

**2. Pleading  $\Leftrightarrow$  4—Error in entitling immaterial.**

If the facts set forth in a pleading entitle one to relief, it is wholly immaterial by what name the pleading is called, especially as to an answer where the facts alleged are denied by reply, and no complaint as to the designation is made until evidence is offered.

**3. Process  $\Leftrightarrow$  85—Statutory requirements as to publication of summons must be accurately taken.**

The method of acquiring jurisdiction by the publication of summons under Rem. Code 1915, § 228, is in derogation of common law, and the well-established rule requires that the statutory requirements be accurately taken in order to confer upon the court jurisdiction over the defendant, although subject-matter of the action is within the power of the court.

**4. Process  $\Leftrightarrow$  96(4) — Nonresidence essential to service by publication.**

Under Rem. Code 1915, § 228, there is no authority to publish summons without the filing of an affidavit of the plaintiff, his agent or attorney, stating that he believes the defendant is not a resident of the state or cannot be found therein.

**5. Process  $\Leftrightarrow$  89—Absence of good faith of plaintiff making affidavit for publication held shown.**

In an action involving validity of judgment entered after publication of summons, a finding by the trial court that plaintiff's affidavit that he believed the defendant was not a resident of the state was not made in good faith held justified.

**6. Process  $\Leftrightarrow$  89—Reasonable effort should be made to find defendant prior to substituted service.**

It is not necessary that all conceivable means should be used, but an honest and reasonable effort should be made to find the defendant prior to substituted service of process under Rem. Code 1915, § 228.

Department 1.

Appeal from Superior Court, King County;  
Everett Smith, Judge.

Action by Julius Schmelling against August Hoffman and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Russell & Blinn, of Seattle, for appellant.  
Dan Earle, of Seattle, for respondents.

**MITCHELL, J.** In 1913 Laura Atwood and husband owned the real property involved in this action. They entered into a written contract with one L. V. Baker for the sale of the lots, which are situated in Seattle, Wash. Thereafter Baker assigned his rights under the contract to the plaintiff. In January, 1914, Mrs. Atwood and her husband sold the property to William Hoffman, subject to the Baker contract. In 1917 the plaintiff, claiming he had fully paid up on his contract and failing to get a deed, brought an action against William Hoffman and wife to acquire title to the property. In that action, upon service by publication of summons, there was no appearance by the defendants, there was judgment for the plaintiff, and a commissioner appointed by the court conveyed the property to plaintiff on October 14, 1917. By a deed dated August 14, 1918 (recorded August 19, 1918), William Hoffman and wife conveyed the property to the defendant August Hoffman. Thereafter, July, 1919, the present suit was brought by plaintiff to quiet his title to the property against the claims of defendants August Hoffman and wife. The complaint was in the usual form in such cases. In their answer the defendants allege in substance that they are the owners of the real property by virtue of the deed to them from William Hoffman and wife; that the judgment obtained by the plaintiff in the former suit against William Hoffman and wife and the commissioner's deed issued thereunder were procured by fraud of the plaintiff, in that the affidavit of plaintiff therein for the publication of summons alleged that those defendants were nonresidents of the state, and could not be found therein; although during all the years from 1913 to 1919 said William Hoffman and wife were continuous residents of Seattle, that he was engaged therein as a painting contractor; their names were to be found in the official city directory, in the telephone directory of the city, and his residence was well known to his agent in Seattle, to whom the plaintiff had made certain payments for William Hoffman on the real estate contract; that none of the defendants in either suit knew anything about the former suit until about the time of the commencement of the present action; and that plaintiff has never completed the payments on his real estate contract, but that the balance due thereon is in dispute, and can be determined only by an accounting. The answer contained the prayer that the former judgment and commissioner's deed be canceled and that an accounting be had. The allegations of the

answer were denied by a reply. Upon the trial, findings and conclusions were made sustaining the charges in the answer, and a judgment was entered, canceling the deed made by the commissioner appointed in the first suit, and directing an accounting to be had. The plaintiff has appealed.

[1, 2] It is contended by appellant that the trial court erred in permitting the defendants in this action to attack the judgment in the former one, on the score that it is a collateral attack upon the judgment of a court of record having jurisdiction of the subject-matter of the action. The attack, however, in the present case is direct. Respondents specifically attack the regularity and validity of the judgment in the former suit upon the ground of fraud on the part of plaintiff in the taking of steps necessary under the statute to resort to the publication of summons against the defendants therein. We are satisfied that where an action is brought against the former owner or his grantee to quiet the title to property acquired by the deed of a commissioner appointed by the court in a former suit wherein there was no appearance on the part of the defendant therein, a cross-complaint by such former owner or his grantee, attacking the validity of that former judgment and commissioner's deed, constitutes a direct and not a collateral attack. Appellant's apparent confusion as to the character of the attack in this case seems to proceed largely from the fact that the portion of the answer constituting the attack is designated an affirmative defense rather than a cross-complaint. But, under our code procedure, if the facts set forth in a pleading entitle one to relief it is wholly immaterial by what name the pleading is called, especially in those cases where, as here, the facts alleged were denied by a reply and no complaint as to the designation of the answer was made unless and until evidence was offered, and even then appellant only objected unless the attack on the judgment in the former action was by reason of the fact either that a return of "not found" was not made therein, or that no affidavit by the plaintiff or any one in his behalf that defendant therein was not a resident of the state, and could not be found within the state had been filed. The objection went not to the form or designation of pleading, but only to the introduction of evidence tending to show the fraud alleged.

That the title given to a pleading is immaterial has been repeatedly held by this court. *Smith v. Driscoll*, 94 Wash. 441, 162 Pac. 572. *L. R. A. 1917C, 1128*; *Lawrence v. Halverson*, 41 Wash. 534, 83 Pac. 889; *Casey v. Oakes*, 17 Wash. 409, 50 Pac. 53. As applied to an answer the rule is tersely stated in the case of *Brown v. Massey*, 19 Okl. 482, 92 Pac. 246, as follows:

"If the facts pleaded are sufficient to authorize the granting of affirmative relief, and the affirmative relief is prayed for by the an-

swer, then it is the duty of the court to treat it as a cross-petition, regardless of what the pleader may call it."

[3, 4] On the other branch of the case section 228, Rem. Code, provides:

"When the defendant cannot be found within the state (of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is prima facie evidence), and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, \* \* \* and stating the existence of one of the cases hereinafter specified, service may be made by publication of the summons. \* \* \*"

The method of acquiring jurisdiction by the publication of summons is in derogation of the common law, and the well-established rule requires that all the statutory requirements be accurately taken in order to confer upon the court jurisdiction over the defendant, although the subject-matter of the action is within the power of the court. By the statute above quoted, there is no authority to publish summons without the filing of an affidavit of the plaintiff, his agent or attorney, stating that he believes the defendant is not a resident of the state or cannot be found therein. In the suit against William Hoffman and wife the affidavit filed was made by the plaintiff, and appears regular upon its face. Among other things it says:

"That he believes that the defendants William Hoffman and Emelie Hoffman, his wife, are not residents of the state of Washington, and that they cannot be found therein; that the place of residence of the said William Hoffman and Emelie Hoffman are unknown to this plaintiff."

It is the absence of good faith on the part of the plaintiff in making such statements that constitutes the grounds for the attack on that judgment, and convinced the trial court of the fraud alleged.

[5, 6] The appellant was not acquainted with William Hoffman or his wife. However, the evidence in the case abundantly justifies the findings made by the trial court. It shows that during all the years from 1913 down to the commencement of the present suit William Hoffman and wife were openly and notoriously residents of Seattle; that said William Hoffman in his own name and with several of his sons was engaged in business in Seattle as a painting contractor; that during those years the official city directory of Seattle gave the names of Hoffman and wife, and that their names or the name of some member of the family were to be found in the city telephone directory during all those years; and that at the date of the affidavit for the publication of summons the agents of William Hoffman and wife to whom payments made by plaintiff on the real estate contract were delivered, were still residing and doing business in Seattle. Ap-

pellant admitted that at and before making the affidavit for publication of the summons in that case the only thing he did to learn the whereabouts of William Hoffman and wife was to have his attorney in that case (who did not testify in the present case) report that William Hoffman and wife could not be found at an address suggested by a subagent who acted for the collection agents of the Hoffmans. Under the facts in this case it is difficult to understand how the sheriff by his deputy could have rather promptly made a return of "not found," unless as suggested by counsel for respondents, it was purely perfunctory. The situation here shows the wisdom of the statute requiring something more than the return of "not found" by the sheriff, and yet, if all the available, reliable, and easily accessible sources of information to be had at the date of the affidavit by the plaintiff in the former suit, as to the residence of William Hoffman and wife, may be wholly ignored, then the right to resort to constructive service of process by publication, based as it is on the ground of necessity, may be readily made a weapon to practically deprive a resident defendant of the sacred right of having his day in court. It is not necessary that all conceivable means should be used, but an honest and reasonable effort should be made to find the defendant prior to substituted service of process.

We are satisfied the spirit and intent of the statute were not complied with in the making of the affidavit upon which the publication of summons was had in the former case, that there was no jurisdiction of the defendants acquired in that case, and that the court properly set aside and canceled the commissioner's deed issued in pursuance of the judgment therein.

The judgment in this case is entirely just and equitable under the circumstances in providing for an accounting between the parties, whereupon, if it shall be found appellant has made full payments on his real estate contract, he will be entitled to the land; otherwise he will be compelled to pay the balance due, or forfeit his rights in accordance with the terms of the contract.

The judgment is affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and MACKINTOSH, JJ., concur.

(111 Wash. 526)

STATE v. THOMPSON. (No. 15645.)

(Supreme Court of Washington. July 13, 1920.)

1. Game  $\S$  6—State game warden not authorized to permit killing of blue grouse in Columbia county.

Under Laws 1917, p. 762,  $\S$  3, denouncing the killing of blue grouse, excepting between

certain dates in certain counties not including the county of Columbia, and under section 1, subd. 9, authorizing county game commission, with permission of the state game warden, "to shorten, close or open the season of any upland game birds of the state in their respective counties," the state game warden was not authorized to permit the killing of blue grouse in the county of Columbia between specified dates; the authority granted in the latter section being merely to shorten a season already created by the Legislature, by closing or opening it at times other than those specified, and no season for the killing of blue grouse in Columbia county having been provided for by statute.

2. Constitutional law  $\S$  63(1)—Executives of state Game Code not delegated legislative powers.

The executives of the state Game Code cannot be delegated legislative powers, but may be granted authority to determine the expediency of the application of the act to changing local conditions, controlled in general by the act.

Department 1.

Appeal from Superior Court, Columbia County; E. C. Mills, Judge.

E. V. Thompson was charged with the offense of killing blue grouse in a certain county in the state. From an order sustaining a demurrer and dismissing the action, the State appeals. Reversed.

Lindsay L. Thompson, of Olympia, A. F. Appleton, of Dayton, and Roscoe R. Fullerton, of Olympia, for the State.

E. V. Thompson, of Dayton, pro se.

MACKINTOSH, J. The respondent was charged with the offense of having killed three blue grouse in Columbia county, this state, on September 14, 1919, and upon his demurring to the information an order was entered sustaining the demurrer and dismissing the action, from which order the state has appealed.

Subdivision 9,  $\S$  1, c. 164, Laws 1917, is:

"Upon written application by the full membership of any county game commission to the state game warden, permission may be granted by the state game warden to shorten, close or open the season on any of the upland game birds of the state, in their respective counties. \* \* \*

Section 3, c. 164, Laws 1917, is:

"Every person who shall within the state of Washington, hunt, pursue, take, kill, injure, destroy or possess any \* \* \* blue grouse, \* \* \* or any species of upland game birds, except as herein provided, shall be guilty of a misdemeanor: \* \* \* Provided, further, that in the counties lying east of the summit of the Cascade Mountains, except in the counties of \* \* \* and Columbia, it shall be law-



ful to hunt, pursue, take, kill and possess . . . blue grouse between the first day of September and the fifteenth day of November, both dates inclusive, of the same year."

The information shows that, in pursuance of an application from the full membership of the Columbia county game commission, the state game warden had granted permission to the county game commission to open a season for blue grouse in Columbia county, and that the commission, pursuant to that authority, had declared it lawful to hunt blue grouse from September 1 to November 15, 1919. By section 3 of the foregoing chapter the season pursuit of blue grouse in Columbia county is absolutely withdrawn. No open season for those birds in that county was provided.

[1] It is claimed that by subdivision 9, section 1, above, the county game commissioners and the state game warden might create an open season under the power granted in that subdivision to "shorten, close or open" the season. The power to "shorten, close or open" is capable only of application to seasonal hunting; but where, as here, such hunting is absolutely prohibited by the complete withdrawal of seasonal regulation, the argument advanced by the respondent, if admitted, necessarily involves what would be, in effect, the creation of a season, rather than the regulation of a season by "shortening, closing or opening," already instituted by the Legislature. To so hold would leave it within the power of the state game warden to make lawful the taking of game in all cases where the statute specifically declared such taking unlawful. Subdivision 9 must be so interpreted as not to nullify other provisions of the act, unless such interpretation is necessary and the other portions of the act are clearly inconsistent with that subdivision. By interpreting the word "season" as meaning a period of time created by the Legislature for the pursuit of game, the entire act is rendered harmonious, and its effective administration is materially assisted.

[2] The words "close" and "open" should be considered together with the word "shorten," so that the subdivision would read to mean that the state game warden may, upon conditions provided in the subdivision, shorten a season already created by the Legislature of closing or opening it at times other than those specifically enacted; but that the power is not granted to open seasons, where no seasonal regulation whatever is provided, or to lengthen the time of a season duly created by the act. The executives of the state Game Code cannot be delegated legislative powers, but may be granted authority to determine the expediency of the application of the act to changing local conditions, controlled in general by the act. The state game warden may determine some fact or

state of circumstances upon which the operation of the law depends. *Cawsey v. Brickley*, 82 Wash. 653, 144 Pac. 938.

Giving subdivision 9 the construction that would empower the state game warden and county game commissioners to allow the killing of blue grouse in Columbia county, contrary to the express provision of section 3, would be to confer upon them the functions of the Legislature, and render the subdivision unconstitutional. The construction which we have here determined leaves the section free from objections to its constitutionality, and harmonizes it with the other express provisions of the act.

We cannot agree with the respondent that, if the county game commission and state game commission have authority to open the season under subdivision 9, the same authority would carry the power to declare an open season. The authority given to "shorten, close or open" is, as we have already indicated, merely an authority to shorten, and to declare the opening and closing, as shortened, of hunting not withdrawn from seasonal regulation. The demurrer should have been overruled.

Judgment reversed.

HOLCOMB, O. J., and PARKER, MAIN, and MITCHELL, JJ., concur.

(111 Wash. 477)

STATE ex rel. BOUFFLEUR et al. v. SUPERIOR COURT FOR PIERCE COUNTY. (No. 15934.)

(Supreme Court of Washington. July 9, 1920.)

1. Schools and school districts  $\S$  37(3)—Change of territory not allowed on petition not signed by a majority of heads of families.

County superintendent of public schools could not transfer portion of territory of one district to another under Rem. Code 1915,  $\S$  4433, where it was made to appear at the hearing before the superintendent, or in the superior court, by timely objection, that the petition for the change did not have the signatures of a majority of the heads of families residing in the territory to be transferred.

2. Schools and school districts  $\S$  37(3)—What constitutes "heads of families" required to sign petition for transfer of territory.

The words "heads of families," as used in Rem. Code 1915,  $\S$  4433, relating to the transferring of territory from one school district to another or enlarging the boundaries of a school district, and providing that a majority of the heads of families in the territory affected must sign a petition, means all heads of families, whether they have children of school age dependent upon them or not.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Head of a Family.]

### Department 1.

Proceeding by the State, on the relation of W. A. Bouffleur and others, to review a judgment of the Superior Court for Pierce County, affirming a decision or order of the superintendent of public schools for that county. Judgment and order reversed and set aside.

H. G. Rowland, of Tacoma, for plaintiff.  
Hugo Metzler, of Tacoma, for respondent.

**PARKER, J.** The relators seek review and reversal of a judgment of the superior court for Pierce county, affirming a decision and order of the superintendent of public schools for that county, transferring a portion of the territory of school district No. 83 to school district No. 124 of that county. The law under which such transfer of territory was assumed to be made by the superintendent is found in section 4433, Rem. Code, which, so far as pertinent to our present inquiry, reads as follows:

"For the purpose of transferring territory from one district to another or enlarging the boundaries of any school district, a petition in writing shall be presented to the county superintendent, signed by a majority of heads of families residing in the territory which it is proposed to transfer or include, \* \* \* which petition shall describe the change which it is proposed to have made."

This is followed by provisions for the giving of notice and for a hearing before the superintendent, and rendering of a decision by him as to whether or not the proposed change shall be made and the making of an order by him accordingly. The only questions considered by the superior court, and to be here considered, are: (1) Whether or not the filing of the petition with the superintendent, signed by a "majority of the heads of families residing in the territory," is jurisdictional; that is, whether or not the superintendent is authorized to entertain the question of such a change of territory in a given case without the filing of such a petition with him; and (2) whether or not the petition filed with him upon which he acted in this controversy was signed by the required number of such qualified persons.

[1] As to the first question it seems plain to us that the superintendent is constituted a special tribunal of limited jurisdiction for the purpose of determining the question of whether or not the change of territory shall be made, and that he can rightfully entertain the question in a given case only when the question is presented to him in the manner and after giving the notice prescribed by law. Should he entertain the question of a change in a given case upon a petition which, after due inquiry, he finds does contain the signatures of a majority of the "heads of families residing in the territory," an interested person, thereafter seeking to have the question of the sufficiency of such a petition

as to the required number of signatures reviewed in the courts after the change is fully consummated and new rights of the respective districts became vested flowing from acts done by or on their behalf upon the faith of such change being lawfully made, it is highly probable that an estoppel would arise as against all such persons so challenging the sufficiency of the petition, since necessarily the sufficiency of the number of signatures to such petition becomes one of fact as well as law. That, however, is not this case. It is not claimed here that there is any estoppel or laches which can be invoked as against these relators. Their challenge to the sufficiency of the petition here in question was manifestly timely made. We are therefore of the opinion that if it was made to appear at the hearing of this case in the superior court that the petition did not have the signatures of "a majority of the heads of families residing in the territory," the decision and order of the superintendent, and the judgment of the superior court, affirming such order and decision, must be reversed.

The petition here in question was filed with the superintendent on May 17, 1919. Thereafter due notice being given, a hearing was had before him, at which these relators and other interested persons remonstrated against the making of the proposed change. Thereafter, on August 6, 1919, the superintendent, being of the opinion that the petition was signed by the required number of persons qualified to sign such petition, made his decision, ordering the change of the territory substantially as prayed for by the petitioners. Thereafter the matter was timely brought into the superior court, where a hearing was had and evidence adduced touching the questions above noticed, and on May 29, 1920, the superior court rendered its decision and judgment affirming the decision and order of the superintendent, wherein it found, among other things:

"That said petition, filed with the county superintendent of public schools, contained the names of a majority of the residents and heads of families of said disputed territory, petitioned to be transferred as hereinafter described, who had dependent upon them for support, care, and education, children of school age. \* \* \*

"That said petition did not contain a majority of the names of residents, heads of families of said disputed territory, who had dependent upon them other persons than children of school age."

[2] It is apparent from the record before us that the court affirmed the decision and order of the superintendent upon the theory that the words "heads of families," as used in the law above quoted, means only heads of families having children of school age dependent upon them, and excludes heads of families having others dependent upon them, and that, since the petition had the signa-

tures of a majority of heads of families having children of school age dependent upon them, it was sufficient, though it did not contain the signatures of a majority of the heads of families of the territory proposed to be changed, having others dependent upon them. So the question is: Do the words "heads of families," as used in the law, have the restricted meaning which is the basis of the decision of the superintendent and the trial court? Nowhere in our school statutes is to be found any definition of the words "heads of families." We must, therefore, we think, look to the primary common acceptation of the meaning of the word "family." No authority or decision has come to our notice suggesting the view that the word "family" has any such restricted meaning as has been attributed to it by the superintendent and the superior court, in the absence of a statutory definition so restricting the meaning of the word. In *Dodge v. Boston & Providence R. Co.*, 154 Mass. 299, 23 N. E. 243, 13 L. R. A. 318, it is said:

"The word 'family' has several meanings. Its primary meaning is a collective body of persons who live in one house and under one head or management. Its secondary meaning is those who are of the same lineage, or descend from one common progenitor. Unless the context manifests a different intention, the word 'family' is usually construed in its primary sense."

Observations of similar import may be found in *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553; *Arnold v. Waltz*, 53 Iowa, 706, 6 N. W. 40, 36 Am. Rep. 248, and many other decisions, where the meaning of the word is uncontrolled by some express words of definition to be found in the statute or document in which it may be used. 19 Cyc. 451; *Bouvier's Law Dict.* (Rawle's 8d Ed.) 1186.

Counsel for respondents call our attention to and rely upon the decision of the Minnesota court in *Oppegaard v. Board of County Commissioners*, 120 Minn. 443, 139 N. W. 949, 43 L. R. A. (N. S.) 936. We think, however, a critical reading of that decision will show that it comes nearer lending support to relators' contention here made. In that case there was involved the term "legal voters" as specifying the persons who might petition in certain cases for the enlargement of a school district. At the time in question women had certain franchise rights in Minnesota in the determination of certain school matters, but did not have the right to vote generally upon or for other public questions or officers. The statute in question not having defined the words "legal voters," it was held that they must be taken in their ordinary and usual sense, and hence did not include women. Such, we think, is the sense in which the

words "heads of families" as used in this statute must be taken.

We are referred to the opinion of the Attorney General rendered in 1891, found at page 162, *Opinions of the Attorney General* of that year, claimed to have been followed by the school authorities. The words "heads of families" there in question were found in the school law relating to the organization of new districts; the law reading in part:

"For the purpose of organizing a new district a petition in writing shall be made to the county superintendent, signed by at least five heads of families," etc.

In response to an inquiry addressed to him by the state superintendent of public instruction as to the meaning of the words "heads of families" as used in the statute, the Attorney General concluded his opinion as follows:

"For the foregoing reasons, I am of the opinion that any person who is the actual head of a family, that is, who is under legal obligations to provide for the support and education of persons dependent upon him, and who is in fact providing for their education and support, is the head of a family, and qualified to sign the petition mentioned in the section referred to, whether he be a legal voter or not."

It is plain that the question here presented was not there considered. There is no question here presented as to whether or not the head of a family must be a voter in order to be entitled to sign the petition; our only inquiry being as to whether or not heads of families, having others dependent upon them than children of school age, constitute a part of the class a majority of which must sign the petition in order to institute proceedings looking to a change of territory from one school district to another. According to the specific finding of the superior court made in this case, there was not a majority of the heads of families, including those having children other than those of school age dependent upon them who signed the petition. We are not advised by this record that the school authorities of the counties have generally construed the law as is here contended for by counsel for respondent; but, if such be the fact, we think such construction is so clearly erroneous that we should not adopt it.

The decision and order of the superintendent of public schools for Pierce county, which assumed to make the change of territory in question, and the judgment of the superior court affirming the same, are reversed and set aside.

HOLCOMB, C. J., and MAIN, MITCHELL, and FULLERTON, JJ., concur.

(111 Wash. 489)

**HURLEY-MASON CO. v. PACIFIC COMMISSARY CO. (LINDBERG, Intervener).**  
(No. 15574.)

(Supreme Court of Washington. July 8, 1920.)

1. Account stated  $\S$ 18(2)—If other facts alleged constitute another cause of action recovery may be had thereon.

If a complaint stated facts sufficient to constitute a cause of action without reference to allegations of an account stated, recovery could be had, although the account stated was not proven.

2. Pleading  $\S$ 64(2)—Complaint not duplicitous which sets forth several consistent distinct grounds for relief.

Where plaintiff has two or more distinct grounds for the relief he asks, the one not inconsistent with the other, he may set them forth in his complaint in orderly sequence, and may recover if he proves any one or more of them.

3. Pleading  $\S$ 237(8) — Complaint may be amended to conform to proofs.

If allegations of a complaint were wholly on an account stated, and the evidence failed upon that ground, but justified a recovery on another, plaintiff would have been entitled to amend so as to make its allegations conform to the proofs.

4. Appeal and error  $\S$ 889(3)—Amendments which could have been made regarded as made.

The Supreme Court, under Rem. Code 1915,  $\S$  1752, is required, in appeal cases tried to it de novo, to regard all amendments to pleadings as made which could have been made, and where there is a variance between the allegations and the proofs the pleadings will be disregarded and the evidence treated as stating the issues between the parties.

5. Corporations  $\S$ 550(7)—Officer could not make agreement detrimental to creditors after assignment.

An officer, whatever may have been his authority prior to an assignment for creditors, cannot thereafter bind the corporation to a new agreement detrimental to the interests of the assignee and the creditors represented by him.

6. Evidence  $\S$ 244(17)—Witnesses  $\S$ 379(5) —Letter written by corporate officer after assignment for creditors inadmissible, except for impeachment.

A letter written by an officer of a corporation after an assignment for the benefit of creditors was not admissible, in an action against the corporation, as evidence of an independent acknowledgment by the corporation of a debt sued for, although it could be introduced to contradict or impeach the testimony of the officer, if he should testify that debt was not just.

7. Evidence  $\S$ 265(17)—Account of auditor as agent for both parties prima facie correct.

A statement by one who was keeping an account as agent for both parties, as between

the immediate parties to the transaction, and as between either of the parties and an assignee of one for the benefit of creditors, as evidence for or against either of them, must be taken prima facie as being correct, although subject to dispute as to its correctness.

8. Account, action on  $\S$ 7—Evidence insufficient to impeach statement of agent keeping account for both parties.

In an action involving an account, evidence of defendant held not sufficient to impeach a statement of account struck by one who was acting as agent of both parties in keeping the account.

9. Contracts  $\S$ 4—No Implied agreement to pay plaintiff for loss from repudiation of contract by United States.

Where government officers agreed with a construction company that it should suffer no loss by reason of the use of trucks by a commissary company messing officers at an army post, there arose no promise, either direct or implied, that the commissary company would reimburse the construction company should the government repudiate its promise and charge the cost to the construction company.

En Banc.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by the Hurley-Mason Company against the Pacific Commissary Company, in which E. G. Lindberg intervened. Judgment for plaintiff, and defendant and intervener appeal. Reversed and remanded, with instructions.

Peters & Powell, Donworth, Todd & Higgins, and W. E. Froude, all of Seattle, for appellants.

Stiles & Latcham, of Tacoma, for respondent.

FULLERTON, J. In June, 1917, the respondent, Hurley-Mason Company, entered into a contract with the government of the United States for the construction of the buildings and other utilities the government desired to have constructed at the site of the army post in Pierce county, afterwards known as Camp Lewis. By the terms of its contract the construction company obligated itself to establish a commissary at the site of the construction work for the purpose of supplying meals and lodgings to such of its employees as might desire the service. No rate of charge was fixed by the contract for the service to be furnished the employees, although the contract provided that the revenue derived from the commissary and the utilities connected therewith should be applied in reduction of the cost of its operation; the government agreeing to reimburse the construction company for its net expenditures incurred in such operation. The contract further provided that the title to all completed work and all work in the

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course of construction should be in the United States. It also provided that all subcontracts should be in accordance with the agreement between the government and the construction company, and that all such contracts should have the approval of the contracting officer of the government.

On July 10, 1917, the construction company, with the approval of the constructing quartermaster of the post, sublet the work of conducting the commissary to the appellant Pacific Commissary Company. By the terms of the contract the commissary company agreed to buy all of the provisions and supplies necessary to be used in the work, prepare and serve meals to the construction company's employes, and to do the janitor work connected with the lodging places. The construction company on its part agreed to pay the costs of the provisions and supplies, and, as a consideration to the commissary company for its services, agreed to pay it for each meal served, prices ranging from 1½ cents to 2 cents per meal, owing to the number of meals served each day.

This contract, like the one between the construction company and the government, made no provision for charging the construction company's employes with the meals supplied them. Such a charge, however, was made, and the sums collected thereon were turned over to the construction company, or credited to its account. The charge made was 80 cents per meal, which was afterwards found to be less than the actual cost by 15 cents per meal.

The government had on the grounds at all times an accounting officer, denominated a "field auditor." To prevent "duplication of forces" this officer took charge of the accounting between the construction company and the commissary company. He established a commissary warehouse, in which all supplies purchased for the use of the commissary were received and from which they were disbursed as required for the immediate uses of the commissary company. The construction company seemed to have no connection therewith other than the duty of paying the bills. The method of operation, as described by the bookkeeper of the construction company, was substantially this: As a particular commodity became low in the warehouse a request for an additional supply would be made by the commissary company on the field auditor. If he approved of the purchase he would make out a requisition and send it to a purchasing agent. This agent would make the purchase, and cause the commodity purchased to be shipped to the warehouse, where it would be examined as to quality and checked with the requisition. If found correct in these respects an order would be sent to the construction company authorizing payment. That company would thereupon send its

checks to the seller of the commodity for the amount of the purchase.

In August, 1917, the government ordered some 1,400 line officers to report at Camp Lewis for duty. Notice of their coming was given the commander of the post on the day before the day they were due to arrive. Officers of this character are required by the government to provide for their own subsistence, but, as it is well known locally, Camp Lewis is several miles distant from any point where such subsistence could be procured from independent sources, and no arrangement had been made by the government by which such subsistence could be procured at the camp. In this emergency, the camp officer in charge called upon the commissary company and requested it to provide for messing the officers, assuring it that it could use for that purpose the facilities provided for messing the construction company's employes. The commissary company undertook the work, and a rate per day to be charged the officers was agreed upon between the officer and the company. The company arranged for messing the officers in buildings apart from those used in messing the construction company employes, and, while it procured the supplies used in the messes from the general warehouse from which all the supplies were taken, separate accounts were kept thereof by the field auditor. The construction company did not learn of the arrangement until some two weeks after it was consummated, the attention of its officers being then attracted to it by the rapid rise in the supply account. Protest was then made against the arrangement by its officers, who were quieted by the assurance on the part of the camp officers of the government that the government would protect them against loss. The commissary company, also acting under the permit given it by its contract, opened and conducted several stores at the site of the post, and also opened and conducted a public restaurant thereat. In these it had a number of employes, who took their meals at the messhouses conducted for the use of the construction company's employes. The business of providing messes for the officers, and the business of conducting and operating the stores, was wholly the private business of the commissary company; the construction company having no interest therein or anything to do therewith.

These conditions continued until some time in December, 1917, when the construction company completed its contract with the government. The field auditor at that time cast the accounts relating to the commissary between the construction company and the government. He found that the gross loss to the construction company in the operation of the commissary had been \$180,260.74. Of this sum he conceived that \$7,768.08, which the construction company had paid, repre-

sented items properly chargeable to the commissary company because of the independent businesses conducted by it, and disallowed the same, leaving a net balance due from the government to the construction company of \$122,492.60.

From the first statement of the account submitted by the auditor, it is impossible (for us at least) to gather the items that make up the total of the amount disallowed.

In part the items were the following:

Construction work on buildings.....	\$ 623.24
Overhead on expense account (proportion)...	2,517.80
Overhead on salaries account (proportion)...	4,906.82
Meals to employees of commissary company...	1,400.85
Salaries .....	600.00

The item deducted for construction work was the cost paid by the construction company for labor and material used in fitting certain buildings (constructed for other purposes) with shelves, counters, and other fixtures for use by the commissary company as stores. The items for overhead were a one-fourth part of the total expenses paid by the contracting company for general services rendered the commissary company, and a one-fourth part of the salaries paid employees in the conduct of the commissary department. The item for meals was the auditor's estimate of the number of meals served to the employees of the commissary company, who were employed in the conduct of its independent business. These were charged for at the rate of 45 cents a meal, the average cost of the meals to the government. The item under the head "Salaries" was made up from salaries paid the officers of the commissary company, which the auditor conceived were not payable under the contract between the construction company and the commissary company; at any rate not properly chargeable to the government. From the total of the disallowances certain fees for the service of meals were deducted, leaving the balance as stated.

A copy of the account was given the commissary company, whereupon its officers protested against the charges. It was then made the subject of further inquiry by the department at Washington and the account was recast. On the recast the finals remained the same, but there was a material change in the items making up the deductions. In the account as finally approved the items were listed as follows:

Merchandise .....	\$ 1,901.50
Proportion of overhead expense.....	1,876.31
Proportion of overhead salaries.....	4,419.34
Meals to employees.....	1,400.85
Truck services .....	118.50
Repairs to buildings.....	623.24

Making a total of.....	\$10,239.84
From this was deducted fees.....	2,467.65

Leaving a net balance of..... \$ 7,772.19

This total, it will be observed, is \$4.11 more than the total actually deducted. The

bookkeeper of the construction company explained that this difference was probably the result of a transposition made when totaling the numerous items making up the account, which it was found more convenient to ignore than to run down. The item "Truck Services" was included in the "Overhead Expense" item in the original cast. No explanation was given to account for the remaining differences between the amounts of the "overhead" charges in the two statements, or for the omission from the latter of the salary item included in the first; these differences, however, were absorbed in part by the item in the recast account labeled "Merchandise" and in part by the allowance made for fees. This recast account, so the officers of the commissary company testify, was never submitted to them.

In this action the construction company seeks to recover from the commissary company the amount of the disallowances made by the government auditor. In its complaint it set forth its contract with the government, its subcontract with the commissary company, and alleged, in substance, that the commissary company used the privileges accorded by the subcontract in the carrying on of businesses for its own benefit and emolument, other than the business provided for in its contract, causing the bills incurred in the operation of such businesses to be presented to and paid by it, along with other bills covered by the terms of the agreement between them, thereby becoming indebted to it in the sum of \$10,239.84, no part of which had been paid except the sum of \$2,467.65, and that the balance was due and owing. It further alleged that on April 13, 1908, an account of the indebtedness was stated between the parties, "whereby said sum of \$7,772.19 was found to be the balance due." It alleged also that on or about March 10, 1918, the commissary company became insolvent and unable to pay its creditors in due course or out of its tangible property, and thereupon, in violation of its duty in the premises, executed and delivered a general assignment of all of its property for the benefit of certain of its creditors, not including the plaintiff, to one E. G. Lindberg, with the intention of excluding the plaintiff from any participation in the division of its assets. Lindberg was not made a party defendant in the action. He, however, afterwards intervened and defended along with the commissary company.

In its answer the commissary company put in issue the allegations of the complaint tending to show liability on its part. It also set up an affirmative defense, which need not be set out in detail. In substance, the defense was that the contracting company, in consideration of a receipt given it by the commissary company, promised to present a claim for the items sued upon in its

own name to the government for allowance; that it failed so to do, although leading the officers of the commissary company to believe to the contrary; that if the claim had been presented it would have been allowed and paid, and that its loss was due solely to the negligence of the construction company.

The action was tried to the court sitting without a jury. The trial judge found that the commissary company had contracted and the construction company had paid the obligations which make up the items the auditor refused to allow the construction company in its settlement with the government, and that the obligations were incurred by the commissary company in the conduct of its private business, with which the construction company had no connection and in which it had no interest. He found that the commissary company "in the month of May, 1918, agreed in writing to pay to the plaintiff this sum of \$7,772.19." He found that the commissary company later presented a claim to the government for the amount so disallowed, and that the government refused to consider it because not presented in the name of the construction company, with whom alone the government had contracted. He found that thereafter the commissary company informed the construction company of the action of the government and requested that the claim be presented in its name; that it was informed by the construction company that it then had other unsettled claims pending before the government, and that it believed the presentation of this claim would prejudice it in the prosecution of these claims, and refused to so present it. He found that it was reasonably probable that had the claim been timely presented to the government in the name of the construction company the same would have been allowed and paid. The sixteenth, seventeenth, and eighteenth findings were as follows:

"The defendant sought to estop the plaintiff by showing that plaintiff had undertaken to present and prosecute a claim for the above-mentioned balance to the government, and thereby procure its own reimbursement, and that it had not done so; but the court does not find that plaintiff did so undertake, and finds that if it had done so there was no consideration for its undertaking and no bar therein to the prosecution of this action.

"Prior to the commencement of this action defendant was an insolvent corporation, and was indebted to sundry creditors, not including plaintiff, for sums aggregating about \$40,000, and to secure the payment of such indebtedness assigned all of his property to the intervenor, E. G. Lindberg, who took and now retains all of said property except such as he has paid to said creditors, and has been and now is carrying on defendant's business, as such assignee, for the benefit of said creditors who were not yet fully paid.

"Said Lindberg, from time when he took pos-

session of the property of defendant, being informed of the claim of the plaintiff to be considered a creditor of defendant, kept and reserved in his possession, out of the receipts coming to him from the business of defendant, a sum proportioned to the sums he paid to the other creditors, to be paid to the plaintiff in case it established its debt against defendant by this action; which sum, on the 17th day of January, 1918, amounted to \$4,663.31, and which sum he stipulated to retain for the use of plaintiff, to abide the event of this action."

No direct finding was made on the issue of an account stated, but it is inferable from the findings as a whole that the issue was determined against the construction company. On these findings the court entered a judgment for the amount deducted by the auditor, this being \$4.11 less than the total of the items making up the amount. From the judgment so entered the commissary company and the intervenor prosecute this appeal.

[1, 2] The appellants first contend that the respondent's cause of action is founded wholly upon an account stated, and that there is in the record no evidence, or inference arising from evidence, from which it can be found that this account ever became an account stated between the parties. From this the conclusion is drawn that there was a failure of proof, and that the judgment is erroneous, since, in effect, it is a judgment unsupported by evidence. But to this we think there are at least two sufficient answers. The first is that the complaint states facts sufficient to constitute a cause of action, even if the allegations with reference to an account stated be disregarded. This being so, it may recover on this branch of its case, although the other be not proven. Nor is the complaint, by construing it as stating different grounds for recovery, made duplicitous. Under the practice in this state, where a plaintiff has two or more distinct grounds for the relief he asks, the one not inconsistent with the other, he may set them forth in his complaint in orderly sequence, and may recover if he proves any one or more of them. *Barto v. Mix*, 15 Wash. 563, 46 Pac. 1033; *Loveday v. Anderson*, 18 Wash. 322, 51 Pac. 463; *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023; *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D, 290; *O'Donnell v. McCool*, 89 Wash. 537, 154 Pac. 1090; *Starwich v. Ernst*, 100 Wash. 198, 170 Pac. 584; *Welch v. Northern Bank & Trust Co.*, 100 Wash. 849, 170 Pac. 1029.

[3, 4] The second answer is that to hold with the appellants' conclusion would be to deny the respondent the benefit of the statutes relating to amendments of pleadings. If the allegations of the complaint were wholly upon an account stated, and the evidence failed upon that ground, but justified

a recovery upon another, the respondent would have been entitled to amend so as to make its allegations conform to its proofs. This court is required, in appealed causes tried to it de novo, to regard all amendments as made which could have been made. Rem. Code, § 1752. The effect of the rule is to compel us, in all cases where there is a variance between the allegations of the pleadings and the proofs in evidence, to disregard the pleadings and treat the evidence as stating the issues between the parties. So, here, if it were true that the complaint was based wholly upon an account stated, and the proofs showed a right to recover upon another ground, the variance is not fatal to the judgment, since the judgment may rest upon the proofs made.

[5] The trial court found, it will be remembered, that the appellant commissary company, in May, 1918, agreed in writing to pay to the respondent the amount found due by the field auditor. This finding was based on a letter dated May 8, 1918, written by one Nathaniel Paschall to the accounting agent of the respondent in answer to letters from the agent demanding payment of the account. In this letter Mr. Paschall stated that he was endeavoring to get into communication with the officer of the government who had authorized the use of the facilities which resulted in the account, and his co-operation in presenting to the government a claim for reimbursement, adding:

"If this is allowed us, of course, we will make immediate settlement of your claim against our company. If, however, we are unsuccessful, we will make partial settlement and will advise you when we can pay the balance."

It was shown by other proofs that Mr. Paschall was a stockholder in the appellant corporation and its duly elected secretary. But it was shown also that the letter was written after the corporation had become insolvent, after it had assigned its property for the benefit of its creditors, and after its assets had been taken into possession by the assignee named in the assignment. The appellants contend, we think correctly, that this evidence does not justify the finding. It is a general rule that contracts and agreements made by an officer of a corporation on behalf of the corporation are binding upon it only when the officer at the time represents the corporation and is authorized to act on its behalf. At this time Mr. Paschall did not represent the corporation in the sense that he could add to its obligations or create new obligations for it chargeable against its existing property. The corporation was then insolvent. It had made an assignment of its property for the benefit of its creditors. The assignee and the creditors acquired an interest in the property of the corporation in virtue of the assignment.

We think it plain that an officer of a corporation, whatever may have been his authority prior to an assignment for the benefit of creditors, cannot thereafter bind the corporation to a new agreement detrimental to the interests of the assignee and the creditors represented by him. To so hold would be to hold that the officers of a corporation could, after an assignment by the corporation for benefit of its creditors, destroy the interests the assignees acquired by the assignment. Treating this promise as an agreement on the part of the corporation to pay an obligation which it was not otherwise obligated to pay, we are clear that it was not obligatory as to the existing property of the corporation in the hands of the assignee.

[6] Whether the letter was admissible as a declaration or admission on the part of the corporation that the obligation sued upon was a just obligation of the corporation incurred prior to the assignment, so as to be chargeable against the property in the hands of the assignee and thus independent evidence of the fact sought to be proved, is a more troublesome question. In our opinion it was not. This for reason that it was not the act of the corporation, but the act of an officer who did not then represent its interests. Doubtless the officers of the corporation could testify that the obligation was just and was a proper charge against the property in the hands of the assignee. So, also, could they testify to the contrary. And had this particular officer testified that the obligation was not just, the letter could have been introduced to contradict or impeach his testimony; but neither of these considerations, we think, would justify the admission of the letter as evidence of an independent acknowledgment by the corporation of the debt.

[7] It remains to inquire whether there was other evidence in the record from which the trier of fact can find that the indebtedness was established. As to the item for merchandise, the item for meals furnished employes, and the item for repairs of buildings, there is abundant evidence in the record to show that services of this sort were furnished, and that the obligations incurred thereby were obligations incurred for the private use of the appellant corporation. Since the appellant corporation caused them to be paid by the respondent, there arose on its part an implied promise that it would make the loss good to the respondent. The difficulty arises with the items themselves; that is, whether there is evidence from which it can be found that the items are just, and represent the true balances due for articles delivered and services performed for which payment has not been made. The field auditor was not sworn, nor did any of the witnesses on the part of either party have knowledge of the true state of



the account. But the auditor in keeping the account was the agent of both parties. Both assented, or at least acquiesced, in his so doing, and it was necessarily intended that at the termination of the transaction he should state the account between them. His statement is therefore, as between the immediate parties to the transaction, and as between either of the parties and the assignee of one of them, admissible as evidence for or against either of them. No doubt the statement was subject to dispute as to its correctness, but, being admissible as evidence, it must be taken *prima facie* as being correct. Nor can we find that it was impeached as to these particular items. True, as we have shown, there were two statements, each showing the same total but differing in the items making up the total. But the power to cast the account includes the power to recast it, and since the recast is not impeached other than by showing a difference in the items, we are constrained to hold that it represents the true state of the account between the parties as to the items mentioned.

[8] We have not overlooked the testimony of an officer of the appellant corporation to the effect that his corporation paid by its own checks for all of the items of merchandise taken from the commissary and applied to the private use of the corporation. It is no doubt true that the corporation did make payments on the account as they were called for by the field auditor, but as its information as to the state of the account from time to time was derived wholly from the auditor, it could not be known by any of the officers whether or not the payments made were payments in full. The account as a whole was large. It involved transactions approximating a half million of dollars. Much material was on hand when the account was ready to close, and its true state could hardly have been known even to the auditor himself until the final balance was struck. In view of these facts, we cannot think the evidence of the officer impeaches the auditor's statement.

In this connection the appellant contends that the rate charged for the meals furnished its employes is too large, since the cost is fixed at 45 cents per meal instead of 30 cents—the rate charged the respondent's employes. But the rate was fixed at the actual cost, and, in the absence of an agreement to the contrary, the appellant cannot be heard to say that it did not receive the benefit of the service to the extent of such actual cost.

[9] The items for overhead, in which must be included the item for truck services, stand upon a different footing. These were incurred, for the greater part at least, under a direct agreement with the government that the appellant could make use of the facilities

which give rise to them without cost to itself. By the terms of the contract between the government and the respondent the government had an interest in the facilities used in these operations, and had agreed to reimburse the respondent for its expenditures in conducting the operations. The government therefore had such a direct interest therein as to empower it to make contracts with reference to their use by another. Since it agreed with the appellant corporation that it could make use of them in messing the officers sent to the army post on the government's business without charge, and agreed with the respondent that it should suffer no loss by reason thereof, there could arise no promise, either direct or implied, that the appellant would reimburse the respondent for such use should the government repudiate its promise and charge the cost to the respondent, or, what is the same thing, refuse to allow the cost thereof in its settlement with it. It is not a case referable to the rule which permits a loss, which one of two innocent parties must suffer, to be charged to the party whose act causes the loss. In this instance the appellant is equally innocent with the respondent in act and promise. Both acted on the promise of the government's representation that no charge would be made for the use of the facilities which gives rise to the loss. The appellant, because thereof, did not seek to protect itself against it; in fact its charges for the services rendered, in the performance of which it suffered an actual loss at it was, were based on a rate in the making of which this item was not considered. Plainly, we think, the government cannot, by repudiating the contract of its officers and charging the cost to the respondent, make it a charge recoverable by the respondent from the appellant.

With regard to the matter referred to in the sixteenth finding of the court, before quoted, we think the court in error in its findings of fact, but correct in its conclusions with regard thereto on the facts as they appear in the record. The respondent, as we read the evidence, did promise that as soon as its own accounts with the government were finally adjusted it would present this claim to the government in its own name on the appellant's behalf, and we think further there was a sufficient consideration for the promise. But we cannot conclude that the respondent intended thereby to relieve the appellant from its obligation, or postpone the time of its payment. On the contrary, it contended at all times that the obligation was the obligation of the appellant, but was willing to use its name and its friendly offices in an endeavor to have the government make good the loss to the appellant. The record shows in this connection that these claims had not been ad-

justed at the time of the trial, and hence no breach of the promise had then occurred.

The foregoing considerations lead to the conclusion that the appellant is entitled to recover from the respondent corporation the sum of the items set forth in the auditor's account under the heads "Merchandise," "Meals to Employes," and "Repairs to Bulldozings," but that it is not entitled to recover for the other items listed. A proportionate share of the judgment is payable, of course, from the funds in the hands of the assignee.

The judgment is therefore reversed and the cause is remanded, with instructions to enter a judgment in accordance with this opinion.

HOLCOMB, C. J., and MAIN, MOUNT, MITCHELL, PARKER, BRIDGES, and MACKINTOSH, JJ., concur.

(111 Wash. 415)

**BURLEY et al. v. HURLEY-MASON CO.**  
(No. 15895.)

(Supreme Court of Washington. July 8, 1920.)

**1. Bailment §14(1)—Bailee for mutual benefit liable only for failure to exercise ordinary care.**

Bailee of a scow for the mutual benefit of the bailor and bailee did not become liable as an insurer for any damage that the scow might sustain while in its possession, but only for failure to exercise ordinary care.

**2. Bailment §31(1)—Presumption of negligence on part of bailee on returning damaged property.**

Where property is delivered to bailee for the mutual benefit of the parties in good condition and returned damaged, a presumption arises of negligence on the part of the bailee, and casts upon him the burden of showing the exercise of ordinary care.

**3. Bailment §31(3)—Finding that scow was damaged while in hands of bailee sustained by evidence.**

In an action against a bailee of a scow for damages to the scow, evidence held sufficient to sustain a finding that the injury to the scow was caused while the scow was in the possession of the bailee and by reason of his negligence.

**4. Bailment §31(1)—Presumption of negligence of bailee from injury to scow held not overcome.**

In an action by bailor against bailee for damage to scow while in the possession of the defendant, evidence held not to overcome the presumption of negligence of bailee arising from the fact of injury to the scow while in his possession.

**5. Bailment §32—Damages consisting of towing charges computed at rate fixed by Public Service Commission not unreasonable.**

In an action for injuries to a scow, where one of the items complained of by plaintiff was

towing charges required to be paid on account of the damaged condition of the scow, it was not necessary for plaintiff to show that the towing charges were reasonable, where it appeared that such charges were made at a rate fixed by the Public Service Commission.

**Department 1.**

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by Thomas S. Burley and Robert McCullough, doing business as the Tacoma Tug & Barge Company, against the Hurley-Mason Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Stiles & Latcham, of Tacoma, for appellant.

Remann & Gordon, of Tacoma, for respondents.

MAIN, J. The purpose of this action was to recover damages to a scow. The cause was tried to the court without a jury and resulted in findings of fact, conclusions of law, and judgment sustaining the plaintiffs' right to recover. From this judgment the defendant appeals. The essential facts may be summarized as follows:

The respondents are copartners doing business under the firm name of Tacoma Tug & Barge Company. The appellant is a corporation organized under the laws of this state. The appellant was constructing a concrete base for a pavilion at Point Defiance, on the shore of Puget Sound, in the city of Tacoma. On or about the 27th day of June, 1919, the respondents delivered at or near the pavilion a barge loaded with sand and gravel. This barge remained in possession of the appellant for approximately three weeks. From time to time it was caused to be moved by the appellant from one location to another to accommodate its convenience in getting the sand and gravel from the scow and using it in the construction work. When the scow was redelivered to the respondents its bottom at one place near one of the corners thereof was in such a damaged condition that it leaked badly. The boards were splintered as though that point of the scow had rested upon some hard surface while the remaining portion of the scow was afloat. When the scow was first delivered the captain of the tugboat refused to moor it in a place indicated by the superintendent of the works because he did not know the nature of the bottom at that place. The parties admit that the relation created by the delivery of the scow was that of bailment for their mutual benefit.

[1-3] Before taking up the consideration of the questions of fact, two rules of law should be stated, the first of which is that the appellant did not become liable as an insurer for any damage that the scow might sus-

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tain while in its possession, but only for the failure to exercise ordinary care. *Thompson v. Seattle Park Co.*, 94 Wash. 539, 162 Pac. 994. The other rule is that in cases where property is delivered to the bailee in good condition and returned damaged a presumption arises of negligence on the part of the bailee and casts upon him the burden of showing the exercise of ordinary care. *Patterson v. Wenatchee Canning Co.*, 53 Wash. 155, 101 Pac. 721; *Kingsley v. Standard Lumber Co.*, 84 Wash. 189, 146 Pac. 369. With these rules of law in mind, attention will now be given to the questions of fact presented by the appeal. It is first claimed that there is no showing that the scow was in good condition at the time it was delivered. The trial court on this question found that it was in "good repair and condition." While the direct evidence upon the matter was general, it is amply sufficient when supported by other circumstantial evidence to sustain the finding. The captain of the tugboat which towed the scow to its first mooring testified that it was in good condition then. The evidence further shows that had it been in the leaky condition that it was at the time it was redelivered by the appellant it could not have been towed while loaded, because it would have capsized. To establish that the bottom of the scow was in good condition at the time of the delivery when it was drawing approximately seven feet of water it was not necessary that some one should have gone beneath it and examined its condition.

[4] It is also claimed that the court failed to find, and the evidence failed to show, that the appellant did not exercise ordinary care to protect the scow from damage while it was in its possession. The court specifically found that it was in good condition at the time of delivery and that when redelivered it was in a "leaky and bad condition, with the bottom planks sprung and broken," and in one of the conclusions recited that the damage was caused wholly by the carelessness and negligence of the defendant." Under the rule of law second above stated, the fact that the scow was delivered in good condition and redelivered in bad condition would raise a presumption of negligence and cast upon the appellant the burden of showing that it had exercised ordinary care. The character of the injury sustained by the scow was such as to indicate that the injured portion had rested upon a knob or hump, while the balance of the scow was afloat. There was evidence that at one point where it was caused to be moored by the appellant there was a hump on the beach upon which the scow would rest when the tide receded. The trial court was right in its conclusion that the presumption arising from the fact of injury was not overcome by the evidence.

[5] Finally, it is claimed that the items

of damage were charged at arbitrary rates without regard to the reasonable value. One of the items complained of was towing charges which the respondents were required to pay on account of the damaged condition of the scow. The evidence shows that these charges were made at a rate fixed by the Public Service Commission. The other items complained of are supported by evidence that the amount expended for each item was the reasonable value thereof. The proof therefore meets the requirement of the rule stated in *Torgeson v. Hanford*, 79 Wash. 56, 139 Pac. 648.

The judgment will be affirmed.

HOLCOMB, C. J., and PARKER, MACKINTOSH, and MITCHELL, JJ., concur.

(111 Wash. 557)

**WONDERFUL GROUP MINING CO. v. RAND. (No. 15801.)**

(Supreme Court of Washington. July 14, 1920.)

**1. Corporations §308(3)—Corporation bound when officers' compensation is fixed by trustees under by-laws.**

Where by-laws empower corporation trustees to fix and allow compensation to officers, and they contract to allow compensation for services of officers other than themselves, the corporation is bound thereby, and the officers can recover reasonable compensation for such services, or such salary as the board of trustees may fix as such reasonable compensation.

**2. Corporations §308(1)—Trustees cannot recover compensation.**

Trustees cannot recover compensation for their services as trustees.

**3. Corporations §308(3)—Adoption of resolutions on vote of interested trustees held void.**

Act of trustees in passing resolutions awarding money to four out of five members of the board of trustees as compensation for past services rendered as officers held void, since the trustees voting for the adoption of the resolutions were pecuniarily interested therein, even though no one of them voted for the particular resolution affecting such particular trustee.

**Department 1.**

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

Action by the Wonderful Group Mining Company against L. L. Rand. Judgment for plaintiff, and defendant appeals. Affirmed.

D. W. Henley, of Spokane, for appellant.  
Don F. Kizer, of Spokane, for respondent.

MACKINTOSH, J. In 1896 the respondent was organized under the laws of this

state for the purpose of developing mining claims located in British Columbia. In article 4, § 3, of the by-laws of respondent, it is provided: "The treasurer shall be entitled to such compensation as the board of trustees shall fix and allow." By article 5, § 2, it is provided that the "secretary shall receive such compensation as the board of trustees may fix and allow." The trustees in July, 1896, fixed the salary of the secretary at \$75 per month, which was paid until November, 1896, and on October 7, 1896, the salary of the treasurer was fixed at \$50 per month, and the salary of the secretary increased to \$125. Both of these officers drew these salaries from November 1, 1896, until the board of trustees passed a resolution, September 14, 1897, abolishing all salaries. These were the only resolutions with reference to salaries until the resolution of June 3, 1913. On that day a resolution was passed, by a vote of four of the five members constituting the board of trustees, providing for the payment to the secretary of a salary of \$300 per year for the entire term during which he had acted as secretary, and paying the appellant, as treasurer, a like amount for a like time, and at the same meeting another resolution was passed paying to two other members of the board of trustees \$500 each for legal services. Of the members of the board of trustees, the one who voted against these three resolutions was a beneficiary of the last resolution.

From 1897 to 1913 the company was inactive; the ore chute of the mines having been lost. During this time neither the license fees due the state of Washington or to the province of British Columbia were paid, and from 1902 until 1917 no meeting was held of the stockholders. Members of the board of trustees resigned and their successors were elected by the remaining members, and in September, 1907, the board of trustees elected a secretary, who is the beneficiary of the resolution of June 3, and in 1915 elected the appellant, Rand, as treasurer. When elected secretary and treasurer both officers were members of the board of trustees. From 1908 to 1913 there were no entries made in the books and there was no transfer of stock from 1908 to 1915. Only one meeting of the board of trustees was held from 1908 to 1911. In 1913 the trustees entered into a lease of the mining property, under which royalties were paid, which, in the event of purchase, were to apply on the sale price. Prior to June 3, 1913, these royalties amounted to \$9,000. Shortly prior to June 3, 1913, a verbal agreement had been made for an extension of this lease for a period of three years, and at the meeting of June 3, 1913, after having passed the resolution already mentioned, a resolution was passed granting such extension. Immediately after the close of this meeting the trustees

repaired to a bank in Spokane where the meeting was held and turned in their stock and drew down the purchase price, as provided in the extension agreement. The secretary was paid \$3,300 and appellant was paid \$1,050, in conformity with the resolution passed on that date. A new board of trustees having been elected, it repudiated the salary resolutions and instituted this action to recover the amounts paid thereunder.

During the time the company was in existence the stock had been distributed in various hands and the stockholders generally had taken very little, if any, interest in the affairs of the company, and the arrangements which finally resulted in the sale of the property were arrangements which were made through the active instrumentality of the members of the board of trustees. It is claimed by appellant that the testimony shows that he and the secretary, at the time they accepted election as secretary and treasurer, had an agreement with the board of trustees that they were to be compensated for their services, and had it not been for such agreement, they testified, they would not have accepted the offices.

[1] "Where the board of trustees of a corporation is by its by-laws empowered to fix and allow compensation to its officers, and where they enter into a contract, express or implied, to allow compensation for services of such officers (other than trustees), the corporation is bound thereby, and such officer can recover reasonable compensation for such services or such salary as the board of trustees may fix as such reasonable compensation." *Clark & Marshall, Corporations*, vol. 3, pp. 3064, 3065; *St. Louis F. S. etc., v. Tiernan*, 37 Kan. 606, 15 Pac. 553; *Baggett v. Fairchild (Cal.)* 61 Pac. 793.

It has been held that a trustee may receive compensation from the corporation for services which he performs, other than those performed by him as trustee. *Burns v. Comm. Bay Land Co.*, 4 Wash. 558, 30 Pac. 668, 709; *Blom v. Blom Fish Co.*, 71 Wash. 41, 127 Pac. 596; *Argo Mfg. Co. v. Parker*, 52 Wash. 100, 100 Pac. 188.

[2] The respondent contends, however, that the trustees of a corporation have no right to vote themselves compensation for past services, either as trustees or as officers. It is true that trustees cannot recover compensation for their services as trustees. 7 R. C. L. 445; *Crumlish's Adm'r v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Wood v. Lost Lake, etc., Co.*, 23 Or. 20, 23 Pac. 848, 37 Am. St. Rep. 651.

It is unnecessary for us, in view of the determination we are to make of this case, to pass upon the question of whether the board of trustees might, under such power as is contained in the by-laws here, vote back

salaries to officers who may also be trustees.

[3] The record in this case shows clearly that the rule of law which provides that a trustee may not vote upon his own compensation was violated by the resolution of June 3, and that the act of the trustees in passing a series of resolutions awarding money to four out of the five members of the board was void. It appears that the members of the board of trustees felt, and honestly, that, as they by their efforts had secured a favorable sale of the property of the corporation, resulting in a benefit to the stockholders, therefore they should receive some compensation greater than that which would accrue to them merely through their ownership of stock. The method, however, by which they sought to obtain this extra compensation was not by a resort to the stockholders and from the stockholders to obtain authority to so compensate themselves. When they became members of the board of trustees they were charged with the duty of using their best efforts for the promotion of the interests of the stockholders, and nothing was done but what should have been done by them in the performance of such duty. By the resolution the trustees were attempting to pay themselves for these general services under the guise of compensation for special services. The record in the case clearly indicates that these resolutions were merely a subterfuge. It appears that at various times discussions had taken place among the trustees, the net result of which was that a majority of them were inclined to compensate themselves after the property was finally disposed of, and that when it had become apparent that a sale, was to take place, and it having in general been agreed to on or before June 3, and that in addition to the sale amount the company was in possession of \$9,000, due on royalties on the original sale agreement, which it had decided to retain before agreeing to an extension and modification of the original sale agreement, and that compensation could be secured from that amount, instead of submitting the matter to the stockholders the device of June 3 was adopted.

Granting that the board of trustees might compensate officers, but not trustees, for past services, it is the rule that where concerted action of this kind is taken the passing of a resolution awarding such pay must be had without the vote of any one peculiarly interested in the resolution. The board of trustees consisting of five members, it was necessary for three disinterested members to vote for the passage of each resolution. The record shows that of the four voting for each resolution three were peculiarly interested in the general scheme, although the scheme was divided into three resolutions. Taking, for instance, the resolution awarding salary to the secretary, we find it was voted

for by the president, who was to receive compensation under a companion resolution, the treasurer, who was to receive compensation under a companion resolution, the secretary, who was to receive compensation under the resolution itself, and one of the members, who had no pecuniary interest in the general plan.

In the case of *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131, 23 Atl. 708, three separate resolutions were introduced, fixing the salaries of the president, vice president, and assistant treasurer; the board of trustees consisting of the three officers and two others. The Connecticut court disposed of the contention that the trustees could evade the rule by making separate resolutions for each officer saying:

"But whether this action of the directors be regarded as one vote or as three separate votes can make no real difference. If there were three votes, they were all passed at the same meeting. They were related to each other, and all had reference to one common object, the continuing the same persons in the management of the business of the corporation who were then managing it; so that the three separate votes, or the three parts of one vote, must all be taken together in order to ascertain what influences operated to procure the passage of any one of them, and to determine their effect when passed. It is not necessary to suppose that there was any formal agreement beforehand between the three directors interested that these three votes should all be passed. It is altogether likely that there was no such agreement. But the votes were all before the directors' meeting at the same time. These three directors were all present. They were each interested in the common object to be attained by their passage. No one of these votes could be passed without the affirmative voice of one of these directors."

In the case at bar the affirmative vote of at least two of the interested parties was needed to pass any one of the resolutions, and such trustees had no more right to vote on any of the resolutions than if only one resolution had been introduced embracing the contents of the entire three. *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Boothe v. Summit Coal Min. Co.*, 55 Wash. 187, 19 Ann. Cas. 1255; *Smith v. Los Angeles, etc., Co.*, 78 Cal. 289, 20 Pac. 677, 12 Am. St. Rep. 53; *Steele v. Gold Fissure Min. Co.*, 42 Colo. 529, 95 Pac. 349, 126 Am. St. Rep. 177.

For the reasons stated, the judgment will be affirmed.

MAIN, PARKER, and MITCHELL, JJ., concur.

HOLCOMB, C. J. I concur in the result for reasons not stated in the majority opinion. The principal and only reason necessary to here state is that, as shown by the

testimony of appellant himself and of Schermerhorn, the secretary, what was contemplated, at the time of their election as treasurer and secretary, respectively, was compensation for performing corporate executive duties, and not for additional duties as treasurer and secretary. Had there been any such agreement to grant them salaries as treasurer and secretary, even though not of record, and had it been performed, or made a charge upon the company prior to the consummation of the sale by the company's stockholders of the majority stock, in my opinion they should have recovered such compensation. But, as a matter of fact such was not the case.

(111 Wash. 533)

**STATE v. ROUSSEAU. (No. 15761.)**

(Supreme Court of Washington. July 14, 1920.)

**Indictment and information §110(31)—Information sufficiently charges defendant was "jointist," though not averring he acted as principal or agent.**

The crime of being a "jointist," defined by Laws 1917, p. 60, § 17h, as one who opens up, conducts, or maintains, "either as principal or agent," any place for the unlawful sale of intoxicating liquors, is sufficiently charged, though the information does not in terms charge that defendant acted "as principal or agent"; as he must have so acted.

**Department 1.**

Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Joseph Rousseau was convicted of being a jointist, and appeals. Affirmed.

G. D. Eveland and S. A. Bostwick, both of Everett, for appellant.

Thos. A. Stiger and Q. A. Kaune, both of Everett, for the State.

**PARKER, J.** The defendant and appellant, Rousseau, was charged and upon trial adjudged guilty of the offense of being a "jointist": "In that he, the said Joseph Rousseau, in Snohomish county, state of Washington, on or about the 1st day of May, 1919, willfully and unlawfully did open up, conduct and maintain at Mukilteo, in said county and state, a certain place, to wit, a certain dwelling house, together with the appurtenances thereunto appertaining and belonging, for the unlawful sale of intoxicating liquor." The only question to be here considered is whether or not this language quoted from the information charges appellant with the crime of being a "jointist" within the meaning of the definition of that offense as found in the Laws of 1917, p. 60,

§ 17h, which, so far as pertinent to our present inquiry, reads as follows:

"Any person who opens up, conducts or maintains, either as principal or agent, any place for the unlawful sale of intoxicating liquor, be and hereby is defined to be a 'jointist.' Any person who carries about with him intoxicating liquor for the purpose of the unlawful sale of the same be and hereby is defined to be a 'bootlegger.' Any person convicted of being either a 'jointist' or 'bootlegger' as herein defined shall be deemed guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years."

The substance of the whole contention here made in appellant's behalf is that the information is fatally defective because it does not in specific terms charge him with opening a place for the unlawful sale of intoxicating liquor "as principal or agent." It of course, seems plain that in order to sustain a conviction of appellant it must appear that he opened the place as principal, that is, as owner or proprietor of the place, or as agent of the owner or proprietor of the place; but is not this just what the language of the information necessarily means? How could one "open up, conduct, or maintain \* \* \* any place for the unlawful sale of intoxicating liquor" except for himself as principal, or as agent for another as principal? We think the language of the information as plainly means that appellant opened the place "as principal or agent" as if these words were in the information.

Counsel for appellant rely upon our decisions in *State v. Gaasch*, 58 Wash. 381, 105 Pac. 817, *State v. Smith*, 58 Wash. 235, 108 Pac. 618, and *State v. Hardwick*, 63 Wash. 35, 114 Pac. 873, as analogous and decisive in appellant's favor here, though they were gambling cases. In the *Gaasch* Case there was under consideration the sufficiency of an information charging that he and three others "did then and there conduct and carry on a gambling game played with cards, to wit, the game commonly known as poker, the said game being played for money, checks, credits and other things of value, in a building used for a saloon and lodging house purposes where persons resort for the purpose of playing, dealing and operating such gambling games." The statute, Laws of 1903, p. 63, under which conviction was there sought, was as follows:

"Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employé, or assistant, or in any manner whatever whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenette, rondo, vingt-un (or twenty-one), poker, draw poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice or any other device, or any slot machine, or other gambling device whether the same be

played or operated for money, checks, credits, or any other representative or thing of value, in any house, room, shop, or other building whatsoever, boat, booth, garden or other place, where persons resort for the purpose of playing, dealing or operating any such game, machine or device, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for the period of not less than one nor more than three years."

The information was held to be insufficient to charge the felony so defined, because from its language it could not be said that it charged Gaasch and his co-defendants with anything more than playing at a gambling game at the alleged resort which was a misdemeanor, and did not charge or connect them in any way whatever with the proprietorship of the resort; and, since the statute was aimed only at those who were proprietors of such a resort and those who assisted in maintaining such a resort, Gaasch was not charged with the felony defined by the statute. A critical reading of the decisions in the Smith and Hardwick Cases, we think, will disclose that the informations therein were held insufficient upon substantially the same grounds as in the Gaasch Case. This appellant is in no such position under this information and statute. The language of this information, we think, could by no possible construction be said to be directed against any one except one who was either the proprietor of the prohibited place or agent of such proprietor, in the opening, conducting, or maintaining of such place, and does not charge any act done or which could be done by any one at the prohibited place other than as proprietor or agent of such proprietor.

We are quite convinced that the information sufficiently charges the offense of being a "jointist."

The judgment is affirmed.

HOLCOMB, C. J., and MAIN, BRIDGES, and MITCHELL, JJ., concur.

(111 Wash. 537)

#### STATE v. BURGESS. (No. 15879.)

(Supreme Court of Washington. July 14, 1920.)

#### 1. Intoxicating liquors § 17—"Jointist" statute does not punish mere intent, but overt acts.

Laws 1917, p. 60, § 17h, declaring it a crime to be a "jointist," defined as one who opens up, conducts, or maintains any place for the unlawful sale of intoxicating liquors, is not unconstitutional as an attempt to punish a mere intent, but prescribes the punishment for the overt acts of opening up, conducting, or maintaining, to which intent is merely incidental.

#### 2. Criminal law § 1218—Imprisonment as punishment for jointist in state penitentiary.

Laws 1917, p. 60, § 17h, declaring the felony of being a "jointist," since declaring no place of imprisonment as punishment, is within Rem. Code 1915, § 2265, providing that in such case imprisonment shall be in the state penitentiary.

#### 3. Indictment and information § 86(3)—information for being a jointist need not fix the place of offense otherwise than in the county.

Information under Laws 1917, p. 60, § 17h, declaring the offense of being a jointist, need not fix the place of the offense more specifically than as being in the county, though it necessarily has a fixed location with some relation to real property.

#### Department 1.

Appeal from Superior Court, Spokane County; Hugo Oswald, Judge.

William Burgess was convicted of being a jointist, and appeals. Affirmed.

Geo. H. Crandell and Reuben Crandell, both of Spokane, for appellant.

J. B. Lindsley and T. T. Grant, both of Spokane, for the State.

PARKER, J. The defendant, Burgess, was charged, and upon the verdict of a jury adjudged guilty by the superior court for Spokane county of the offense of being a "jointist" under the Laws of 1917, p. 60, § 17h, the language of which, so far as necessary to be here noticed, is as follows:

"Any person who opens up, conducts or maintains, either as principal or agent, any place for the unlawful sale of intoxicating liquor, be and hereby is defined to be a 'jointist.' Any person who carries about with him intoxicating liquor for the purpose of the unlawful sale of the same be and hereby is defined to be a 'bootlegger.' Any person convicted of being either a 'jointist' or 'bootlegger' as herein defined shall be deemed guilty of a felony and shall be punished by imprisonment for not less than one nor more than five years."

The defendant has appealed to this court from the judgment so rendered against him.

[1] It is contended in appellant's behalf that the above-quoted statute, in so far as it purports to define the offense of being a "jointist" and provides for the punishment of one adjudged guilty thereof, is unconstitutional. The following language of counsel's brief embodies the substance of their argument in that behalf:

"In order to constitute a crime it is necessary that the act of keeping or maintaining a place must be connected with some overt act which in itself is unlawful, in order to constitute a crime. That the intent to commit a crime is, in itself, unconnected with an overt act, a violation of no law."

Counsel invoke the general rule as stated in Wharton's Criminal Law (11th Ed.) p. 197, as follows:

"The law does not deal with a man's inner feelings and unexecuted purposes and intentions. A mere criminal or guilty intent to do an act which is in and of itself a crime, not connected with an overt act or outward manifestation, is not in and of itself a crime, and with it the law has no concern."

The argument proceeds upon the assumption that the statute seeks only to punish the entertaining of the intent, and not for the committing of any overt act, on the part of the accused. This, we think, is an erroneous assumption. Manifestly the jointist statute strikes at the opening up, conducting, or maintaining of places; "joints," in the common parlance; where the unlawful sale of intoxicating liquor is carried on. It seems to us that it is plainly the opening up, conducting, or maintaining of such places, for which the prescribed punishment is meted out. Of course, the prohibited place could not exist as such without an intent on the part of the accused to make it such a place. But that, it seems to us, does not argue that the lawmaking power is not primarily interested in the prevention of the opening up and maintenance of such places. We are of the opinion that the opening up, conducting or maintaining of the place for the unlawful sale of intoxicating liquor are the overt acts for which the law seeks to punish, and that the intent of the accused is merely incidental thereto; just as intent is incidental to all overt criminal acts, to be considered in determining the question of guilt. We concede that the particular intent to sell intoxicating liquor at a particular place, that is, an intent to sell it generally in the sense of making a business of so doing, at such place, unaccompanied by the overt act of opening up, conducting, or maintaining a place in such manner as to evidence such intent, could not be rendered punishable by legislative enactment. But we do not think such is the meaning of this statute. When one "opens up, conducts, or maintains" a place for the sale of some commodity, he necessarily does so by some overt act manifesting his intention in that regard. We think that without some outward manifestation of such intent, and without the ability to consummate such sales by furnishing and delivering, or causing the furnishing and delivery of such commodity, it could not be said that one "opens up, conducts, or maintains" a place for the sale of such commodity, within the meaning of these words as used in this statute. Counsel for appellant call our attention to, and rely upon, a recent decision of the Oklahoma court in *Proctor v. State* (Cr. App.) 176 Pac. 771, a decision which seems to express views out of harmony with the

conclusion we here reach, though a critical reading of that decision may suggest to some minds that the question as there presented may be differentiated from the one here presented. We are, however, so thoroughly convinced of the soundness of our conclusion in this case, that we would feel constrained to adhere to it rather than follow the Oklahoma decision even though it be not distinguishable from our present case.

[2] Contention is made in appellant's behalf that the judgment is erroneous and that no judgment can be rendered against appellant under this statute, because it fails to specify any place of imprisonment as punishment for the commission of the prohibited act. This contention is answered by the provisions of section 2265, Rem. Code, reading as follows:

"Every person convicted of a felony for which no punishment is specially prescribed by any statutory provision in force at the time of conviction and sentence, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both."

It seems plain therefore, since the jointist statute defines the offense as a felony, that the punishment therefor should be in the penitentiary as was adjudged in this case, even though that statute be silent on the question of the place of imprisonment.

[3] It is further contended in appellant's behalf that the information does not sufficiently plead facts constituting the offense as defined in the statute, because it fails to allege the commission thereof at any particular location in Spokane county; the charge being only that the offense was committed in Spokane county. The argument is that since this offense, when committed, necessarily has a fixed location with some relation to real property, it is necessary in the information to specify such location. This contention may find some support in the older authorities, and possibly even at this day in some jurisdictions; but we think it is answered in this state by the decisions of this court in *State v. Meyers*, 9 Wash. 8, 36 Pac. 1051, wherein it was held that a charge of arson was sufficiently specific as to location when it stated that the crime was committed in Spokane county. It seems plain that the offense here involved could have no more close relationship to some specific location and property than could the crime of arson. Whatever appellant's rights may have been as to his being advised upon the trial as to the exact location of the offense charged, it seems well settled in this state that the information is not rendered defective because of its failure to state the particular location of the commission of the offense within the county of the court's jurisdiction.

It is finally contended that the informa-



tion is insufficient in that it fails to charge the defendant with conducting and maintaining the place as principal or agent. This exact contention was disposed of adverse to the claims here made in appellant's behalf in our decision in *State v. Rousseau*, 191 Pac. 634, just rendered.

We conclude that the judgment must be affirmed. It is so ordered.

HOLCOMB, C. J., and MACKINTOSH, MAIN, and MITCHELL, JJ., concur.

(112 Wash. 53)

STATE v. HESSEL. (No. 15828.)

(Supreme Court of Washington. Aug. 8, 1920.)

1. Intoxicating liquors  $\S$  17—"Bootlegger" statute does not punish mere intent, but overt act.

Laws 1917, p. 60,  $\S$  17h, declaring it a crime to be a "bootlegger," defined as one who carries about with him intoxicating liquor with the purpose of the unlawful sale thereof, is not unconstitutional as an attempt to punish a mere intent, but the overt act of carrying around liquor with the purpose of selling it, as a peddler.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Bootlegger.]

2. Criminal law  $\S$  1213—Bootlegger statute does not provide cruel and unusual punishment.

It cannot be said that Laws 1917, p. 60,  $\S$  17h, in making the carrying around of intoxicating liquor with the purpose of unlawfully selling it a felony, while other sections make its unlawful sale a mere misdemeanor, provides for cruel and unusual punishment in violation of Const. art. 1,  $\S$  8, and Const. U. S. Amend. 8.

3. Criminal law  $\S$  371(10)—Sales competent to prove intent on prosecution for being a bootlegger.

Proof of sales is competent to prove intent on prosecution, under Laws 1917, p. 60,  $\S$  17h, for being a bootlegger.

4. Criminal law  $\S$  873(5)—Requested instruction calling attention to matters in evidence involving offenses not charged held proper.

On a prosecution under Laws 1917, p. 60,  $\S$  17h, for being a bootlegger, carrying about liquor to sell as a peddler, requested instructions that he was not being prosecuted for other things should have been given, where the jury might easily be misled by evidence of sales to show intent, and evidence allowing belief that defendant had solicited orders, or might be maintaining a place for unlawful sales.

5. Criminal law  $\S$  814(3)—Instruction calling attention to matters not in evidence and crime not charged held to tend to confuse.

Instruction on prosecution for bootlegging calling attention to matters on which there was

no evidence and a crime not charged held erroneous and prejudicial as tending to confuse the issue.

6. Criminal law  $\S$  863(1)—Giving additional instructions on court's own motion, after retirement of jury, condemned.

The giving of additional instructions on the court's own motion after the jury had retired and been deliberating, whereas Rem. Code 1915,  $\S$  352, provides for it only on request of the jury, condemned, though it may not have been prejudicial.

Department 1.

Appeal from Superior Court, Franklin County; John Truax, Judge.

Herman Hessel was convicted of being a bootlegger, and appeals. Reversed, and retrial ordered.

Chas. W. Johnson, of Pasco, for appellant.

E. M. Gibbons, of Connell, and C. M. O'Brien, of Pasco, for the State.

MACKINTOSH, J. The defendant was tried and convicted under section 17h, c. 19, Laws 1917, which provides:

" \* \* \* Any person who carries about with him intoxicating liquor for the purpose of the unlawful sale of the same be and is hereby defined to be a 'bootlegger.' Any person convicted of being \* \* \* a 'bootlegger' as herein defined shall be guilty of a felony."

[1] The appellant urges, first, that this section is unconstitutional for the reason that it attempts to provide for the punishment of an intent to do an act, not coupled with an overt criminal act, and bases his argument upon the case of *Procter v. State*, 15 Okl. Cr. 338, 176 Pac. 771. The fallacy of appellant's argument, and the decision upon which he relies, lies in this, that they overlook the fact that the section in question is aimed at the carrying around of liquor for the purpose of selling it, and that it is not the intent which is being punished, but the act of peddling liquor with the intent to sell it. A person cannot be punished for merely possessing an unlawful intent, but he may be punished for acts which are forbidden but are not malum in se if they are coupled with an unlawful intent. The statute is one against the peddling of liquor as a business, and that avocation, connected with the intent of disposing of the liquor, furnishes the overt act which must accompany the intent in order to constitute the crime.

[2] It is also urged against the constitutionality of this section that it violates article 1,  $\S$  8, of the Constitution of the state, and the Eighth Amendment to the federal Constitution, in that it provides for cruel and unusual punishment, the section making it a felony to carry liquor about with the intent of selling it, whereas other sections of

the act merely make it a misdemeanor to sell liquor unlawfully; in other words, that the lesser crime in fact is punished by the severer penalty. It might be that a very plausible argument can be made based on this hypothesis, but the fault lies in that the hypothesis is false. The offenses of selling liquor unlawfully, or possessing it unlawfully, were deemed by the Legislature to merit punishment as misdemeanors, but the engaging in the business of bootlegging, which we have defined as the peddling of liquor with intent to unlawfully dispose of it, was deemed by the Legislature more subversive of the morals of the community than an isolated sale or possession, and we cannot say that a person who is engaged in that business does not deserve severer punishment than one who is convicted of merely making a sale, or having liquor in his possession.

"The states as a part of their police power have a large measure of discretion in creating and defining criminal offenses." 12 C. J. 1185. The Legislature had a right to take into consideration the general experience in attempts to suppress the illegal sale of liquor and to draw upon that experience in determining that persons who carry liquor about with them with the intent to sell it should be more severely punished than persons who have liquor in their possession or might make a sale thereof. The element of intent is a part of the crime of bootlegging, and the Legislature in fixing the punishment considered that. "The purpose of our law is to graduate punishment according to the guilt involved." 1 Wharton, Criminal Law (11th Ed.) p. 13. We see no merit in this objection to the constitutionality of the section.

The recent case of *State v. Burgess*, 191 Pac. 635, had under consideration the companion offense of being a jointist, and this court there arrived at the conclusion that the statute in that regard was constitutional, and we now hold that the statute defining and punishing bootlegging is constitutional.

[3] The appellant urges that evidence was improperly admitted of separate and distinct unlawful sales of liquor. One of the elements of the crime necessary for the state to prove is the purpose for which the liquor was carried about, and in order to show that purpose and intent evidence of various sales was admissible. The case of *State v. Smith*, 103 Wash. 267, 174 Pac. 9, cited by appellant, was a case in which the act charged against the defendant characterized the offense and was proven by proving the act. Here the guilty intent must be proven by acts other than the act of carrying liquor about, and proof of sales was competent to prove that intent. *State v. Raymond*, 24 Conn. 204.

[4] A considerable confusion appears in the record by reason of exceptions taken to the refusal to give requested instructions, and exceptions taken to instructions given.

The appellant requested that the court instruct the jury that he was not being prosecuted for the sale of intoxicating liquor, or with the taking or soliciting of orders for the purpose of selling intoxicating liquors, or with maintaining a place for the sale of intoxicating liquors, and that he could only be convicted of carrying liquor about with him for the purpose of unlawful sale, and that this did not mean "transporting liquor from one given place to another with no intention of sale while being so transported."

In view of the fact that the jury might easily be misled by the evidence of sales which was introduced solely for the purpose of showing intent, and by evidence which might have allowed the jury to believe that the appellant had solicited orders, or that he might be maintaining a place for the unlawful sale of liquor, these instructions should have been given. Although, as a general rule, the court is not required to inform the jury with what crimes the defendant is not charged, we have no question here of requested instructions of a lower offense than that charged, but it was desired to have the court call the jury's attention to matters which involved other offenses, with which the appellant was not charged.

[5] It is also urged that the court erred in giving instruction No. 7, which reads:

"Other sections of the statute under which this prosecution is brought are as follows: It shall be unlawful for any person other than a regularly ordained clergyman, priest, or rabbi actually engaged in ministering to a religious congregation, to have in his possession any intoxicating liquor other than alcohol.

"In any prosecution for the violation of any provision of this act it shall be competent to prove that any person, other than a regularly ordained clergyman, priest, or rabbi actually engaged in ministering to a religious congregation, had in his possession any intoxicating liquor other than alcohol, and such possession and proof thereof shall be prima facie evidence that said liquor was so held and kept for the purpose of unlawful sale or disposition.

"And I instruct you further that it is not necessary for the state in this prosecution to allege in the information that the defendant is not a regularly ordained clergyman, priest, or rabbi actually engaged in ministering to a religious congregation, and it is not necessary for the state to prove in this case that the defendant is not or was not a regularly ordained clergyman, priest, or rabbi actually engaged in ministering to a religious congregation."

The court then goes into the other portion of the section (17h) in which is contained the prohibition against bootlegging; then he proceeds to tell the jury that it is not necessary for the state to prove matters and things contained in the balance of the section which the court had just quoted. This was clearly erroneous and prejudicial, as it tended to confuse the issue before the jury, by calling

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their attention to matters upon which there was no evidence, and to a crime with which the defendant was not charged.

[8] It is next urged as error that after the jury had retired at the conclusion of the argument, and without any request from the jury, or from counsel, and after the jury had been deliberating, the court, on its own motion, called the jury back for additional instructions. Section 352, Rem. Code, provides for further instruction to the jury, and, although the error complained of may not have been prejudicial, it is a practice which ought not to be recommended.

It is finally contended that there is no evidence upon which the verdict of bootlegging could be returned. The evidence shows that a sale was made to the prosecuting witness of bottled whisky in a hotel room at Connell. While the evidence in the case is stronger in proof of the appellant's guilt of unlawfully having liquor in his possession or of having made an unlawful sale of it, there was some evidence tending to prove that he was guilty of bootlegging; that is, of peddling liquor with intent to sell it. There was enough evidence from which the jury might have found that the state had proved that the appellant was engaged in the business of carrying liquor about with the intent to sell it, and that the appellant did more than to have liquor in his possession and sell it.

For the reasons indicated in this opinion, the judgment will be reversed and a retrial ordered.

HOLCOMB, C. J., and PARKER, MAIN, and MITCHELL, JJ., concur.

(111 Wash. 382)

PESHA v. PRATT. (No. 15847.)

(Supreme Court of Washington. July 7, 1920.)

1. Master and servant §82(5) — Evidence held to sustain finding that no wages should be allowed.

In suit to foreclose labor lien claims, evidence held to sustain the trial court's holding that it was the understanding of the parties to defendant's incorporation that no wages should be allowed plaintiff and his assignor for work on the company's plant until it was completed and in operation.

2. Master and servant §82(5)—Labor lien claimant must establish elements of action.

The burden is on the labor lien claimant to establish all the elements of his action.

Department 1.

Appeal from Superior Court, King County, Everett Smith, Judge.

Action by Fred J. Pesho against William H. Pratt, receiver of the Wilcox Lumber &

Logging Company. From a decree for him, plaintiff appeals. Judgment affirmed.

Channing M. Coleman, of Seattle, for appellant.

Thos. N. Swale, of Everett, and Wm. H. Pratt, of Tacoma, for respondent.

MAIN, J. The purpose of this action was to foreclose two labor lien claims. The plaintiff performed the labor covered by one of the claims and the other claim had been assigned to him. The total amount of recovery sought was approximately \$900. The trial before the court without a jury resulted in a decree allowing \$35.32 and directing a foreclosure for this sum. The plaintiff, being dissatisfied with this award, prosecutes the appeal. The facts which gave rise to the controversy may be summarized as follows:

During the month of October, 1918, W. A. Wilcox, Samuel C. Brown, and Fred J. Pesho organized the Wilcox Lumber & Logging Company, a corporation. Wilcox became the president and manager, Pesho the secretary and treasurer, and Brown the vice president. The capital stock of the company was \$40,000. Each of the parties put in \$1,000 in cash. In addition to this, Brown put in \$1,500 worth of sawmill machinery and Wilcox \$14,000 worth of machinery. The purpose of organizing the corporation was to engage in the logging and sawmill business. The parties were first brought together by an advertisement by Brown, which Wilcox answered. Pesho was induced to invest through Brown. After the parties met and talked the matter over they proceeded to organize the corporation and acquired the amount of stock specified. The balance of the capital stock was not subscribed. Soon after the organization of the corporation the work of assembling the machinery and the construction of the mill began. At that time it was contemplated that it would take about 90 days to get the mill ready for operation. It developed that it would take a considerably longer time. Pesho, not being entirely satisfied with his investment and the way the construction of the plant was progressing, drew, in his own handwriting, on January 15, 1919, a memorandum and presented it to Wilcox as president of the company for signature and it was thus signed. Brown added his name to the writing. This writing will be subsequently referred to. From the time the work of construction began, Brown and Pesho worked about the plant, which was completed and ready for operation on or about April 1, 1919. On the 22d of that month the mill was destroyed by fire. It was operated from some time early in April until the time of its destruction, and Pesho and Brown continued to work therein. The corporation being in an insolvent condition after the mill was destroyed, a receiver was

appointed. Pesha and Brown each filed a notice of claim of lien. The question of fact is whether they were to draw wages from the time the construction work of the mill was entered upon or from the time it was completed and in operation. Upon this question the testimony is conflicting. The appellant claims that they were to be allowed wages from the time they first began work, but that they were not to be paid until the mill was in operation. The respondent's contention is that the understanding between the parties was that no one of them should be allowed any compensation for any work done until the mill was completed and in operation.

[1] Without reviewing the evidence in detail, it may be said that we think the holding of the trial court that it was the understanding of the parties that no wages should be allowed until the mill was completed and in operation must be sustained. After a careful consideration of the record, we are in entire accord with the views of the trial judge expressed orally at the conclusion of the case, as shown in the following excerpt from his opinion:

"I am well satisfied that Mr. Pesha and Mr. Brown originally started out with the intention of contributing without compensation their services until the mill was in operation, anticipating it would be for 90 days, and it lasted too long and they got tired of it. And when they finally wound up and the business collapsed they got together and thought it would be a good plan to put in a claim for wages, which, in my judgment, they never anticipated getting when they started out. There is no showing that either party ever demanded wages, and they did not have their names in the books as employes. But when the mill was completed then, in accordance with the understanding, their names went on the pay roll for a brief period, and they were entitled to wages."

It is claimed, however, that the writing above referred to indicates a contrary intention. It recites:

"Wilcox Logging & Lumber Company does hereby agree to give F. J. Pesha steady work at not less than \$5 per day at said company's mill in consideration of said F. J. Pesha being a stockholder in said company, and to be employed for duration of said F. J. Pesha and

holding stock in said Wilcox Logging & Lumber Company; said stock and position transferable."

This memorandum, as already stated, was prepared by Pesha and signed "Wilcox Logging & Lumber Company," by Wilcox and by Brown. Pesha, having become dissatisfied, was desirous of getting his money out of the corporation, and apparently conceived the idea that if he had some memorandum showing that the stock and position were transferable it would aid him in this respect. The memorandum was made approximately three months after Pesha and Brown began work on the construction of the mill, and yet contains no recital covering the matter of wages prior to that time. It fixes no time when the employment covered by it was to be begun, but recites that the employment was for the duration of the holding of the stock and that the stock and position were transferable. The reason for writing the memorandum and causing it to be signed, as stated by Pesha in his testimony, is as follows:

"I wrote the contract and took it to Mr. Wilcox and asked him to sign it and I asked him if that was all right. And when I presented it to him he said, 'What is the idea? It is understood,' he said, 'Is it not, that you and Brown are going to get steady work?' I said, 'Yes; but in case I should want to dispose of my stock I would have a position to transfer with it.'"

As we view the writing, it is not inconsistent with the view that wages were not to be paid until the mill was completed and in operation.

[2] There is some argument in the briefs over the question of the burden of proof. This, however, is not very material in the present case. Under the issues made by pleadings, the burden was upon the appellant to establish all the elements of the action. If it be assumed, arguendo, that he did not carry this entire burden, the result would be the same.

The evidence amply sustains the holding of the trial court. The judgment will be affirmed.

HOLCOMB, C. J., and PARKER, MACK-INTOSH, and MITCHELL, JJ., concur.

(111 Wash. 398)

**STOLZE v. STOLZE.** (No. 15819.)

(Supreme Court of Washington. July 7, 1920.)

**Judgment** ¶338, 407(2)—Exercise of one of two statutory processes for vacation of judgment forecloses other.

The statutory processes for seeking a vacation of judgment, one by motion in the original action, the other by independent equitable suit, are concurrent, and exercise of one forecloses use of the other.

Department 2.

Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Suit by Ida M. Stolze against Florence Stolze. From denial of defendant's motion to vacate default judgment, defendant appeals. Judgment affirmed.

See, also, 191 Pac. 641, 642, 644.

Kelly & MacMahon, of Tacoma, for appellant.

P. L. Pendleton, of Tacoma, for respondent.

**PER CURIAM.** The respondent commenced suit against the appellant in Pierce county, Wash., to set aside a certain deed which had previously been made to the appellant, involving lots 1 to 8, inclusive, block 26, Cascade Park addition to the city of Tacoma, Wash., and to quiet the title to such property in the respondent. There was a judgment by default wherein the deed to appellant was canceled and annulled and the title quieted in respondent. Thereafter the appellant, defendant below, commenced an independent action against the respondent here for the purpose of vacating and setting aside the judgment in this action. After a hearing in the independent action the court entered an order refusing to vacate and set aside the judgment rendered on default. Thereafter the defendant here made and filed in this case her motion to vacate the judgment because the court had no jurisdiction to make it; her motion was based on the files of the case. The plaintiff answered the motion by setting up the above-mentioned independent action to vacate the judgment. After a hearing the court denied the motion to vacate, and from this order or judgment the defendant appeals.

The objects of the independent action and the motion herein were identical—to secure the vacation of the judgment rendered herein. Our statutes appear to afford two processes for seeking the vacation of a judgment; one by motion in the original action and the other by an independent equitable suit. The remedies are concurrent, and the exercise of the one forecloses the use of the other. In the case of *Boylan v. Bock*, 60 Wash. 423, 111 Pac. 454, we said:

"A person against whom a judgment is taken without jurisdiction may move against the judgment, or may prosecute an independent action to procure its vacation, but the two remedies are concurrent, and an adverse judgment in one proceeding is a bar to an action for similar relief under a different name or in a different form. This question has so often been decided by this court that it is no longer an open one."

So in this case the defendant against whom the judgment ran brought an independent action to vacate the judgment. The judgment of the lower court was against her. She cannot now attempt to accomplish the same thing by motion in this case. Her sole remedy is an appeal from the adverse ruling in the independent action.

The judgment of the lower court is affirmed.

(111 Wash. 699)

**STOLZE v. STOLZE et al.** (No. 15821.)

(Supreme Court of Washington. July 7, 1920.)

Department 2.

Suit by Ida M. Stolze against C. H. Stolze and others. From an adverse judgment, defendants appeal. Affirmed.

See, also, 191 Pac. 642, 644.

Kelly & MacMahon, of Tacoma, for appellants.

P. L. Pendleton, of Tacoma, for respondent.

**PER CURIAM.** The facts and questions of law involved in this appeal are substantially the same as those involved in the case of *Stolze v. Stolze*, 191 Pac. 641 (Serial No. 15819), just decided. What we said in that case is applicable to this, and the disposition of that case must control the disposition of this. For the reasons given in that case the judgment here appealed from is affirmed.

¶ For other cases see same title and KEY-NUMBER in all Key-Numbered Digests and Indexes  
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(111 Wash. 393)

**BURNS v. STOLZE.** (No. 15820.)

(Supreme Court of Washington. July 7, 1920.)

**1. Judgment  $\S$ 17(9) — Failure to serve or publish summons within time after filing complaint did not void judgment.**

Judgment for plaintiff by default in suit to set aside deed *held* not void because the summons was not served or published within 90 days after filing of the complaint.

**2. Process  $\S$ 96(2)—Affidavit insufficient to authorize legal service by publication.**

Affidavit for service of summons by publication, failing to state existence of facts constituting any one of the seven grounds specified by Rem. Code 1915,  $\S$  228, for service by publication, was insufficient to authorize legal publication of summons.

**3. Judgment  $\S$ 17(9) — Judgment reciting summons served as provided by law not void on account of defective affidavit.**

Default judgment against defendant, reciting that the summons in the action was served on defendant in the manner provided by law, was not necessarily void simply because the affidavit in the record for service by publication and on which publication of summons was based was fatally defective, not stating any one of the seven grounds for service by publication embraced in Rem. Code 1915,  $\S$  228.

**4. Judgment  $\S$ 162(2) — Petition to vacate with answer showed petitioner was brought into court only by defective service, and overcame presumption from recitals of judgment.**

Petition for vacation of default judgment against defendant and answer thereto, read together, *held* to show conclusively that the only attempt to bring the petition into court in the original action was by virtue of a summons served by publication based on affidavit defective in that it did not set forth any one of the seven grounds for such service embraced in Rem. Code 1915,  $\S$  228, thus overcoming the presumption of jurisdiction from the judgment's recital that the summons was served as provided by law, particularly where the certificate of the court to the statement of facts recited the affidavit was the only one on file on which the judgment rested.

**5. Pleading  $\S$ 212—Going to trial on merits waived demurrer.**

Where, after answer was filed and served, defendant asked permission to withdraw it to interpose a demurrer to the petition, which was done, but the record does not show any disposition of the demurrer, but that the case proceeded to trial on the merits by taking of oral testimony, the demurrer was waived, and the case heard on petition and answer.

**6. Pleading  $\S$ 214(3) — Demurrer admitted truth of statement in petition.**

Demurrer admitted the truth of a statement in petition for vacation of judgment that no other service on plaintiff, defendant in the former case, had been made except such as was shown in the files.

**7. Appeal and error  $\S$ 172(1)—Judgment  $\S$ 490(3)—Void default judgment may be attacked at any time.**

Default judgment against defendant, void for lack of jurisdiction because service of summons by publication was based on affidavit insufficient under Rem. Code 1915,  $\S$  228, may be attacked at any time as on appeal in equitable suit to vacate, without the question having been called to the attention of the court.

**Department 2.**

Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Suit by Florence Burns, formerly Florence Stolze, against Ida M. Stolze to vacate default judgment. From judgment denying relief, plaintiff appeals. Reversed and cause remanded, with directions to vacate.

See, also, 191 Pac. 641, 644.

Thos. MacMahon and Guy E. Kelly, both of Tacoma, for appellant.

P. L. Pendleton, of Tacoma, for respondent.

**BRIDGES, J.** Prior to July 17, 1919, Ida M. Stolze, the respondent here, brought suit in the superior court of Pierce county, Wash., against Florence Stolze (now by marriage Florence Burns), the appellant here, to set aside a certain deed theretofore made to her, covering lots 1 to 8, inclusive, block 26, Cascade Park addition to the city of Tacoma, Wash., and to quiet title in her (Ida M. Stolze). Thereafter the court entered judgment by default in her favor against Florence Stolze, canceling and annulling the deed mentioned and quieting title as prayed. This is an independent suit or proceeding in equity by Florence Burns to vacate and set aside the judgment so made.

In her petition to vacate she alleged, among other things, the commencement of the suit above mentioned and the entry of the judgment therein by default; that during all the times mentioned she was absent from the state of Washington and not a resident thereof; that there was in said original action a publication of summons against her and that no service was ever made upon her except by publication of summons. The petition then proceeds to set out various excuses why she did not appear and defend. The respondent, Ida M. Stolze, answered this petition, and, among other things, admitted the allegations to the effect that Florence Stolze was a nonresident of the state of Washington and during all of the times mentioned she was not therein, and that no service was had upon her in the original action other than by publication of summons. Later the respondent demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action or to justify any relief, and at the time of serving and filing the demurrer she moved the court for permission to withdraw her answer for the purpose of

interposing the demurrer. The record fails to show any order of the court permitting the withdrawal of the answer, or any order on the demurrer. The court proceeded to hear the case and take testimony upon the pleadings as indicated. After such trial and hearing the court made a judgment denying the petition to vacate, from which Florence Burns has appealed.

The trial court was of the opinion that no sufficient excuse had been shown for failure to appear and defend the action, and in this conclusion we concur, if it be determined that appellant was properly brought into court.

[1] The appellant, however, contends that the judgment was void because the court did not have any jurisdiction to enter it. This contention is based largely upon two grounds: First, because the summons was not served or published within 90 days after the filing of the complaint; second, because the affidavit for publication of summons was defective. The first objection cannot be sustained. *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049; *State ex rel. Teeter v. Superior Court*, 188 Pac. 391. The second ground for reversal is of a more serious nature. Section 228, Rem. Code, provides that when the defendant cannot be found within the state, and upon affidavit being made and filed to the effect that the defendant is not a resident of the state or cannot be found therein, and that a copy of the summons had been mailed to him at his place of residence, if known, "and stating the existence of one of the cases herein-after specified," the service of summons may be by publication thereof. The statute sets out seven instances where the service may be by publication. The affidavit in this case fails to state the existence of facts contained in any one of the seven grounds, and for this reason it is contended that the court did not obtain jurisdiction.

In the case of *Felsing v. Quinn*, 62 Wash. 183, 113 Pac. 275, in discussing this identical question, we said:

"An attempted affidavit for service by publication which entirely omits allegations expressly required by the statute is without vitality or force, and when filed leaves the party, on whose behalf it is made, in no better position than if no affidavit had been filed. \* \* \* Where jurisdiction of a defendant depends upon service by publication, the making of the affidavit for publication, in strict compliance with the statute, is as essential to obtaining such jurisdiction as the publication of the summons itself, and an affidavit which does not contain all the statements specifically required by the statute is not sufficient to authorize publication of summons or confer jurisdiction." *Lutkens v. Young*, 63 Wash. 452, 115 Pac. 1038; *Pullman v. Pullman*, 92 Wash. 120, 158 Pac. 746.

[2] Plainly, the affidavit in this instance did not comply with the statute and was in-

sufficient to authorize a legal publication of summons. But the respondent attempts to meet this situation by showing that the judgment sought to be vacated recited the default of the defendant, appellant here, and "that the summons in said action was served on the defendant in the manner provided by law," and contends that under the previous decisions of this court such a recital in the judgment is sufficient to show that the court obtained jurisdiction in some manner. This court has consistently held that recitals in a judgment that due and legal service of process had been made as provided by law will overcome any previous showing in the record of defective or insufficient service, and if one would overcome the presumption of jurisdiction resulting from such recitals he must make some showing that the only service on him was the defective service shown in the record.

In the case of *Nolan v. Arnot*, 36 Wash. 101, 78 Pac. 463, this court, discussing the question involved here, said:

"It has been the uniform holding of this court that the recitation in a judgment of jurisdictional facts, sufficient to give the court jurisdiction, \* \* \* is proof of such jurisdiction."

In the case of *Peterson v. Lara*, 46 Wash. 448, 90 Pac. 596, the identical question involved here was discussed, and we there said:

"If it be conceded that the affidavit for service by publication was defective, and this is the only objection urged against the jurisdiction, yet the judgment recites that due service of process was made, and in such cases the presumption of jurisdiction is not overcome by any defects in the record."

In the case of *Ballard v. Way*, 34 Wash. 116, 74 Pac. 1067, 101 Am. St. Rep. 993, it was said:

"The judgment shows upon its face that the defendants had been served as required by law. In order to avoid the judgment, it devolved upon the respondent to show that no legal service was made, and that the court had no jurisdiction."

[3-6] The doctrine thus established has been followed by this court in a great many cases. It follows, therefore, that the judgment here is not necessarily void simply because the affidavit in the record, and upon which publication of summons was based, is fatally defective. But the testimony showed that appellant was at all times a nonresident of the state, and the petition for the vacation of the judgment alleged that at all times she was a nonresident of the state, and "that the complaint in said action was filed January 15, 1919, summons by publication commenced May 6, 1919, and no service was made upon this defendant therein other than by said service of publication," and the answer to this petition admitted that allegation of the petition. We think that the petition and

the answer thereto, read together, show conclusively that the only attempt to bring the petition into court in the original case was by virtue of the published summons, based upon the defective affidavit. It is true that after this answer was filed and served the respondent asked permission of the court to withdraw it for the purpose of interposing a demurrer and that a demurrer was interposed; but the record does not show any disposition of the demurrer, but does show that the case proceeded to trial upon its merits by the taking of oral testimony. Manifestly, the demurrer was waived and the case was heard upon the petition and answer. In no event was the demurrer well taken, because it necessarily admitted the truth of the statement in the petition that no other service had been made except such as is shown in the files of the case. In addition to this, the certificate of the court to the statement of facts recites that the affidavit for publication found in the files was the "only affidavit for publication of summons on file in said cause and the affidavit upon which the judgment sought to be vacated rests." This condition of the record is sufficient to overcome the presumption of jurisdiction as a result of the judgment recitals. *Holly v. Monro*, 55 Wash. 811, 104 Pac. 508, 133 Am. St. Rep. 1028; *Hembree v. MacFarland*, 55 Wash. 605, 104 Pac. 837; *Bauer v. Widholm*, 49 Wash. 310, 95 Pac. 277; *Gould v. White*, 54 Wash. 394, 103 Pac. 460.

We do not find any merit in the respondent's motion to strike the briefs herein.

[7] The record seems to indicate that the jurisdictional question which we have discussed was not pressed on the attention of the trial court. However, the question is involved, and if the judgment is void it may be attacked at any time, and it is necessary that we determine the question, although it may not have been called particularly to the attention of the trial court.

The judgment of the lower court is reversed and the cause is remanded, with directions to the trial court to make a judgment vacating the default judgment in question.

HOLCOMB, C. J., and FULLERTON, MOUNT, and TOLMAN, JJ., concur.

(111 Wash. 697)

**STOLZE et al. v. STOLZE et al.** (No. 15822.)

(Supreme Court of Washington. July 7, 1920.)

Department 2.

Action by C. R. Stolze and others against Ida M. Stolze and another. From an adverse judgment, petitioners appeal. Reversed and cause remanded, with directions.

See, also, 191 Pac. 641, 642.

Kelly & MacMahon, of Tacoma, for appellants.

P. L. Pendleton, of Tacoma, for respondents.

BRIDGES, J. Some time prior to April 23, 1919, the respondent Ida M. Stolze instituted suit in the superior court of Pierce county, Wash., against the appellants here and defendant North Pacific Bank. None of the defendants in that case appeared except the North Pacific Bank. While the complaint in that action is not before us, it may be gleaned, however, from the record that Ida M. Stolze and C. R. Stolze were husband and wife, and Florence Stolze (now by marriage Florence Burns) was the daughter of C. R. Stolze by a former marriage; that the plaintiff Ida M. Stolze sought judgment against her husband for separate maintenance and support; that prior to the commencement of the suit the plaintiff and her husband had entered into three written contracts for the sale of certain real property, which contracts were placed in escrow with the defendant bank, which was to collect the various deferred payments, and that at the same time deeds were made and deposited in escrow with the bank to be delivered to the purchasers when full payment had been made, and that thereafter C. R. Stolze assigned these contracts to his daughter, Florence Burns, née Stolze, and authorized her to collect from the bank any and all payments thereafter made upon them. On April 23, 1919, judgment by default was entered in that cause in favor of the plaintiff therein Ida M. Stolze, wherein she was awarded separate maintenance and support, and which canceled the assignments of the contracts made by C. R. Stolze to his daughter Florence, and adjudged that the plaintiff Ida M. Stolze and her husband, C. R. Stolze, were the owners and entitled to receive the payments to be made on account of such contracts, and it directed the bank to transfer such accounts on its books and place the same to the credit of C. R. Stolze and wife, the plaintiff herein. The plaintiff was also given a judgment against her husband in the sum of \$386.50. It further provided that the bank should deliver the contracts of sale and escrow deeds to the plaintiff Ida M. Stolze.

After the entry of such judgment and during the month of August, 1919, C. R. Stolze and his daughter, Florence Burns, instituted this action against Ida M. Stolze and the North Pacific Bank for the purpose of setting aside the judgment above mentioned in favor of Ida M. Stolze. The petition for vacation, while mentioning jurisdictional grounds, was mainly rested upon the merits of the case and presented excuses for not appearing in the action and defending the same. The respondent was duly brought into the action, but the record does not disclose whether service of summons or notice was made on the defendant North Pacific Bank. At any rate, that bank did not appear in the action. Later Ida M. Stolze appeared and answered the petition to vacate. Still later she demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action or to justify any relief, and at the same time she moved the court to be permitted to withdraw her answer for the purpose of interposing the demurrer. The record does not disclose any disposition of



either the motion or the demurrer. Thereafter the matter came on for trial before the court and testimony was taken, and the court on the 11th of February, 1920, entered an order denying the motion to vacate the judgment. From this order the petitioners C. R. Stolze and Florence Burns have appealed.

This is a companion case with the case of *Burns v. Stolze*, 191 Pac. 642, just decided, and the entire proceeding in this case is substantially the same as in the foregoing case. The affidavit for publication of summons contains the same defects; the petition for the vacation of the judgment and the answer and demurrer to the petition are substantially the same as in the previous case, and this case was rested for the most part upon the testimony taken in that case. What is said in *Burns v. Stolze*, supra, is applicable to the facts and circumstances of this case, and the disposition of that case must control the disposition of this one. There we held that the court should have vacated the default judgment. We hold here that the default judgment in this case, in so far as it affects these appellants, should have been vacated and set aside.

The judgment is reversed and the cause remanded, with directions to the lower court to make and enter an order vacating and setting aside the judgment in the original case, in so far as it affects the appellants here.

FULLERTON, MOUNT, and TOLMAN, JJ.,  
concur.

(56 Utah, 533)

### ROSE v. GARN. (No. 3481.)

(Supreme Court of Utah. July 10, 1920.)

**Specific performance** §58—Vendor not entitled where agreement provides for liquidated damages on buyer's breach.

Under an agreement whereby abstract and deed were placed in escrow and were to be delivered to grantee "upon payment" of certain amounts and providing for forfeiture of sums paid as liquidated damages, on buyer's breach, held, that failure of grantee to make one of such payments terminated the transaction, and vendor was entitled only to retention of installments paid and repossession of the property and could not specifically enforce the agreement as a contract of sale of the property.

Appeal from District Court, Box Elder County; J. D. Call, Judge.

Action by Thomas J. P. Rose against M. A. Garn. Judgment for defendant, and plaintiff appeals. Affirmed.

Walters & Harris, of Logan, for appellant.  
W. J. Lowe, of Brigham, for respondent.

CORFMAN, O. J. Plaintiff commenced this action against the defendant to compel the specific performance of a contract made August 15, 1918, with respect to real property situate in Box Elder county, Utah, and

certain farming implements used in connection therewith. Attached to and made a part of plaintiff's complaint was the contract. A deed for the real estate and a bill of sale for the personal property were made by the plaintiff as vendor to the defendant as vendee simultaneously with the contract and placed with the Bank of Garland, Utah, as an "escrow holder," to be delivered to the defendant "upon payment to the said escrow holder of the sum of \$29,000, as follows, to-wit: \$500.00 September 1, 1918, \$28,500.00 on or before January 1, 1919." Said contract or escrow agreement between the parties further provided:

"In the event that said payments are not made when due, or thirty days thereafter, said deed, abstract, and other papers deposited with this agreement shall become null and void and all sums of money theretofore paid by the grantee shall be forfeited to the grantors as liquidated damages."

There are other provisions in the contract to the effect that the defendant shall be entitled to the immediate possession of the property, and that defendant shall pay all taxes, assessments, water charges, or rents assessed, levied, or charged against the land or water stock during the life of the contract except for the year 1918. It is further alleged in substance by the amended complaint of the plaintiff that immediately after the execution of the contract by the parties defendant paid \$500 on the purchase price (\$29,000) of the property and entered into the possession of the same and thereafter on September 1, 1918, pursuant to the terms of the contract, made a further payment of \$500; that the defendant continued in possession of the property until on or about February 4, 1919, at which time defendant attempted to repudiate the agreement and refused to proceed further under the same.

The prayer of the complaint is for specific performance of the contract, for judgment against the defendant in the sum of \$28,500, and that a vendor's lien be declared against the property; that the property be sold to satisfy the same, and for general equitable relief.

The defendant filed both a general and special demurrer to the amended complaint, and the demurrer being sustained the plaintiff refused to further plead, whereupon a judgment of dismissal was entered by the district court from which the plaintiff appeals.

Necessarily, the case involves a construction of the contract sued upon, and the only question raised for our determination on the appeal is whether or not the judgment of dismissal entered by the district court is to be sustained.

The defendant contends that his failure to make any further payment on the purchase price of the property or to further perform,

under the provisions of the contract, and the forfeiture of the sum paid as provided for therein, relieved him from further obligation or liability to the plaintiff. The plaintiff insists that by the defendant's failure to further perform the conditions of the contract he was not confined in his remedy against the defendant to a retention of the money paid as liquidated damages, but that he had an election of remedies, viz.:

"That at his election he may (1) specifically enforce the contract, or (2) one at law to recover the purchase price remaining due, or (3) re-enter and take possession of the lands and recover damages for the breach of the contract."

In the present case, as pointed out, plaintiff sues for specific performance and general equitable relief. Evidently the district court took the view in passing on the defendant's demurrer to the plaintiff's complaint that, under the provisions of the contract in question, upon the failure of the defendant to make further payments on the purchase price of the property or to further perform, the plaintiff was limited in his rights to the retention of the installments then paid and to repossession of the property. It is quite true that courts have generally held that forfeiture clauses in contracts affecting the sale of real property are usually made for the sole benefit of the vendor as contended for by plaintiff in this instance. Counsel for plaintiff have cited us to numerous cases and authorities upon which they rely in support of their contention. Among them is the leading case of *Wilcoxson v. Stitt*, 65 Cal. 596, 4 Pac. 629, 52 Am. Rep. 310, followed in the following cases: *Freeman v. Griswold*, 4 Cal. Unrep. Cas. 256, 34 Pac. 327; *Bohart v. Investment Co.*, 49 Kan. 94, 30 Pac. 180; *Shermere v. Pritchard*, 104 Wis. 287, 80 N. W. 458; *Meagher v. Hoyle*, 173 Mass. 577, 54 N. E. 347; *Steel v. Long*, 104 Iowa. 39, 73 N. W. 470; *Maffett v. Railway Co.*, 46 Or. 443, 80 Pac. 489; *Westervelt v. Huiscomp*, 101 Iowa, 196, 70 N. W. 125; *Cullen v. Land Co.* (Colo.) 184 Pac. 303; *Smith v. Mohn*, 87 Cal. 489, 25 Pac. 696; *Reed v. Hickey*, 13 Cal. App. 136, 109 Pac. 38; *Newton v. Hull*, 90 Cal. 494, 27 Pac. 429; *North Stockton v. Fisher*, 138 Cal. 100, 70 Pac. 1082; *Fouts v. Foudray*, 31 Okl. 221, 120 Pac. 960, 38 L. R. A. (N. S.) 256, Ann. Cas. 1913E, 301; *Lumber, etc., Co. v. Town Co.*, 51 Kan. 394, 32 Pac. 1100. In the case of *Wilcoxson v. Stitt* the contract before the court was one wherein the plaintiff agreed to purchase, for a stipulated price payable in installments, certain real property on or before a specified date. The contract in legal effect was an absolute sale and contained the following provision:

"In the event of failure to comply with the terms and all the conditions hereof by the party of the second part the party of the first part shall be released from all obligations, either in

law or equity, to convey said property or any part thereof, and the said party of the second part shall forfeit all right thereto and this agreement shall be void."

Upon failure to make payment of all of the installments, the plaintiff brought an action to recover the balance of the unpaid purchase price. The California court held the plaintiff was entitled to a recovery. Justice Thornton, the writer of the opinion, in speaking of the provision of the contract above quoted, took occasion to say:

"That such agreement is void only at the election of the plaintiff, who can avoid it or enforce it at his option."

Similar views are expressed in the opinions of the courts in the other cases cited by plaintiff's counsel, and it may be admitted that the courts have with very few exceptions adhered to and followed the rule of construction laid down in the *Wilcoxson* Case in the interpretation of similar contracts. Nevertheless, in every case of this character, like in all other contracts, the question to be determined is one of intention of the parties. No court has ever held that the parties may not agree between themselves as to the measure of damages that shall be sustained upon the breaching of a contract by either party. In the contract we have under consideration, it is to be observed that there are no express words constituting a contract of sale between the parties. In so far as appears upon the face of the agreement itself, and from that we must determine the relative rights of the parties under it, no sale of the property affected by it was intended to be consummated by its provisions. As we construe the agreement, in its last analysis, the parties intended by its terms that the plaintiff should place a deed for the real estate and a bill of sale for the personal property in escrow with the bank of Garland to be delivered to the defendant upon the full payment of the balance of the purchase price agreed upon, \$29,000 payable in installments. If all payments were not made as stipulated, the deed and bill of sale were to be returned to the plaintiff and all sums theretofore paid by defendant were to be forfeited to and retained by plaintiff as liquidated damages, in which event the contract between the parties was to become null and void. Under the foregoing provisions alone, without a word expressed in the contract itself, and without any act done between the parties by which their intention might be otherwise inferred, we should be constrained to hold that the full measure of plaintiff's right to recover from the defendant would be the repossession of the property and the retention of such sums as had already been paid in installments under the contract. But the escrow agreement goes farther, and the language employed by the parties clearly differentiates this contract from

any of those considered by the courts in the foregoing cases cited and relied on by the plaintiff. It contains, among other things, this provision:

"The grantee further agrees to plow during the fall of 1918 what is known as the lower field as far as the weather conditions will permit."

As heretofore remarked, it is the province of the courts in placing constructions upon contracts to arrive at the intention of the parties. In the light of human affairs generally, and particularly in the dealings of men in the ordinary business transactions of life, it would be extremely difficult to conceive of the vendor of real property directing the purchaser as to when, or what use or disposition is to be made of it, more especially in the way of plowing it for crops. We do not think this provision of the contract would have been written had the parties contemplated that an absolute purchase and sale of the property was being made by the transaction between them. Nor do we think it may now be contended with any degree of consistency that this provision was made for the benefit of the plaintiff unless it be implied that upon failure of the defendant to meet the installments the bank was to return to plaintiff the instruments of transfer undelivered and thereupon no further liabilities on the part of either party should continue.

As we view the record, the judgment of dismissal by the district court must be sustained. It is so ordered. Defendant to recover costs.

WEBER and THURMAN, JJ., concur.

FRICK, J. I concur both in the reasoning and in the conclusions reached by the CHIEF JUSTICE. In my judgment the doctrine laid down in the case of Wilcoxson v. Stitt should not be extended by implication or construction. That case and the cases which follow it go to the very limit of following a technical rule and, as I view it, lose sight of the intention of the parties. In the case at bar, the parties to the contract clearly contemplated that the defendant might make default in paying the full purchase price, and in view of that fact provided what the consequences of such default should be. The provision of the contract respecting that matter is as much a part of the contract as any other provision and is binding upon them and should be respected by the courts. In case a controversy arises between the parties to a contract respecting its purport or meaning, courts are required to consider all the language used by the parties in determining their intention. As an aid in arriving at such intention, the language must be viewed and considered in connection with the circum-

stances surrounding the parties when the contract was entered into as well as the subject-matter of the contract, and force and effect must be given to all the language. Technical words or phrases, if any are used, must not alone be given controlling force and effect unless from a consideration of the whole contract such was the manifest intention of the parties. Parties to a contract, unless prevented by public policy or some positive law, have the same right to determine and fix the consequences of a breach of the contract that they have to agree upon any other proper provision, and, in case they have so agreed, courts must enforce their agreement. In that regard the case at bar, in my judgment, falls squarely within the rule laid down in the case of Foxley v. Rich, 35 Utah, 162, 99 Pac. 666.

GIDEON, J. I concur in the conclusion of the CHIEF JUSTICE. I do so, however, solely on the ground that the contract in question is, in my judgment, nothing more than an option. There is no promise or undertaking on the part of the optionee to pay the purchase price named in the contract. To my mind the forfeiture clause discussed by the CHIEF JUSTICE would not defeat the right of plaintiff to specific performance if there was any assumption or agreement by the defendant to pay the purchase price.

(56 Utah, 564)

YOUNG v. CORLESS, Sheriff, et al.  
(No. 3462.)

(Supreme Court of Utah. July 21, 1920.  
On Petition for Rehearing,  
July 29, 1920.)

1. Public lands  $\S$  136—Certificates of sale of state land constituted mortgageable interest, and assignment thereof was equitable mortgage subject to redemption.

Certificates of sale of land by the state under Comp. Laws 1917,  $\S$  5589, represented an interest in land that could be mortgaged, and an assignment of such a certificate as security for a debt constituted an equitable mortgage of the interest of the mortgagor in real estate, and not a pledge of personalty, and after a sale of such certificates by the creditor, the debtor, or his personal representative, could redeem under sections 6940, 6941, in view of sections 5597, 5848, 5862.

2. Public lands  $\S$  136 — Administratrix of mortgagor could waive statutory notice of foreclosure sale of certificate.

The administratrix of mortgagor, who stood by while certificates of sale of state land, issued under Comp. Laws 1917,  $\S$  5589, were sold as personalty and bid on them without objection, thereby acquiesced in the sale, and waived the notice prescribed by the statute for sales of real estate under mortgage foreclosure.<sup>1</sup>

<sup>1</sup> For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

<sup>2</sup> Park v. Parsons, 10 Utah, 330, 37 Pac. 570.

**3. Public lands §136—Right of redemption not lost by permitting sale of interest in school land to be treated as sale of personalty.**

Where certificates of sale of state land issued under Comp. Laws 1917, § 5589, were assigned as security for debt, and it was agreed that such certificates might be sold either at private or public sale by the creditor, and after the death of the debtor the certificates were treated as personal property and sold as a pledge under a decree of court, the personal representative of the debtor was not estopped to deny that the certificates were personal property, and could redeem from the sale, under sections 6940, 6941.

**4. Mortgages §526(1)—No approval by court necessary on return of sheriff selling land at foreclosure.**

An order of court approving a sale of land under mortgage foreclosure upon return to the court by the sheriff would be of no binding effect upon any one, since there is no provision in the statute requiring a sheriff to make a return.

**5. Public lands §136—Purchaser at foreclosure entitled on redemption to money paid on certificates of sale of state land.**

Upon redemption of certificates of sale of state land, which were sold under foreclosure, the purchaser was entitled to installments paid the state to keep the contracts alive.

**6. Public lands §136—Judgment in proceeding to redeem state land should not direct that it be clear of all incumbrances.**

In an action to redeem certificates of sale of state lands from mortgage foreclosure sale, the court, on finding for the plaintiff, should not have determined the status of the property, and directed in its judgment that the property redeemed "shall be free and clear of all liens and incumbrances of every character connected with or growing out of" proceedings in which the certificates were ordered sold.

**Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.**

Proceeding by E. T. Young, administrator of the estate of George B. Greenwood, deceased, against John Corless, Sheriff of Salt Lake County, and the State Bank of Beaver County. Judgment for plaintiff, and defendants appeal. Affirmed in part and remanded with directions to modify.

C. S. Varian, of Salt Lake City, for appellants.

Skeen & Skeen, of Salt Lake City, for respondent.

**GIDEON, J.** In this proceeding plaintiff seeks to redeem from judicial sale certain certificates of sale of real property. No evidence was heard by the court, but it was agreed by counsel that the allegations of the answer should be accepted as the facts in the case, and the matter was submitted to and determined by the court on the admissions

and allegations contained in the answer. The facts out of which the controversy arose are as follows: In February, 1913, one George B. Greenwood, now deceased, gave his note to the defendant bank for money loaned, and at the same time assigned and delivered as security for said loan a certificate of sale of certain school lands from the state of Utah, known as certificate No. 8110, and dated July 4, 1904. This certificate of sale purported to sell to said Greenwood in the manner provided by law to be paid for in 10 annual payments the agreed price as stated therein. The certificate further provided that said Greenwood, his assigns, heirs, or legal representatives, upon making all payments provided for therein, and upon the surrender of the certificate, should receive patent from the state for the lands therein described. It was also provided that if default be made in the payments the certificate would be forfeited, and the title to the lands revert to the state. It further appears in the answer that it was agreed between the defendant bank and said Greenwood that upon his failure to repay the money borrowed the defendant might sell the said certificates at public or private sale without notice, and that the defendant might become the purchaser. It likewise appears that on or about the same date Greenwood, in consideration for a loan to him by the Bank of Pioche, gave his note for money borrowed, and assigned and delivered to that bank another certificate, No. 9518, for the purchase of land under like provisions and conditions as in the loan made by the defendant bank. The note of the Bank of Pioche was assigned to the defendant, State Bank of Beaver County. It further appears that the notes were not paid. Afterwards Greenwood died, and his widow, Ida P. Greenwood, was appointed administratrix of his estate. Upon presentation of claims to the administratrix for the indebtedness she refused to act upon the same, and thereupon suit was instituted against her as administratrix and personally to procure a sale of the certificates, which it is claimed were held in pledge as security for the indebtedness. Ida P. Greenwood claimed a one-third interest in each of the certificates as the widow of deceased. On or about July 20, 1915, judgment was rendered in favor of the defendant bank and against the administratrix for the sums of money found due, and directed a sale of a two-thirds interest in said certificates at public auction, and that the proceeds be applied on the judgment obtained in that action, the widow having been adjudged to be the owner of a one-third interest in the said certificates. In January, 1916, execution was issued, directing the sheriff to sell the certificates as provided in the judgment. The sheriff proceeded to post notices of the sale

for a period of not less than 5 nor more than 10 days, and on February 7, 1916, sold a two-thirds interest in said certificates to the defendant bank. Attending upon that sale was the attorney for the administratrix who bid upon the property for the administratrix against the bid of the defendant bank. A return was made to the court of the sale of the two-thirds interest, and an order made affirming the same, and the clerk of the court was directed to enter judgment against the administratrix for the deficiency after applying the proceeds upon the judgment. Within six months after the sale plaintiff, Young, who in the meantime had been named administrator of the estate of George B. Greenwood, deceased, tendered to defendant Corless as sheriff the amount bid for the certificates, together with interest as provided in the statute. The sheriff declined to issue a certificate of redemption, and this suit was instituted. Plaintiff had judgment in the lower court. Defendants appeal.

[1] It will be observed that the controlling question, so far as this appeal is concerned, is: Was the interest of the deceased, and after his death his estate, an interest in real property, or was it chattel interest and therefore personal property? By the provisions of Comp. Laws Utah 1917, § 5589, any one desiring to purchase any of the public domain belonging to the state at private sale is required to submit a written application, and to accompany that application with a deposit of 25 per cent. of the agreed purchase price. If the offer is accepted by the state land board it issues in the name of the state to the purchaser a certificate of sale wherein it is provided that the state has sold to the purchaser in the manner provided by law the property therein described. The application and the certificate of sale construed together constitute a contract for the sale of real estate. Not only would it be a contract for the sale of real estate by general law, but it is designated "a sale" by Comp. Laws Utah 1917, § 5597.

The date of certificate No. 8110, as found in the record, is July, 1904. The date of certificate No. 9516 is not given. Under the provisions authorizing the sale of public lands by the state, the purchaser is required to make annual payments of at least 10 per cent. of the purchase price. Section 5589, *supra*. It is therefore safe to assume that at the dates the certificates were delivered to the banks at least eight or nine annual payments had been made. That the certificates and the payments made thereunder gave Greenwood in his lifetime, and his heirs thereafter, an interest in the real property described, cannot well be doubted. The authorities are all to that effect, and we are not aware that any one contends to the contrary in this proceeding. It is contended,

however, as we understand the appellants, that the certificates of sale created a right or title to the property, and were therefore personal property under the rules of construction stated in Comp. Laws Utah 1917, § 5848, subds. 9-11. Also that, it being personal property, the assignment and delivery to the banks constituted pledges, and should be so treated.

This contention seemingly does not take into account what must have been the real intent of the parties at the time of the transactions. The banks did not accept the mere evidences of interests in real property as security for the obligations of the debtor, but evidently it was the intention of both banks and the borrower that the banks should have liens upon the interest of the borrower in the real property described in the certificates. The Supreme Court of Wisconsin, in discussing a question similar to the one presented here, in *Mowry v. Wood*, 12 Wis. at page 424, said:

"Although the certificates, as contracts in writing, may, for some purposes, be regarded as chattels or choses in action, yet it was evidently not the intention of the parties to pledge them as such, but to pledge Wood's estate in the land represented by them as a security for the payment of the debt. That estate was something tangible and of value, but the mere certificates were worthless in the hands of any one except the holder of the estate. If there is no distinction between contracts of that kind made with the state and those made by private individuals—and I can see no reason for any—then Wood was possessor of an equitable estate of inheritance in the land, subject, of course, to forfeiture for the nonfulfillment of the conditions of the agreements, but nevertheless, until forfeited, perfect and indefeasible. It was an interest in the fee, and a performance of the conditions would have been followed by the acquisition of it. In case of his death it would have descended to his heirs."

We conclude, therefore, that the assignment and delivery of the certificates in this case constituted not mere pledges of personal property, but equitable mortgages of the interest of the mortgagor or borrower in the real property described therein. Under the certificates of sale and the law authorizing the issuance of the same the purchaser was entitled to immediate possession, and could enter upon the land, cultivate it, improve it, and was entitled to any crops produced thereon. Under the revenue law of the state, he was assessed and required to pay taxes, not only upon the improvements made upon the real estate, but upon the interest in the land to the extent of the payments made prior to levying the tax. Section 5862, Comp. Laws 1917. Clearly, under that condition, his interest in the property was an interest in real estate, one that could be mortgaged, one that would descend to his heirs, and such

as could be alienated or incumbered as other real estate. The facts in the case of *Mowry v. Wood*, supra, are very similar to the facts involved here. The opinion in that case is authority that the interest of the purchaser and borrower was not personal property, and could not be pledged as such, but that the assignment and delivery of the certificates of sale constituted an equitable mortgage upon the interest of the purchaser in the real estate. The law is also stated in 27 Cyc. p. 981, as follows:

"Where a contract for the purchase of real estate, or a bond for a deed, is assigned to a third person as security for a debt, and with an agreement to reassign on payment of the debt, this constitutes in equity a mortgage on the assignor's equitable title to the land in question."

To the same effect is the opinion of the Oregon Supreme Court in *Lovejoy v. Chapman*, 23 Or. 571, 32 Pac. 687.

The only authority found contrary to the conclusion here reached is the case from the Supreme Court of Montana of *Ringling v. Smith River Development Co.*, 48 Mont. 467, 138 Pac. 1098. While it is true the court in that case held that a contract for the sale of real estate could be pledged for an indebtedness, the court seems to have based its conclusion largely upon some rule of practice that before the appellate court would disturb a judgment of the district court "the appellant must assume the burden of showing that the trial court's conclusion is erroneous under any possible state of facts consistent with the declaration of the record." The court concluded that the appellant had failed to maintain this burden.

Having determined that the interest of the deceased in the real property under the certificate of sale was an interest in land, it necessarily follows that, under Comp Laws Utah 1917, § 6941, he, or the administrator of his estate is entitled to redeem upon the payment of the amount specified to be paid upon the redemption of property sold either on foreclosure or under execution. By the terms of section 6940, supra, any interest in real property greater than a leasehold of two years unexpired term is subject to redemption.

[2-4] No complaint is made by either party that the sale of the certificates was not regular, although it is conceded by all parties that notice was not given as required by the statute for the sale of real property. Only such notice was given as is required for the sale of personal property. The decree or judgment of the court directed the sale of the certificates, but it does not appear that that judgment directed that they should be sold as personal property. The sheriff, however, advertised and conducted the sale as a sale of personal property. The attorney for the ad-

ministratrix was present at that sale, and offered bids for the property against the defendant bank. No third party claiming an interest in the property is here objecting, or, so far as the record discloses, has any right to object, to the method of sale. Such being the facts, it would appear that the administratrix could, and by her acquiescence and failure to object did, waive the notice prescribed by the statute. 17 Cyc. p. 1247. See, also, *Park v. Parsons*, 10 Utah, 330, 37 Pac. 570. It is, however, contended on the part of appellants that the predecessor of the plaintiff administrator having acquiesced in the sale of the securities as personal property, is therefore estopped at this time from questioning the fact that the same was and is personal property; that having acquiesced in that conclusion, and being represented at the sale by her attorney, who bid in her behalf upon the property, it does not now lie within her rights to assert and claim the right of redemption, as she might have done if the property had been sold as real property. The right of a mortgagor to redeem from a foreclosure sale seems to be inherent in the mortgage, and even a waiver of that right by the terms of the mortgage does not deprive the mortgagor of the right to redeem. Such is the holding of the Supreme Court of the United States in *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775. Moreover, there is nothing in the record before this court indicating that the mortgagor ever waived or released his right to redeem. The most that does appear is that an agreement was made by which the banks had the right to sell either at public or private sale the securities and apply the proceeds in payment of the indebtedness. That is exactly what was done by judicial sale under a decree of court, and it was not within the power of the court, even if such were its order, to preclude the plaintiff from the right to redeem. It is stated in the answer that upon the return of the sheriff an order was made by the court approving the sale as made. There is no provision of our statute requiring a sheriff to make a return to the court upon the sale of property under execution or by foreclosure; hence that order would be of no binding effect upon the plaintiff, or, in fact upon any one, as the court was not required to make any such order.

[5] It appears from the record in this case that in order to keep the contracts alive or to prevent a forfeiture the defendant bank as purchaser has paid some annual installments falling due, as well as taxes levied against the property. Apparently no account was taken of these items or amounts by the plaintiff in attempting to redeem the property. Clearly the expenditure of that money was necessary to protect the interest, not only of the purchaser, but the redemptioner.

The court should ascertain these amounts, and if they are not included within the amount tendered they should be required to be paid before any certificate of redemption is authorized. The bank should have legal interest for any amounts so paid from the dates of payment.

[8] The court also directs that the property redeemed "shall be free and clear of all liens and incumbrances of every character connected with or growing out of the proceedings in the case of State Bank of Beaver v. Ida P. Greenwood, Adm'r." The court was not called upon to determine the status of this property after it is redeemed, whether it should be free from liens or otherwise. The question for determination by the court was the right of the plaintiff as the administrator of the original debtor to redeem the property upon the payment of the amount required by law. The court was right in determining that question in favor of the plaintiff, and, having so determined, there was no further order required or made necessary respecting the future liens or claims against the property.

It follows from the foregoing that the judgment of the district court, holding that the plaintiff is entitled to redeem, is affirmed, and the cause will be remanded to the district court, with directions to modify the judgment entered in accord with the views herein expressed. Neither party will be allowed costs on this appeal.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

#### On Petition for Rehearing.

GIDEON, J. Appellants, by petition, ask this court to modify its order refusing costs on appeal to either party, and moves the court to direct that such costs be paid by respondent. They assign as reasons: (a) Appellant bank, by reason of the administrator declining to approve its claim, was compelled to institute suit to recover the amount due the bank from the estate; (b) in this suit brought against the sheriff, requiring him to issue a certificate of redemption, no offer was made to repay to the bank taxes paid by it, and the annual payments made to the state to protect the interests of both the purchaser and the redemptioner; (c) the lower court in its judgment directed that the land in question be free from all liens and incumbrances by reason of the judgment entered in the former action.

The appeal is from the entire judgment; that is, from the order directing the sheriff to issue a certificate of redemption, as well as the failure of the court to require as a condition precedent of redemption the repayment of the amounts expended for taxes

and the annual payments due the state. Had the appeal been from the refusal of the court to require the repayment of the money expended for taxes, etc., only, it would be just to allow appellants all their costs, but the appeal brought to this court for review the entire judgment of the district court, and as the right to redeem was affirmed, it would not be right to tax the entire costs against respondent. However, we have concluded to modify the order respecting costs to this extent: The total costs on appeal will be divided into two equal parts, appellants to pay one and respondent the other. Such is the order. The petition for a rehearing is denied.

CORFMAN, C. J., and FRICK, WEBER, and THURMAN, JJ., concur.

(97 Or. 64)

#### NOONAN v. CITY OF SEASIDE et al.

(Supreme Court of Oregon. July 18, 1920.)

1. Municipal corporations  $\S$  46—Amendment to charter embraced only one subject.

An amendment to a charter authorizing the issuance of bonds for four different improvements embraced but one subject.

2. Municipal corporations  $\S$  46—Voters not required to vote separately on each provision or amendment to charter.

The legal voters of a municipality are not required by the Constitution to vote separately on each division of a proposed municipal charter or an amendment thereto.

3. Municipal corporations  $\S$  61—Electors of city may legislate under Constitution and laws.

What Legislature of the state could formerly enact as to matters which pertained strictly to municipal affairs or to intramural transactions, the electors of a city in a proceeding in conformity with Const. art. 2,  $\S$  2, and article 4,  $\S$  1a, and the statutes enabling the same, may now enact, subject to the Constitution and general laws of the state.

4. Appeal and error  $\S$  172(1)—Grounds of invalidity of amendment to city charter must be pointed out below.

Irregularities in adopting a city charter amendment not referred to in a complaint and not passed on by the trial court are not before the court on appeal.

In Banc.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by E. P. Noonan against the City of Seaside and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This is a suit brought by plaintiff, E. P. Noonan, in his own behalf, and also for the

benefit of all taxpayers and owners of property liable to taxation in the city of Seaside, a municipal corporation in Clatsop County, Or.

On February 17, 1920, at a regular meeting of the common council of the city of Seaside, the council passed a resolution which, among other things, provided for a proposed charter amendment to be submitted to the voters of the city of Seaside at a special election to be held on Monday, March 1, 1920. Thereafter upon due notice of the election, the defendant city of Seaside held a special election as provided for in the resolution for the purpose of voting upon the amendment of the charter of the city of Seaside. The ballot title for the election was as follows:

"Charter Amendment Submitted to the Voters by the Council.

"An act to amend section 22 of the present charter of the city of Seaside, authorizing the city of Seaside to issue general improvement bonds in the sum of two hundred and sixty-three thousand dollars, and to construct and maintain a pier extending from the west end of Broadway into the Ocean; also to extend Roosevelt Drive to Avenue M and to improve same; also to construct a public walk or way over and along that strip of land lying between the Boardwalk and low water in the Pacific Ocean, and Avenue U and Twelfth avenue, and to construct thereon bulkheads and retaining walls and to construct parks thereon and otherwise beautify same, and to construct and maintain a fire alarm system, or systems with equipment; also ratify the bond issue under the amendment of section 22 of the City Charter, as adopted at the special election held in said city, March 29, 1919.

"100 Yes.

"101 No."

At the election the majority of the votes, 217, were cast in favor of the adoption of the amendment, and 30 votes against the same. Thereafter, on March 2, 1920, the defendant E. N. Hurd, mayor of the city of Seaside, proclaimed the result.

By the charter amendment the legal voters authorized the city of Seaside, through its officers, to issue and dispose of general improvement bonds of the city of Seaside, of such denominations as the councilmen from time to time might determine, to the amount of \$263,000. The charter amendment provided that each of the bonds should become a direct general obligation of the city of Seaside and be known as city of Seaside general improvement bonds. The sum of \$263,000 derived from the sale of these bonds, is to be expended for four separate improvements, which are as follows: (1) The sum of \$60,000 for the construction and maintenance of an ocean pier extending from or near the end of Broadway street in the city of Seaside out into the Pacific Ocean; (2) the sum of \$108,000 for the construction of a mu-

nicipal highway or street in the city of Seaside to be known and designated as the Roosevelt Drive, extending from the south line of Broadway street to Avenue M; (3) the sum of \$85,000 for acquiring right of way and construction of walks, parks, bulkheads, and retaining walls along the ocean front; (4) the sum of \$10,000 for construction and equipment of a fire alarm system with necessary wire connections and attachments.

Plaintiff brought this suit for the purpose of restraining the city of Seaside, and each of the defendants herein, from attempting to issue any bonds of the city of Seaside for any of the purposes stated in the attempted charter amendment, and from carrying into effect any of the provisions of the charter amendment.

The plaintiff set forth all of the proceedings in his complaint, and further alleged that the charter amendment and the election are null and void, upon the ground that the amendment attempted to authorize the defendant city of Seaside to incur indebtedness by the issuance of bonds for four separate improvements, all combined and incorporated in one amendment.

A demurrer was interposed by defendants to this complaint which was sustained by the trial court. Plaintiff appeals and seeks to reverse this decision.

Edw. C. Judd, of Astoria, for appellant.

Victor J. Miller, of Seaside, and G. C. & A. C. Fulton, of Astoria, for respondents.

BEAN, J. (after stating the facts as above). The case comes to this court for a review of the decision of the lower court in sustaining the demurrer to the complaint. But one reason is alleged in the complaint why the charter amendment in question is invalid. Plaintiff urges that it is repugnant to section 20, art. 4, of the Constitution of Oregon, which provides that—

"Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. \* \* \*

It is contended on behalf of defendants that the provisions of article 4, § 20, of the state Constitution, have no application to charter amendments enacted by the legal voters of a municipality, nor do ordinances adopted by a municipality, citing 38 Cyc. 378; State v. Langworthy, 55 Or. 303, 104 Pac. 424, 106 Pac. 336; Colby v. City of Medford, 85 Or. 485, 508, 167 Pac. 487; Wagoner v. City of La Grande, 89 Or. 192, 199, 173 Pac. 305; Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678.

[1, 2] It is, however, unnecessary to decide whether the section of the Constitution referred to is applicable to such proceeding or not, as according to our view the title of the



(191 P.)

act, and the ballot title, and the act amending the charter of Seaside, embraced but one subject and matters properly connected therewith. This subject is expressed in the title of the act and in the amendatory act. In *Wagoner v. City of La Grande* the title of the act was "An act to amend the charter of the city of La Grande, in Union county, state of Oregon," and did not in any way indicate the nature of the proposed amendment. In the amendment of the charter of the city of Seaside by the legal voters, now under consideration, the subject of the act is the amendment of section 22 of the charter of the city of Seaside. This is followed by a plain and concise statement of the purport of the amendment, as will be observed from the ballot title. There is no authority that we have discovered which holds that the legal voters of a municipality are required by the Constitution to vote separately upon each different provision of a proposed municipal charter or an amendment thereto. Such a requirement would render it practically impossible, or at least exceedingly difficult and cumbersome, to enact a city charter. There are many provisions usually contained in such an instrument. To hold that there should be one separate amendment to provide for the improvement of streets, another for other city improvements, another for prescribing the authority of the officials of the municipality, another to authorize the prevention of live stock from running at large in the city, another to empower the impounding of dogs, and so on through the usual category of powers and privileges usually conferred upon a municipality, would require proceedings beyond the pale of the letter and intent of our Constitution. All such provisions, when a new charter is enacted, may properly be embraced in one act; and in the amendment of a section of such a charter all appropriate provisions of such an amendment may well be included in one act, where the matter as in this instance is plainly and fairly submitted to the electors and is entirely free from fraud or deceit.

[3] The authorities and cases cited and relied upon by plaintiff such as 21 Am. & Eng. Enc. of Law, p. 47, and *State ex rel. v. Allen*, 186 Mo. 673, 85 S. W. 531, are where the courts were considering the execution or application of powers conferred upon municipalities. In the present case we have to deal with an enactment of a charter authority conferring a power upon the council of the city of Seaside. The council is not compelled by the charter to execute the power conferred nor issue the bonds for the purpose of making the city improvements. That matter is left to the city council, and in the exercise of such authority it is fairly to be presumed that the members of that body

would be responsive to the will of the people of the city. In the enactment of charter provisions by the electors of the municipality, pertaining strictly to municipal affairs, they exercise a power reserved and conferred directly to them by the Constitution, art. 2, § 2, and article 4, § 1a, and take the place of the Legislature in enacting or amending a municipal charter prior to the "Home Rule" amendment. What the Legislature of the state could formerly enact as to matters which pertain strictly to municipal affairs, or to intramural transactions, the electors of a city, in a proceeding in conformity with the Constitution and statutes enabling the same, may now enact, subject to the Constitution and general laws of the state. *Brown v. Silverton*, 190 Pac. 971, opinion rendered June 29, 1920. Under the old régime, the Legislature in creating municipal corporations, and in amending municipal charters, did so as one act. For a full discussion of the powers of municipalities, we refer to the opinion of Mr. Justice Harris, in *State ex rel. v. Port of Astoria*, 79 Or. 1-26, 154 Pac. 390, which leaves nothing to be said.

In speaking of the subject or scope of an act, Judge Sutherland, in his work of *Statutory Construction* (volume 1 [2d Ed.] § 117), says:

"There is no constitutional restriction as to the scope or magnitude of the single subject of a legislative act. One to establish the government of the state embraces but a single subject or object, yet it includes all its institutions, all its statutes. The unity of such an act, covering the multifarious concerns of a commonwealth, is the congruity of all the details as parts of one 'stupendous whole,' of one government. That is the grand subject of such a statute or system of laws; it is equally the object of all its varied titles of chapters and sections."

The charter amendment in question conferred authority upon the officials of the city of Seaside to issue bonds in a proper manner for municipal improvements and subject the property, liable to taxation within the city, to the payment thereof.

[4] Other questions are discussed in the brief of plaintiff, which are not referred to in the complaint, and were not passed upon by the trial court and are not before this court. As stated by Mr. Justice McCamant in *Wagoner v. City of La Grande*, 89 Or. at page 198, 173 Pac. 305, referring to the amendment of the charter of the city of La Grande, "if they claim it is invalid for any reason, they should point out the ground of the invalidity." So in the case at bar, if there were any other irregularities in adopting the charter amendment, it is incumbent upon plaintiff to point out any grounds he may claim invalidate the proceedings.

There was no error of the trial court in sustaining the demurrer to the complaint.

The judgment of the lower court will therefore be affirmed.

(97 Or. 459)

**BURDICK v. TUM-A-LUM LUMBER CO.\***

(Supreme Court of Oregon. July 27, 1920.)

**1. Costs  $\S$  264—Expense of procuring transcript in circuit court taxable there only.**

The expenses incurred by a party in procuring a transcript of the evidence in the circuit court must be taxed in such court, and will not be included in the cost bill in the Supreme Court.

**2. Costs  $\S$  2—Term defined.**

Under L. O. L.  $\S$  561, "costs" are certain sums of money granted by law to the prevailing party by way of indemnity for maintaining an action, or for vindicating a defense, being an incident of the judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

**3. Costs  $\S$  247—Defendant, after reversal of adverse judgment and before new trial and judgment for it, not entitled to expense of transcript of testimony.**

Under L. O. L.  $\S$  564, judgment for plaintiff in an action at law having been reversed on defendant's appeal, the case standing ready for new trial and undetermined, defendant is not entitled to an item of costs for the expense of procuring a transcript of the evidence in the circuit court, not having obtained judgment there, while its having prevailed on appeal to the Supreme Court entitled it only to costs in such court, not including expenditure for the transcript.

Appeal from Circuit Court, Jefferson County; T. E. J. Duffy, Judge.

Action by N. A. Burdick against the Tum-A-Lum Lumber Company. From an order denying defendant's motion for costs in the amount paid for the transcript of testimony on defendant's appeal, and adjudging the same should abide the outcome of a new trial, defendant appeals. Judgment affirmed.

This case was before this court in Burdick v. Tum-A-Lum Lumber Co., 91 Or. 417, 179 Pac. 245. On August 1, 1917, the defendant filed its transcript on appeal in the case. That document included the typewritten transcript of the testimony taken upon the trial of the cause and filed with the county clerk, which was made by the official reporter. The defendant paid the reporter therefor the sum of \$157.65. On March 11, 1919, this court filed its opinion in the case on appeal, and reversed the judgment of the trial court, and remanded the cause for a new trial. In due course the mandate of this court was sent to the county clerk, and the trial court

on April 14, 1919, ordered the mandate entered, and rendered a judgment in favor of defendant and against plaintiff for costs, amounting to \$273, fixed by this court in the mandate. Defendant then served plaintiff with its cost bill, amounting to \$157.65, paid for the transcript of the testimony, and filed the same with the county clerk on April 17, 1919. On June 9, 1919, the lower court entered an order denying defendant's motion and disallowing this item of costs at that time, and adjudged that the same "should abide the outcome of the new trial." From this order defendant appeals.

George S. Shepherd and Willametta McElroy, both of Portland, for appellant.

Denton G. Burdick, of Redmond, and Jesse Stearns, of Portland, for respondent.

BEAN, J. (after stating the facts as above). The position of the defendant upon this appeal is that it is entitled to a judgment at this time for the expense of the transcript of the testimony. The contention on behalf of plaintiff is that the matter of taxing the cost of the transcript must await the determination of the contemplated new trial of the cause, and that the defendant is not entitled to recover for the expenditure while the action is still pending. The trial court took the view advocated by the plaintiff.

[1] The rule is well established by this court that the expenses incurred by a party in procuring a transcript of the evidence in the circuit court must be taxed in that court, and will not be included in the cost bill in this court. *Allen v. Standard Box & Lumber Co.*, 53 Or. 10, 18, 96 Pac. 1109, 97 Pac. 555, 98 Pac. 509; *Sommer v. Compton*, 53 Or. 341, 100 Pac. 289; *McGee v. Beckley*, 54 Or. 250, 102 Pac. 303, 103 Pac. 61; *West v. McDonald*, 64 Or. 203, 209, 127 Pac. 784, 128 Pac. 818; *Shepherd v. Inman, Poulsen Lumber Co.*, 85 Or. 639, 167 Pac. 785.

[2] Section 931, L. O. L., provides, in part, that the fees of the official reporter for making a transcript of his shorthand notes of the testimony in civil cases "shall be paid forthwith by the parties or party for whose benefit the same is ordered, and when paid shall be taxed as other costs in the case." Costs are certain sums of money granted by law to the prevailing party by way of indemnity for maintaining an action or for vindicating a defense. Section 561, L. O. L.; *Sommer v. Compton*, supra. Costs are an incident of the judgment. *Stewart v. Corbus*, 15 Or. 68, 13 Pac. 647; *Lemler v. Bord*, 80 Or. 224, 231, 156 Pac. 427, 1034. They comprise, inter alia, such an expenditure as the necessary expenses of copying records. *Rader v. Barr*, 37 Or. 453, 61 Pac. 1027, 1127.

By section 562, L. O. L., "costs are allowed of course, to the plaintiff upon a judgment in his favor in the following cases." The

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 28, 1920.

cases in which costs are allowed plaintiff are enumerated in that section. The present case is in the class specified. Section 564, L. O. L., enacts, as far as material here, that "costs are allowed of course to the defendant in the actions mentioned in section 562, unless the plaintiff be entitled to costs therein. \* \* \* " By the provisions of section 566, L. O. L., all necessary disbursements are allowed to a party entitled to costs. Such disbursements are therein enumerated.

[3] It will be seen by the language of the statute that a plaintiff is allowed costs when a judgment in his favor has been rendered. The same condition must obtain to entitle a defendant in an action to costs under section 564. In the original case under consideration the plaintiff obtained a judgment against the defendant in the circuit court, which entitled him to costs and disbursements. That judgment, however, was reversed and annulled upon appeal, and the case now stands ready for a new trial and undetermined, as if no judgment had ever been rendered. According to the record, the defendant has expended the sum of \$157.65 as a necessary disbursement in the circuit court. Whether or not it will be entitled to recover the amount of such expenditure from the plaintiff will depend upon the condition that the defendant is successful in obtaining a judgment in its favor against the plaintiff, so that the plaintiff will not be entitled to costs in the action. In an action at law in the circuit court the disbursements follow the judgment, and a defendant is not entitled to costs unless it is determined and adjudged that the plaintiff is not entitled to judgment in his favor, so as to entitle him to costs and disbursements, or unless defendant prevails. The matter is governed by our statute, to which we have referred.

The defendant prevailed upon its appeal to this court, and obtained a judgment of reversal, which entitled it to costs in this court. The expenditure for the transcript of the testimony is no part of such costs. The outlay for transcribing the testimony is not an incident to that judgment. The item of disbursement claimed is in exactly the same condition as defendant's other disbursements, if any, upon the first trial, such as witness fees. It is true that the expense was incurred while the case might be said to be "in transitu." It is by statute directed to "be taxed as other costs in the case." It is practically the same as if a part of the official reporter's per diem compensation had been paid by defendant. If the shorthand notes in the case had been transcribed before judgment, the expense thereof would have been governed by the same rule of law. We make no reference to costs or disbursements in a suit in equity.

We therefore conclude that the determina-

tion of the trial court, as the case stood at the time of the order appealed from, was correct. The judgment is therefore affirmed.

(97 Or. 190)

## HANSEN et al. v. OREGON-WASHINGTON R. & NAV. CO.

(Supreme Court of Oregon. July 27, 1920.)

1. Bailment §31(1)—Presumption of damages to goods in hands of bailee "overcome," where prima facie case is counterbalanced.

Where bailor, suing for damages to goods in hands of bailee, establishes prima facie case of negligence by proof of delivery in good condition and return in bad condition, the bailee is not required to produce evidence overbalancing or outweighing such prima facie case, under L. O. L. § 797, providing that a presumption may be "overcome" by other evidence, but is required merely to produce such proof as will counterbalance the presumption, since bailor has the burden of proving negligence by a preponderance of the evidence, and since the presumption is merely evidence, and is "overcome" within the statute, when bailee's evidence counterbalances that of the bailor, in view of sections 695, 793, 795, and section 868, subd. 2.

2. Warehousemen §34(6)—Repairs of leaks, not limited to period of bailment, inadmissible.

In action against warehousemen for damage to goods from water, testimony as to practice of repairing leaks on discovery thereof, not limited to period covered by the bailment, would have been incompetent.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

On petition for rehearing. Petition denied. For former opinion, see 188 Pac. 963.

O. E. Cochran, of Portland (A. C. Spencer and W. A. Robbins, both of Portland, on the brief), for appellants.

G. C. Fulton, of Astoria (G. C. & A. C. Fulton and Edw. C. Judd, all of Astoria, on the brief), for respondent.

HARRIS, J. The plaintiffs have petitioned for a rehearing, and they earnestly contend that our original opinion is erroneous. The trial court instructed the jury that upon proof of delivery of the canned salmon in good condition, plus proof of return of it in bad condition, the law presumed that the bad condition of the salmon was caused by the negligence of the defendant, and that therefore the plaintiffs were entitled to a verdict, "unless," as expressed in one instruction, "the defendant shall establish by the evidence to your satisfaction that this salmon did not become wet by reason of negligence on its part," or, as stated in another instruction, "unless defendant offers evidence which satisfied the jury that the

damage was not due to its own negligence." In our original opinion we ruled that the above-quoted portions of the court's charge in effect instructed the jury that the defendant was required to show a negative by affirmatively showing by a preponderance of evidence a want of negligence, and that the defendant was obliged to establish such negative to the extent of satisfying the jury that defendant was free from negligence. We held that "the most that could possibly be required under our Code would be to introduce enough evidence to cause the scales to balance."

Learned counsel for the plaintiffs earnestly argue that our ruling conflicts with section 797, L. O. L., which reads as follows:

"A presumption, unless declared by law to be conclusive, may be overcome by other evidence, direct or indirect; but unless so overcome, the jury are bound to find according to the presumption."

It will be observed that this section does not define the meaning of the word "overcome," and hence we must look elsewhere to ascertain the meaning of the term. The argument made in behalf of the petitioners is that under the terms of section 797, L. O. L., "it was not sufficient for the bailee to offer evidence equal to the presumption created by law." The petitioners point to the fact that the word "overcome" is the controlling word in section 797, L. O. L., and that the plaintiffs' evidence cannot be said to be "overcome" if it is equal or balanced.

Some text-writers take the view that it is fallacious to attribute to disputable presumptions any artificial probative force after the opponent comes forward with some evidence to contradict the presumption, and that therefore, when the opposite party contradicts a presumption with some evidence, the presumption immediately disappears as a rule of law, and the case goes to the jury free from any artificial rule of law. 4 Wig. on Ev. § 2491; 17 Am. Law Review, 894. Other text-writers and courts maintain that a disputable legal presumption is in the nature of evidence and is to be weighed as such. *State v. Kelly*, 22 N. D. 5, 132 N. W. 223, Ann. Cas. 1913E, 974; 10 R. C. L. 870, 896; 22 C. J. 82.

In this jurisdiction the Code makes presumptions a species of evidence; for section 793, L. O. L., declares that indirect evidence is of two kinds: Inferences and presumptions. A presumption, according to section 795, L. O. L., is a deduction which the law expressly directs to be made from particular facts. *Doherty v. Hazelwood Co.*, 90 Or. 475, 481, 175 Pac. 849, 177 Pac. 432. See, also, section 868, subd. 2, L. O. L. Instead, then, of laying the presumption out of the case the moment evidence contradicting the presumption is received, the presumption remains in the case to be considered by the jury as evidence. As already

pointed out, section 797 does not define the meaning of the term "overcome"; but other provisions of the Code make the meaning plain.

[1] The Code requires that in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory the finding shall be according to the preponderance of the evidence. The plaintiffs charge the defendant with negligence; the defendant denies the charge. This is therefore the issue upon which the plaintiffs have the affirmative. The evidence is contradictory; and therefore the plaintiffs must fail, unless in the end they have sustained the affirmative by a preponderance of the evidence. If the evidence for the defendant either exceeds in weight, or equals and balances, the evidence offered by the plaintiffs, then the latter must fail, because in either event they have not proved the affirmative of the issue by a preponderance of the evidence. In other words, the evidence offered by the defendant has "overcome" the evidence offered by the plaintiffs; and when the evidence for the defendant equals and balances the evidence for the plaintiffs, the defendant has just as effectively "overcome" the evidence for the plaintiffs as though the defendant's evidence incomparably and overwhelmingly outweighed the evidence for the plaintiffs.

As pointed out in the original opinion, in some jurisdictions the defendant is required to acquit himself of negligence by a preponderance of the evidence; but we said in the original opinion, and now repeat, that we cannot give approval to that doctrine. The plaintiffs must show as an ultimate fact that the defendant was negligent as charged in the complaint; and it cannot be said that they have shown this alleged ultimate fact, unless the evidence preponderates in their favor, because this is the standard fixed by the Legislature. The evidence cannot and does not preponderate in favor of the plaintiffs if it is evenly balanced; and therefore, if the evidence for the defendant in weight equals the evidence for the plaintiffs, then the evidence for the plaintiffs is "overcome," because the evidence for the defendant prevents the plaintiffs from succeeding and entitles the defendant to prevail. Proof of delivery in good condition and return in bad condition are the two facts which support the disputable presumption of negligence; and these two facts, plus the disputable presumption, make a prima facie case, and suffice for the proof of the ultimate fact of negligence, "until contradicted and overcome by other evidence." Section 895, L. O. L.

If the presumption of negligence is not contradicted at all, the jury must find for the plaintiffs. If, however, there is contradictory evidence, it becomes a question for the jury to decide whether or not, from a consideration of the whole case, the evidence preponderates in favor of the plaintiffs;

and in considering the whole case the disputable presumption raised by the law from given facts is to be treated and considered in the nature of evidence. A precedent in point is furnished by *Klunk v. Hocking Valley Railway Co.*, 74 Ohio St. 125, 77 N. E. 752. In that case the trial court instructed the jury that the defendant company, to overcome a presumption of negligence raised against it by the statute, "was required to satisfy you by a preponderance of the evidence that it was not negligent"; but the appellate court ruled that the defendant "need only produce such amount or degree of proof as will countervail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose counterbalance the evidence by which the prima facie case is made out or established; it need not overbalance or outweigh it." Another apt precedent is found in *Gibbs v. Farmers' & Merchants' State Bank*, 123 Iowa, 736, 99 N. W. 703, where the court says:

"When a prima facie case is made out by presumption or otherwise, in order to destroy its effect and shift the burden of producing further evidence the party denying it must produce evidence tending to negative the claim asserted to a point where, if no more testimony is given, his adversary cannot win by a preponderance of the evidence."

See, also, *Toledo, etc., R. R. Co. v. Star Flouring Mills Co.*, 146 Fed. 953, 77 C. C. A. 203; 1 *Elliott on Evidence*, §§ 129, 132, 139.

[2] The petitioners urge, also, that we misunderstood the effect of the question asked the witness M. J. Canari concerning the the practice in respect of repairing leaks upon discovering them. The plaintiffs insist that the form of the question was such as to refer only to the practice at the time of the trial. Of course, if the question did not refer to the practice followed by the defendant during the period covered by the bailment, it was incompetent. However, the appellant in its printed brief discussed the question on the theory that the interrogatory related to the period covered by the bailment; and one of the questions attempted to be asked by the defendant refers to the then past, and not to the then present, for the interrogatory reads thus:

"In pursuance of that practice, what was done to repair any leaks that occurred?"

An objection to the question was sustained, and thereupon the defendant offered to show "that the witness would further testify that in pursuance of the practice that any and all leaks were immediately repaired." We adhere to the original opinion.

The petition for a rehearing is denied.

McBRIDE, C. J., and BENSON and BURNETT, JJ., concur.

# MANNING et al. v. GREGOIRE.

(Supreme Court of Oregon. July 31, 1920.)

1. Adverse possession §66(1)—Clearing and cultivating to fence not true boundary gave title in fee.

Where a fence was constructed through timber land as a boundary, a party clearing out the timber up to the fence, and continuously cultivating and maintaining possession for more than 10 years, acquired title in fee up to the fence, if the fence was not the true boundary.

2. New trial §97—Surprise not ground for, in absence of request for continuance.

Where counsel was surprised by the admission of testimony, and such surprise overtook him at the moment the testimony was admitted, he should then have asked for a continuance of the case to enable him to take additional testimony on the subject.

3. Adverse possession §50—Letter soliciting quitclaim deed no recognition of title.

A letter, soliciting an adjoining landowner for a quitclaim deed for a tract claimed by the latter, which was merely an effort on the part of the writer to buy his peace, cannot be construed as an admission of title in the adjoining landowner.

## Department No. 1.

Appeal from Circuit Court, Marion County; George G. Bingham, Judge.

Suit by Felicite M. M. Manning and V. A. Manning against Mary F. Gregoire. Decree for plaintiffs, and defendant appeals. Affirmed.

The plaintiffs claim that they are now and for 43 years last past have been the owners in fee simple of a tract of land in Marion county, and have been in the open, notorious, exclusive, and adverse possession of said premises for 43 years next prior to the commencement of this suit; that the defendant claims some right, title, and estate in the property, which claim is without right, and that she has no title whatsoever to the land or any part thereof. The prayer is for the decree usual in suits to quiet title.

The answer is as follows:

"Defendant, for her answer to plaintiffs' complaint on file herein, admits that she claims some right, title, and estate in the real property described in plaintiffs' complaint. Except as herein admitted, defendant denies each and every allegation set forth and contained in said complaint and the whole thereof."

The circuit court entered a decree to the effect that the plaintiffs are the owners in fee simple and entitled to the possession of the premises, and that their title should be quieted against the defendant and all parties claiming under her. The defendant appeals.

S. M. Endicott and W. C. Winslow, both of Salem, for appellant.

John H. McNary, of Salem (McNary, McNary & Keyes, of Salem, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). [1] The testimony is to the effect that the predecessors in title of the parties owned adjoining lands and some time prior to 1875 built a fence through the timber on the blazed line of an old survey, the north half of which fence was designated as belonging to the plaintiffs' predecessor, and the south half to the defendant's predecessor. The plaintiffs acquired title to the property on the west side of the fence in 1875. They afterwards cleared out the timber from nearly all of the tract in dispute, reduced the clearing to cultivation and have continuously maintained their possession up to the line of the fence, ever since they occupied it in 1875. The case is like that of *Krueger v. Brooks*, 94 Or. 119, 184 Pac. 285, in which Mr. Justice Harris, delivering the opinion said:

"It is not necessary to state any additional facts or to relate any more of the evidence concerning the nature of the use which the plaintiff and his grantor made of the lands south of the fence; but it is enough to say that, although the evidence in behalf of the plaintiff was contradicted by witnesses for the defendant, nevertheless, the record clearly shows that the plaintiff and his grantor have been in actual possession of and have used tract D under claim of ownership for considerably more than 10 years. The fact that all the land south of the fence was cleared, and the fact that all of the land south of the fence, which could be cultivated, was in truth cultivated up to the fence, plus the fact that the fence was maintained as the dividing line for so many years, is the strongest kind of evidence that Charles Krueger, as well as his successor, the plaintiff, claimed ownership in all the land south of the fence. In brief, the evidence shows that the plaintiff is the owner in fee simple of tract D by force of a title acquired by adverse possession. *Gist v. Doke*, 42 Or. 225, 70 Pac. 704; *Dunnigan v. Wood*, 58 Or. 119, 125, 112 Pac. 531; *Stout v. Michelbook*, 58 Or. 372, 114 Pac. 929."

During the testimony of the plaintiff V. A. Manning he stated that Michael Ferschweiler, a son of a former owner on the east side of the disputed line, contended about 1894 that the fence was not on the right line, and that he caused the late Judge Bonham as his representative to write to the witness, making claim to the land. Manning says:

"We went to see Mr. Bonham. I explained to him the condition the fence was made by himself and Viessman as to the line. We cleared up to the fence and held it to that time, and never was any complaint. Mr. Ferschweiler built it as the line, and Bonham says, 'If that is the condition of this line fence,' he says, 'they can't be changed.' Then he gave examples of his own experience in that line."

Mrs. Manning, the other plaintiff, testified concerning the conversation with Judge Bonham thus:

"Well, I couldn't remember what year, but I went with my husband; we both went together and saw him, but I don't remember just exactly the year."

She said just her husband, Judge Bonham, and herself were present at the conversation. At that point the defendant's attorney objected to the testimony as incompetent, and counsel for the plaintiffs went no further with the matter.

[2] After the case had been argued, submitted, and decided against the defendant in the circuit court, her counsel made an affidavit to the effect that during the negotiations about taking the deposition of Ferschweiler no suggestion was made by plaintiffs' counsel about the evidence afterwards offered at the trial, by plaintiffs, pertaining to a conversation with Michael Ferschweiler, the son of the former owner, in Judge Bonham's office, nor was any mention made of retaining Judge Bonham or of the Judge Bonham incident; that since the trial he had consulted with Michael Ferschweiler by mail at some point in Northern Canada; and that the latter had made an affidavit, denying that he had ever employed Judge Bonham, or that he had been present at or participated in any such conversation. Based upon this showing, the defendant applied for a reopening of the decree and for a new trial, but this was denied, and the refusal is made one of the specifications of error. We think the court did not abuse its discretion in refusing to reopen the case. In the first place, no objection was made to the testimony of V. A. Manning respecting his conversation with Judge Bonham, and, besides that, neither of the plaintiffs pretended that Michael Ferschweiler was present at the conversation. Hence, the denial of the latter that he was a participant in that talk would be utterly immaterial. If the defendant's counsel was surprised, that surprise overtook him at the moment they testified, and he should then have asked for a continuance of the case, to enable him to take additional testimony on that subject. He cannot rightly go on and experiment with the result of the trial, and afterwards expect the court to reopen the case for such trivial purposes.

[3] The defendant counted strongly upon a letter written by the plaintiff husband to her, solidifying her to give him a quitclaim deed for the tract in dispute, as being a recognition of the defendant's title, and consequently a defeat of plaintiffs' claim of adverse possession. The letter is clearly an effort of the writer to buy his peace, and cannot be justly construed as an admission of title in the defendant.

A careful reading of the testimony in the case has convinced us that the decision of

the circuit court was right, and it is therefore affirmed.

McBRIDE, O. J., and BEAN and BENSON, JJ., concur.

(97 Or. 96)

**TAGGART v. SCHOOL DIST. NO. 1 OF MULTNOMAH COUNTY.**

(Supreme Court of Oregon. July 20, 1920.)

**1. Schools and school districts §145—Allegation of continuous employment as teacher amounts to averment of express contract.**

In a teacher's action against a school district for wages, an allegation that plaintiff was employed continuously as a regularly appointed teacher is tantamount to a declaration on an express contract, so that when traversed, plaintiff must show such contract to make the allegations and proofs correspond.

**2. Schools and school districts §145 — Evidence not showing a written contract does not support verdict for teacher's compensation.**

Where plaintiff teacher failed to prove an express contract of employment with defendant school district by producing a written agreement between the directors and herself filed with the clerk, as required by Laws 1913, c. 172, § 1, subd. 7, the evidence was insufficient to support a verdict for plaintiff.

**3. Contracts §346(12) — Plaintiff, counting on express contract, must prove it.**

Proofs must correspond to allegations; so that plaintiff, counting on express contract, must prove such a covenant, rather than quantum meruit.

**4. Constitutional law §70(1)—Courts bound by legislative direction that teacher's contract shall be in writing.**

Laws 1913, c. 172, § 1, subd. 7, has fixed within strict limits the method by which both teachers and directors must be bound by written contract, and the courts cannot depart from legislative direction.

**5. Appeal and error §883 — Proffered findings rejected by defendant held not available to increase amount admitted due.**

In a teacher's action against a school district, where plaintiff had opportunity to accept proffered findings allowing amount in excess of that which defendant admitted to be due, and which was tendered into court, but caused the court to reject them, she cannot on appeal in which judgment for full amount is reversed and judgment directed for amount tendered, avail of such tendered findings.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

On petition for rehearing. Petition denied.

For former opinion, see 188 Pac. 912.

Gus. C. Moser, of Portland (Roy K. Terry, of Portland, on the brief), for appellant.

John C. Jenkins and E. T. Taggart, both of Portland, for respondent.

BURNETT, J. Substantially, in her petition for rehearing, the plaintiff contends that the findings of fact filed in the circuit court are equivalent to a verdict which section 8 of article 7 of the state Constitution forbids us to disturb unless it can be said there is no evidence to support it; and, further, that because the defendant, in its proposed findings of fact submitted to the trial court, admitted and in its brief in this court conceded that the plaintiff had earned \$245, instead of only \$205, as stated in the answer, by virtue of her service as a substitute teacher, she is now entitled to judgment for the greater amount.

[1] The allegation of the complaint to the effect that the plaintiff was employed continuously as a regularly appointed teacher is tantamount to a declaration upon an express contract. Having thus laid her case, the plaintiff was bound to prove it when traversed, as it was in this instance, for the allegations and proofs must correspond. *Craft v. Dallas City*, 21 Or. 53, 27 Pac. 168; *Wilkes v. Cornelius*, 21 Or. 348, 28 Pac. 135; *Boring Lumber Co. v. Roots*, 49 Or. 569, 90 Pac. 487; *Boothe v. Farmers' Natl. Bank*, 47 Or. 299, 83 Pac. 785; *Eastman v. Jennings-McRae L. Co.*, 69 Or. 1, 138 Pac. 236, Ann. Cas. 1915A, 185.

[2] The findings of fact, which for the purposes of this case may be considered as a special verdict, show that she was not employed as a regularly appointed teacher. In other words, she failed to prove an express contract, in that she did not produce a written agreement made between the directors and herself and filed with the clerk. Subdivision 7, section 1, chapter 172, Laws 1913. As indicated in the former opinion, the findings do not sustain the judgment. In the constitutional phrase, speaking by the record, we affirmatively say "there is no evidence to support the verdict."

[3, 4] Under the peculiar circumstances of the pleadings in *West v. Eley*, 39 Or. 461, 65 Pac. 798, it was intimated that under an averment in quantum meruit, evidence of an agreement and the price of the services was admissible, presumably because parties would not probably agree on a value, if the same was unreasonable. But the reverse is not necessarily true, as a matter of law, and there is no reason adduced why the rule fixed by the precedents cited should be disturbed, viz. that the proofs must correspond to the allegations, so that, having counted on an express contract, that kind of a covenant must be proved. In the matter of the employment of teachers, the statute has fixed

within strict limits the method by which both they and the directors must be bound. In administering the law we cannot depart from the legislative direction concerning the sole memorial to be made by the parties to such employment.

[5] As to the amount to be recovered, the case presented by the plaintiff is one where after the trial is over and the judgment is rendered a party discovers some new testimony, in this instance an admission by the opposite party, which might have been admitted in evidence at the trial under proper pleadings. It is too late for that now; and it is only by a liberal construction of the pleadings, to which alone at this stage of the litigation the question is referable, that judgment can be rendered in favor of the plaintiff for \$205, the amount tendered and brought into court. The plaintiff had an opportunity to accept the proffered findings allowing \$245, but caused the court to reject them. She cannot thus speculate on the final result of the case, and, having failed in the outcome, now mend her hold and take more than the answer concedes.

The petition for rehearing is denied.

McBRIDE, C. J., and JOHNS, J., absent.

(97 Or. 464)

# PETTIT v. LISTON et al.\*

(Supreme Court of Oregon. July 27, 1920.)

**Infants**  $\Rightarrow$  58(1)—Minor not entitled to recover part of the purchase price paid without accounting for damage to property sold him.

In view of the custom of minors to make purchases, a minor who purchased an article of personal property, as a motorcycle, paying part of the price, cannot, where he disaffirmed the contract, recover from the merchant the amount paid, without compensating the owner for damage to the motorcycle resulting from use.

Department 2.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Action by Arthur Waldo Pettit, a minor, by Martha Pettit, guardian ad litem, against L. C. Liston and F. M. Robinson, copartners doing business as the Cycle Supply Company. From a judgment for defendants after the overruling of a demurrer to the answer, plaintiff appeals. Affirmed.

Plaintiff, a minor, brings this action by his guardian to recover \$125 paid by him upon the purchase price of a certain motorcycle purchased from the defendants.

The case involves the question of whether or not a minor who has purchased an article of this kind, and taken and used the same,

after paying part or all of the purchase price, can return the article and recover the money paid without making good to the vendors the wear and tear and depreciation of the same while in his hands.

The defendants in the case were engaged in the selling of motorcycles and attachments. The plaintiff purchased from them a motorcycle at the agreed price of \$325. He paid \$125 down, and was to pay \$25 per month upon the purchase price until the payments were completed. He took and used the motorcycle for a little over a month and finally returned the same to the defendants and demanded the return of his money. The defendants answer and allege that plaintiff used the machine, and in so doing damaged it to the amount of \$156.65.

There was a demurrer to the answer, which was overruled by the court, and the plaintiff refusing to reply or plead further and standing upon his demurrer, a judgment and order were entered dismissing the cause, from which the plaintiff appeals.

Fred E. Smith, of Eugene, for appellant.

E. O. Potter and O. H. Foster, both of Eugene (Potter & Immel, of Eugene, on the brief), for respondents.

BENNETT, J. (after stating the facts as above). The amount involved in this proceeding is not large, but the question of law presented is a very important one, and one which has been much disputed in the courts, and about which there is a great and irreconcilable conflict in the authorities, and we have therefore given the matter careful attention.

The courts, in an attempt to protect the minor upon the one hand, and to prevent wrong or injustice to persons who have dealt fairly and reasonably with such minor upon the other, have indulged in many fine distinctions and recognized various slight shades of difference.

In dealing with the right of the minor to rescind his contract and the conditions under which he may do so, the decisions of the courts in the different states have not only conflicted upon the main questions involved, but many of the decisions of the same court in the same state seem to be inconsistent with each other; and oftentimes one court has made its decision turn upon a distinction or difference not recognized by the courts of other states as a distinguishing feature.

The result has been that there are not only two general lines of decisions directly upon the question involved, but there are many others, which diverge more or less from the main line, and make particular cases turn upon real or fancied differences and distinctions, depending upon whether the contract was executory or partly or wholly executed.

$\Rightarrow$  For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied September 28, 1920.



whether it was for necessities, whether it was beneficial to the minor, whether it was fair and reasonable, whether the minor still had the property purchased in his possession, whether he had received any beneficial use of the same, etc.

Many courts have held broadly that a minor may so purchase property and keep it for an indefinite time, if he chooses, until it is worn out and destroyed, and then recover the payments made on the purchase price, without allowing the seller anything whatever for the use and depreciation of the property.

Many other authorities hold that where the transaction is fair and reasonable, and the minor was not overcharged or taken advantage of in any way, and he takes and keeps the property and uses or destroys it, he cannot recover the payments made on the purchase price, without allowing the seller for the wear and tear and depreciation of the article while in his hands.

The plaintiff contends for the former rule, and supports his contention with citations from the courts of last resort of Maine, Connecticut, Indiana, Massachusetts, Vermont, Nebraska, Virginia, Iowa, Mississippi, and West Virginia, most of which (although not all) support his contention. On the contrary, the courts of New York, Maryland, Montana, Illinois, Kentucky, New Hampshire, and Minnesota, with some others, support the latter rule, which seems to be also the English rule.

Some of the cyclopedias and some of the different series of selected cases state the rule contended for by plaintiff, as supported by the strong weight of authority; but we find the decisions rather equally balanced, both in number and respectability.

In *Rice v. Butler*, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 808, 78 Am. St. Rep. 703, in an opinion by Mr. Justice Haight, concurred in by the entire court, it is said:

"There are numerous authorities bearing upon the question, but they are not in entire harmony. We have examined them with some care, but have found none in this court which appears to settle the question now presented. We, consequently, are left free to adopt such a rule as in our judgment will best promote justice and equity. The contract in this case in its entirety must be held to be executory; for, under its terms, payments were to mature in the future and the title was only to pass to the minor upon making all of the payments stipulated; but in so far as the payments made were concerned the contract was in a sense executed, for nothing further remained to be done with reference to those payments. Kent, in his *Commentaries* (volume 2, p. 240), says: 'If an infant pays money on his contract and enjoys the benefit of it and then avoids it when he comes of age he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age on the ground of infancy, he must restore

the consideration which he had received. The privilege of infancy is to be used as a shield and not as a sword. He cannot have the benefit of the contract on one side without returning the equivalent on the other.'"

This ruling is followed in *Wanisch v. Wuertz*, 79 Misc. Rep. 610, 140 N. Y. Supp. 573, and *Lown v. Spoon*, 158 App. Div. 900, 143 N. Y. Supp. 275.

In *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379, the plaintiff, a minor, had paid a large sum of money into a partnership concern. The business was not successful and the infant undertook to rescind his contract and recover the money paid. It was held that he could not recover, and the court, citing from an opinion by Lord Justice Turner in the English case of *Corpe v. Overton*, 10 Bing. 252, said:

"He must have a right upon his attaining his majority to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back. If an infant buys an article which is not a necessary, he cannot be compelled to pay for it, but if he does pay for it during his minority he cannot on attaining his majority recover the money back."

And the same court, as late as 1910, in the case of *Latrobe v. Dietrich*, 114 Md. 8, 24, 78 Atl. 983, 989, said:

"If the infant have already advanced money upon a contract, which is executory upon the part of the adult, he cannot disaffirm it, and sue the other party for the advance, whenever it was paid on a valuable consideration, which has been partially enjoyed, and especially if he has received the benefit of his contract."  
\* \* \*

"Where an infant pays money on a voidable contract, and has enjoyed the benefit of it, he cannot avoid it and recover back his money."

In *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761, it is said:

"We think that the sound rule is, as laid down by Chancellor Kent, as follows: 'If an infant pay money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword.'"

To the same effect are *Chicago Mut. Life Indemnity Ass'n v. Hunt*, 127 Ill. 257, 277, 20 N. E. 55, 2 L. R. A. 549; *Bailey v. Barnberger*, 50 Ky. (11 B. Mon.) 113; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Berglund v. American Co.*, 135 Minn. 67, 160 N. W. 191.

Our attention has not been called to any Oregon case bearing upon the question, and

as far as our investigation has disclosed, there is none.

In this condition of the authorities, we feel that we are in a position to pass upon the question as one of first impression, and announce the rule which seems to us to be the better one, upon considerations of principle and public policy.

We think, where the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money on the purchase price, and taken and used the article, that he ought not to be permitted to recover the amount actually paid, without allowing the vendor of the goods the reasonable compensation for the use and depreciation of the article, while in his hands.

Of course, if there has been any fraud or imposition on the part of the seller, or if the contract is unfair, or any unfair advantage has been taken of the minor in inducing him to make the purchase, then a different rule would apply. And whether there had been such an overreaching on the part of the seller would always, in case of a jury trial, be a question for the jury.

We think this rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to the business man who has dealt with such minor in good faith. This rule is best adapted to modern conditions, and especially to the conditions in our Far Western states.

Here, minors are permitted to and do in fact transact a great deal of business for themselves, long before they have reached the age of legal majority. Most young men have their own time long before reaching that age. They work and earn money and collect it and spend it oftentimes without any oversight or restriction.

No business man questions their right to buy, if they have the money to pay for their purchases. They not only buy for themselves, but they often are intrusted with the making of purchases for their parents and guardians. It would be intolerably burdensome for every one concerned if merchants and other business men could not deal with them safely, in a fair and reasonable way, in cash transactions of this kind.

Again, it will not exert any good moral influence upon boys and young men, and will not tend to encourage honesty and integrity, or lead them to a good and useful business future, if they are taught that they can make purchases with their own money, for their own benefit, and after paying for them in this way, and using them until they are worn out and destroyed, go back and compel the business man to return to them what they have paid upon the purchase price. Such a doctrine, as it seems to us, can only

lead to the corruption of young men's principles and encourage them in habits of trickery and dishonesty.

In view of all these considerations, we think that the rule we have indicated, and which is substantially the rule adopted in New York, is the better rule, and we adopt the same in this state.

We must not be understood as deciding at this time what would be the rule where the vendor is seeking to enforce an executory contract against the minor, which is a different question not necessarily involved in this case.

It follows that the judgment of the court below should be affirmed.

McBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

(97 Or. 158)

### HOOD RIVER ORCHARD CO. v. STONE et al.

(Supreme Court of Oregon. July 20, 1920.)

1. Agriculture §6—Member of fruit growers' association held entitled to surplus after cancellation of membership.

A member of a fruit growers' incorporated association, having a by-law providing that cancellation of membership surrendered the membership, together with all benefits accruing thereunder and all right and interest of every kind and nature, held entitled on cancellation of his membership to part of a surplus on hand arising out of charges for handling fruits under contracts providing that members were entitled to pro rata share of any amount which should remain after payment of charges and expenses.

2. Agriculture §6 — Statements rendered member of fruit growers' association held not to show acquiescence in business methods followed.

In an action by one who had been a member of a fruit growers' incorporated association for a part of a surplus in the hands of the association, the rendering of annual statements to the plaintiff held not to show that plaintiff acquiesced in the business methods followed by the association in regard to creating a surplus, where such statements contained nothing more than the amount of sales of plaintiff's fruit, together with the sum which the association had been paid, not including or in any manner referring to charges made for handling, storage, etc.

#### Department 2.

Appeal from Circuit Court, Hood River County; Robert G. Morrow, Judge.

Action by the Hood River Orchard Company, against A. W. Stone and others, as directors and officers of the Apple Growers' Association, and others. Decree for defend-

ants, and plaintiff appeals. Reversed and remanded, with directions.

The plaintiff, which we shall hereafter designate as the orchard company, is an Oregon corporation engaged in the raising of apples, pears, and other fruits in Hood River valley. The defendant Apple Growers' Association, which we shall hereafter designate as the association, is an Oregon corporation, organized in April, 1913, "to handle, distribute and market the fruits, produce and by-products of the Hood River valley and vicinity; to purchase, lease or otherwise acquire, sell, pledge, mortgage, improve, use and operate warehouses, packing plants, cold storage plants, ice plants and all other plants and facilities useful or convenient in handling, marketing and distributing the fruits, produce and by-products of the Hood River valley and vicinity"; generally, to promote and encourage the growing of high grade fruit, to "protect the good name and commercial value of the fruit," to minimize the expense of its handling, to bring the producers and consumers nearer together, and to do everything tending to promote the interests of the fruit growers of Hood River valley, whether stockholders in the association or not; also, "to buy and sell merchandise and other personal property and real property, to borrow money and to pledge and mortgage any of the property of the corporation to secure the indebtedness of the corporation." Its principal office is at Hood River, and its capital stock is \$10,000, divided into 10,000 shares of the par value of \$1 each. The remaining defendants are the officers and directors of the association, except as to Thomas Avery, who is a member only.

At the time of its organization the association adopted a set of rules known as "Stockholders' By-Laws of the Apple Growers' Association of Hood River." In these by-laws it was set out that the general manager of the corporation should have "full authority to enter into contracts with the growers of fruit, for the sale and storage of fruit and for the assorting and packing of the same, provided, however, that said contracts shall be in accordance with the rules and regulations of the board of directors." On April 4, 1914, a form of contract was adopted by a mass meeting of the growers, and readopted by the board of directors on April 16. About the same time "Members' By-Laws of the Apple Growers' Association of Hood River" were adopted, reading in part as follows:

#### "Article I.

"Section 1. Any grower who has ratified and accepted these by-laws and holds with this association an unexpired co-operative growers' contract, in the form adopted April 4 and 16, 1914, shall be and hereby is designated, constituted, and created a 'member.'

"Section 2. If at any time the standard co-operative growers' contract with the association, in the form adopted April 4 and 16, 1914, is canceled or abandoned for any cause whatsoever, such cancellation or abandonment shall ipso facto cancel and terminate the membership of such grower, together with all benefits accruing thereunder, and all voting power, right, and interest of every kind and nature shall thereupon immediately cease and terminate.

"Section 3. Any member of this association may, on ten days' notice, for failure to comply with the rules and regulations of this association, at any regular meeting or any special meeting called for that purpose, be expelled by a majority membership vote and a majority income vote, voting separately.

"Section 4. The expelling of any member shall ipso facto immediately cancel and terminate any and all growers' contracts such expelled member has with the association and this association shall thereupon immediately be relieved from handling the fruit of such expelled member. Nothing in these by-laws shall, however, be construed as releasing any member from any indebtedness to this association nor as releasing this association from any indebtedness to any member."

Provision is made for the nomination and election of directors, each member of the association being entitled to one vote, designated as a "membership vote," and additional votes in proportion to his tonnage of fruit, based upon one vote for each 100 boxes of fruit. It is further set forth that:

#### "Article X.

"Section 1. During the month of July of each year an annual budget estimating the amount necessary to properly and economically conduct the business and affairs of the association for the ensuing year shall be prepared by the board of directors, and mailed to the members, and to cover such budget there shall be retained from the proceeds accruing from all business of the association a sufficient amount to cover all of the operating expense and payments of the association, which shall be based upon a handling charge of an equal amount for strawberries, pears and apples and half that amount for peaches in crates of the standard size and for cherries in 10-pound boxes."

In the event that the charges fixed by the board of directors in the annual budget exceed 22 cents per box, the members are given the right to reduce the budget, at a called meeting, so that the cost shall not be greater than that sum. Further rules follow:

#### "Article X.

"Section 3. The association reserves the right to return to the members, in the form of a dividend, a portion of the profits derived from the purchase and sale of merchandise.

"Section 4. When the pools are finally closed, any amount over and above the actual amount necessary to properly and economically conduct the business and affairs of the associa-

tion for such year as aforesaid, shall be returned to the members in the form of a dividend, based on an equal amount per box on apples, pears and strawberries and half that amount on peaches in standard sized crates and cherries in 10-pound boxes; the intent being that the amount so returned to the members shall be as near as possible in direct proportion to the income from tonnage of members \* \* \* as circumstances warrant."

Another article of the by-laws provides that in the event of a dissolution of the association or sale of its property the proceeds shall be divided among the members who at the time are in good standing, and holding unexpired contracts with the association, one-half of such proceeds to be distributed equally among all of the members, and the other half to be divided "among such members as shall furnish an income to the association, and in direct proportion to the income." Payment of a membership fee of \$10 is required of all new members joining the association after September 1, 1914.

The orchard company entered into the standard form of contract with the association, wherein it was recited that in consideration of the receipt of \$1 the parties agreed as follows: The grower should transfer and promise to deliver to the association its entire crop of fruit for the year 1914 and continuously every year thereafter, provided that the grower could cancel the contract on March 31 of any year, by giving written notice on or before March 20 of that year, delivering its copy of the contract to the association and paying any indebtedness due it. Failure so to notify the association would operate to continue the contract in force. The grower agreed to haul and pack its fruit in accord with the methods and rules of the association, and deliver it at Hood River at the grower's expense. The association agreed to handle and market the fruit with diligence "and to pay the grower such advances from time to time as sales warrant, and to pay the balance of the net proceeds obtained by it for the fruit, within 30 days after the receipt of the money for each pool of fruit." It was stipulated that the fruit delivered should be pooled by the association with other like fruit delivered under similar contracts, "and that the proceeds of each pool shall be distributed by the association pro rata among the growers having fruit in such pools." In the event that "the association shall pack the fruit, it shall be entitled to retain from the proceeds as a packing charge such sum as the association shall from year to year determine." The association was also permitted "to retain from the proceeds a further sum not exceeding 10 cents per box, for storage of such fruit as may be held and stored by it at Hood River, in cold storage, with the understanding that such sum is to be charged pro rata against the entire variety so stored." The associa-

tion reserved the right to "retain from the proceeds of the fruit and products handled by it, such further sum, as an advertising, handling, distributing, and marketing charge, as the association shall from year to year determine." For the year 1914 the association was permitted by the contract to retain as a handling charge not to exceed 10 cents per package for strawberries, pears, and apples, and 5 cents for peaches or cherries in 10-pound packages. Each part of the pool was to receive the same price for the same variety, size, and grade of fruit. The association further reserved the right to withdraw from the pool any diseased fruit and handle it on a separate account. It was further stipulated that the contracts should become operative and binding whenever two-thirds of the membership of the association holding contracts with it in the form adopted in 1913 should have executed like contracts, and not otherwise.

The plaintiff alleges that beginning with the year 1913 and ending in 1916, under the terms and conditions of such contract, it delivered to the association all of its fruit; that the association received and sold the same for the plaintiff; that from each crop delivered the association deducted from the proceeds of the sale large sums of money, which "were greatly in excess of the amounts necessary properly and economically to conduct the business and affairs of defendant corporation, and greatly in excess of the amount actually expended by said association in conducting its business and affairs in marketing said fruit"; that from such excess charges to the grower there has accumulated a large sum of money, funds, and assets, the exact amount of which is unknown to plaintiff, but which is about \$80,000, and all of which is the property of and should be distributed to the growers under their respective contracts; "that all of the pools for the years 1913, 1914, 1915, and 1916 have been finally closed;" that plaintiff has demanded an accounting, statement, and payment of its portion of the money, but that the association has refused and continues to refuse to account or pay; and that there is due to plaintiff out of said funds about \$1,000. It is then charged that the defendants threaten to, and unless restrained by an order of the court will, violate said contracts and agreements, and will irreparably injure the plaintiff by wrongfully and unlawfully purchasing what is known as the "Union Property" at Hood River, subject to a mortgage of \$80,000, and by assuming the mortgage and using or diverting such funds or assets as a part of the purchase price thereof, will thereby deprive the plaintiff and other growers of their interest in such funds.

Answering, the defendants admit the corporate character of the orchard company and of the association; the execution of the

standard form of contract as alleged; that it was in force and effect for the years mentioned; that the association received, handled, stored, and marketed plaintiff's fruit for those years under such contract; and that for more than three years its business methods and accounts were "acquiesced in, accepted, and approved by the plaintiff." As a further and separate defense the defendants allege the conditions existing prior to the organization of the association; that there was no co-operation or community of interest among the fruit growers; that the association was formed to harmonize and consolidate their respective interests, at which time the Davidson Fruit Company, by H. F. Davidson, subscribed for 3,500 shares of its capital stock, the Hood River Apple Growers' Union subscribed for 6,500 shares, and the association then took over the business of those two companies; that the standard contract was then prepared, and that the "members' by-laws" were afterwards adopted, as alleged.

The answer further states that about May 1, 1913, the association leased for 10 years certain real property of the growers' union, at an annual rental of \$17,275, and certain real property of the Davidson Fruit Company, for a like period, at an annual rental of \$9,750, the same being plants and warehouses of those companies operated by them prior to that time; that the capital stock of the association was not paid up in cash, but through the properties turned over to it as above stated; that 3,500 shares of its capital stock were issued to the Davidson Fruit Company, and 6,500 shares to the growers' union; and that on April 27, 1914, all of such stock for value was assigned by them to the Butler Banking Company, of Hood River, as trustee, except 1 share for each of the directors. It is alleged that such stock is now held in trust for the use and benefit of all members of the association in good standing; that there are more than 800 individuals or corporations holding membership in the association; that they constitute about 75 per cent. of the fruit growers in the Hood River valley; that in carrying on its business the association has made provision for furnishing to its members sprays, spraying materials, spray hose, fertilizer, boxes, packing paper, and other supplies necessary for cultivating the soil, caring for the fruit trees, and packing and preparing the fruit for market, carrying individual growers for all these materials to the first of the calendar year after they were furnished; that it is not possible to separate, either actually or in an accounting, the operations of one year from those of another; that the association was organized as a permanent concern, to have in view the proper and economical administration of its affairs in the future, as well as the present; that it

is essential to its prosperity that it should acquire the title to and permanently retain storage and ice plants; that, if its authority is confined to leasing of properties only, it will eventually be left entirely without facilities for carrying on its business; that the plaintiff is not a member of the association; and that of its own volition it canceled and terminated "all benefits accruing thereunder," as provided for in section 2 of article I of the members' by-laws.

The defendants claim that the plaintiff is not entitled to an accounting, that there is nothing due or owing to it from the association, and that by its actions and conduct it has acquiesced in and approved the business policies and methods of the association.

A demurrer to this answer was filed, on the ground that it did not state facts sufficient to constitute a defense or answer to the complaint, but this was overruled. As a reply the plaintiff denies that for the years 1913, 1914, or 1915 the association ever rendered full or final statements, that such statements have ever been approved or accepted, that the association has ever made to the plaintiff or any member an accounting, or that its business methods have ever been acquiesced in or approved by the plaintiff. It traverses generally all of the material allegations of the further and separate answer.

Testimony was taken before Hon. W. L. Bradshaw, who died before a decree was rendered. On July 10, 1917, a stipulation was entered into, to the effect that the cause should be submitted to the circuit court for Hood River county, before Hon. Robert G. Morrow, presiding as judge thereof, for the entering of a final decree, that no findings of fact or conclusions of law should be made or filed, that the validity of the decree should not be assailed by reason thereof, and that nothing in the stipulation should impair or affect the right of either party to appeal or to question the ruling of the court. On the same day a pro forma decree was rendered to the effect "that plaintiff take nothing by this suit, that this suit be and the same is hereby dismissed upon the merits," that the temporary injunction be set aside and dissolved, and that the defendants recover their costs and disbursements.

The plaintiff appeals, claiming that the court erred in not sustaining its demurrer to the further and separate answer, in overruling its request for a decree in its favor, in dismissing the suit, and in rendering a decree for the defendants.

H. S. Wilson, of Portland, and Ernest C. Smith, of Hood River (Huntington & Wilson, of Portland, on the brief), for appellant.

M. H. Clark, of Portland, and A. W. Stone (A. E. Clark, of Portland, and Fred W. Wilson, of The Dalles, on the brief), for respondents.

JOHNS, J. (after stating the facts as above). In its inception, the defendant association was organized to acquire and conduct the business of the Davidson Fruit Company and the growers' union. In effect it was a consolidation of the interests of those two corporations. In consideration thereof, the association issued 3,500 shares of its capital stock to the Davidson Fruit Company and 6,500 shares to the growers' union, the amount of which was the total stock authorized by its articles of incorporation. In addition thereto, and as a part thereof, the association entered into written leases of the real property of those corporations for a period of 10 years at a stipulated annual rental. No other consideration was paid for the capital stock. This was about May 1, 1913.

The association conducted the consolidated business along the usual and customary lines, under its then existing stockholders' by-laws, until it adopted what is known as the standard, or growers', contract. This was for the purpose of increasing the volume of its business, to combine all of the fruit growers into one organization, so far as possible, and to place their fruit in a pool for marketing purposes, with a view of obtaining for the growers the best market price and maintaining the highest grade of fruit. After the contract was prepared, a meeting of all of the growers was called, at which it was submitted and fully explained, and it was approved and accepted by about 75 per cent. of the growers. Concurrent therewith, and as a part thereof, the growers then adopted the "members' by-laws," and thereafter delivered their fruit to the association under such contract and by-laws.

To satisfy the growers and protect their interests, and to insure the payment of the stipulated annual rentals to the Davidson Fruit Company and the growers' union, those corporations, on April 27, 1914, assigned to the association their respective registered brands and trade-marks, and to the Butler Banking Company, as trustee, they assigned the 10,000 shares of capital stock which they then held. Article IV of the members' by-laws provides:

"Section 1. All of the stock of the association shall be held by the Butler Banking Company, of Hood River, Oregon, as trustee, for the benefit of the members of this association as created herein, except that enough shall be assigned to individual members to qualify such members to act as directors and for no other purpose.

"Section 2. It shall be the duty of the trustee to vote the capital stock of this association at all times as he is directed by a vote of the members taken in conformity with these by-laws."

Thereafter, in accord with their by-laws, the members of the association nominated the directors and certified that fact to the Butler

Banking Company, trustee, which voted the 10,000 shares of stock it held for the directors selected by the growers. These directors then met and elected the officers of the corporation. In this manner the business affairs of the association were conducted, after the members' by-laws were adopted, and the growers entered into their respective contracts and delivered their fruit to the association.

It appears from the record that in 1913 the association handled 661,740 packages of fruit; in 1914, 651,842; in 1915, 494,834; and in 1916, 1,112,660 packages. Of this amount the plaintiff furnished, in 1913, 14,250 boxes of apples and 81 boxes of pears; in 1914, 10,630 boxes of apples and 80 boxes of pears; in 1914, 4,285 boxes of apples and 178 boxes of pears; and in 1916, 9,341 boxes of apples and 294 boxes of pears. It is also shown that in the year 1913 the association accumulated, over and above all of its operating charges and expenses, \$924.94; in 1914, \$10,287.27; that in 1915 it suffered a loss of \$2,307.46; and that in 1916 it cleared \$68,562.13. The plaintiff claims that under its contract it is entitled to an accounting for and that it should have and receive its pro rata share of the income of the association for each of those years. It insists that a large amount of such accumulations was the result of excess charges to the growers, which should be returned, and for which the defendant should account under its respective contracts. This involves the construction of the contract and the liabilities of the association, under the members' by-laws, to an individual or corporation that has ceased to be a member. The contract provides that the association shall "pay the grower such advances from time to time as sales warrant, and shall pay the balance of the net proceeds obtained by it, for the fruit, within 30 days after the receipt of the money for each pool of fruit." Provision is also made that the association shall be entitled to a charge for any fruit that it packs, in such amount as it shall from year to year determine; that it may retain a charge for storage, and a further sum for advertising, distributing, and marketing, as it shall determine; and that it shall retain a handling charge, in different amounts named. Although the purposes for which such charges may be made are specified, the amount thereof is not certain or definite. As to the advertising and packing charges, the amount is left largely to the discretion of the association.

Under the terms and conditions of the contract, standing alone and complete within itself, the grower is entitled to receive each year the balance of any net proceeds from an annual pool, within 30 days after the receipt of the money by the association, and it is the duty of the association to render an annual statement of the receipts and disburse-

ments of each pool. The record is conclusive that such statement was never made and such accounting was never rendered to the plaintiff; that, after paying the expenses of the association named in the contract, there is a surplus estimated to be about \$80,000. The defendants insist that the plaintiff is not entitled to any portion of it, and rely in particular upon section 2 of article I of the members' by-laws above quoted. It is conceded that the plaintiff canceled its membership voluntarily, and it is not now a member of the association. Under that section of the by-laws the cancellation ends "the membership of such grower, together with all benefits accruing thereunder and all voting power, right, and interest of every kind and nature shall immediately cease and terminate."

[1] The question arises: What are the "benefits" which are terminated and surrendered? The plaintiff claims that its rights and liabilities are defined by the terms of the contract, which specifies the charges to be deducted from the selling price of its fruit, and that under the contract it is entitled to its pro rata share of any amount which may remain after the annual pool is closed. The defendants contend that by reason of surrendering and canceling its membership the plaintiff has waived and lost its right to any share it may once have had in such proceeds. As we construe the record, the rights of the plaintiff for the sale of its fruit are specified and defined by the contract, by the terms of which the association is to pay and the plaintiff is to receive the amount for which its fruit was sold in the pool, less such fixed charges as might be ascertained and determined under the contract itself, and that when it surrendered its membership it did not lose its right to a pro rata share of any annual surplus of the association derived from its own growers' contracts. The words "benefits accruing thereunder," as defined in section 2 of article I of the members' by-laws, do not apply to a surplus accruing from the sale and purchase of fruit and charges therefor, under an express contract, but are confined and limited to the right, title, and interest which a corporation or individual may have in and to the net assets of the association by reason of membership therein, subject to the payment of all of its debts and liabilities. They do not give to the association the right to keep the money which it promised and agreed to pay another under its express contract. This construction is sustained by article X of the members' by-laws, providing for the annual budget to be submitted to the members of the association during July of each year, which authorizes the association to retain from the proceeds accruing from all business a sufficient amount to cover all of the operating expenses and its payments, which shall be based upon a handling charge. Section 4 of

that article provides that when the annual pools are closed "any amount over and above the actual amount necessary properly and economically to conduct the business and affairs of the association" shall be returned to the members in the form of a dividend. Article XI specifies that in the event of the dissolution of the association, or sale of its property, a distribution of the proceeds shall be made among such as shall be members at the time, and who hold an unexpired growers' contract.

Defendants cite and strongly rely on *Weber Implement & A. Co. v. St. Louis A. M. & D. Ass'n*, 181 S. W. 1025 (Mo. App. unreported). That case states good law, but there is a vital distinction as to the facts between it and the instant case. There, as here, the plaintiff became a member of the defendant in 1909, and tendered its resignation in December, 1910, which was duly accepted on March 21, 1911. On its application the plaintiff was reinstated on June 2, 1911. There, the defendant's by-laws provided:

"No member shall be entitled to the return of any money advanced by him for the holding or promotion of the annual show, or for space at said show, unless he shall have been a member of this association at or prior to the last annual meeting preceding said show."

As the result of the automobile show the defendant association had left about 80 per cent. of the total amount paid to it by members for floor space and refused to pay the plaintiff its share upon the ground that it was not a member "at or prior to the last annual meeting preceding said show," and plaintiff there instituted the action to recover 75 per cent. of the moneys which it had paid to the defendant. The court held that it "was not entitled to its share of the association's refund to members, since, whether it was a new member or a reinstated member, it was not a member at or prior to the annual meeting in April, 1911."

It will also be noted that, while not a member, plaintiff claimed that it was entitled to a pro rata share of the assets of the corporation. Plaintiff here is seeking to recover from the defendant upon its growers' contract for the money which it alleged is due and owing under the terms of that contract. In other words, it is seeking to recover the balance of the selling price of fruit which it delivered to the association under an express contract, and which was handled and sold by the association under the contract. Its claim is not based upon a dividend or an order of distribution of the assets of the defendant corporation. It is founded upon an express contract. For such reason defendants' authorities on that question are not in point.

[2] The defendants contend that the as-

sociation has annually rendered final statements to the plaintiff, which have been accepted and approved, and that the plaintiff has acquiesced in the business methods followed by the association. Such statements, however, contain nothing more than the amount of sales of plaintiff's fruit, together with the sum which it has been paid. They do not include, or in any manner refer to or specify the charges made for handling, storing, advertising, or packing. There is nothing in them from which the plaintiff could determine the amount of such charges or of the surplus arising therefrom.

Much stress is laid by defendants upon the fact that H. F. Davidson was an officer and director of the defendant during a large period of the transactions, that at the same time he was a principal stockholder of the plaintiff, and that he knew or should have known of the business methods of the defendants. It is sufficient to say that Mr. Davidson is not a party to this suit, and that the plaintiff is a corporation, with its rights defined by the terms of its contract.

It appears from the record that, in addition to the packing, handling, storing, and advertising of fruit belonging to members, the association has been engaged in other and different branches of business, in particular the advance of money and sale of merchandise to the growers, and that a portion of its accumulated profits are the result of its enlarged and combined business. It is probable that the litigants and expert accountants can determine from the large volume of its transactions the net amount of surplus which the association has realized from its contracts with the growers, and the amount of plaintiff's pro rata share. The record shows that the volume of business of the association during the years 1914, 1915, and 1916, when Mr. Stone was its manager, amounted to \$3,075,693.59. There is no dispute as to the volume of business during each year, the amount of the annual profits, or the amount of fruit which the plaintiff delivered to the defendants under its growers' contracts. Upon these questions the testimony is clear, but it is not definite and certain as to how much of that surplus accrued from the growers' contracts, or the amount of plaintiff's share, or as to how much profit the defendant made from all other branches of its business. The plaintiff has submitted figures which it claims should be the basis upon which the accounting should be made, and they may be right; but from the whole mass of figures before us we are not clear as to the amount of surplus which has accrued under or as the result of the growers' contracts, and we hold that the plaintiff, from the sales of its fruit under its contracts with the association, is entitled to its pro rata share of any surplus which

may remain after payment of the just and reasonable charges specified and defined in the standard contract.

The decree is reversed, and the cause remanded to the circuit court, with directions to ascertain and determine the amount of any surplus arising from or growing out of plaintiff's contracts in the pools of each year, and then to render in its favor a decree for such amount, together with costs and disbursements.

BENSON, BEAN, and BENNETT, JJ., concur.

(97 Or. 302)

## WOODARD v. A. F. COATS LUMBER CO.

(Supreme Court of Oregon. July 31, 1920.)

### 1. Negligence §112—Complaint held not to charge willful injury.

A complaint, in an action to recover damages for negligence, held to charge mere negligent injury, and not a willful, purposeful injury, although the adverb "willfully" was used.

### 2. Collision §115 — Owner of wood being towed in barge not liable for negligence of owner of boat doing the towing.

One having wood hauled in a barge was not liable for negligence of employees of the owner of the boat doing the towing, having no control over such employees.

### 3. Master and servant §315—Liability for contractor's negligence defined.

One employing a contractor in work involving property of the former is not liable for the negligence of the latter in the work, except where the work is inherently dangerous or liable to inflict damage upon another.

#### Department No. 1.

Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Action by Edgar Woodard against the A. F. Coats Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

The plaintiff and his assignor are fishermen operating nets in Hoquarton slough in Tillamook county, a tributary of Tillamook Bay, where the tide ebbs and flows. The Potter Realty Company was the owner of a barge or scow, which it used sometimes for the transportation of fuel oil in bulk and at other times for carrying wood. The Coats Lumber Company had wood for sale at Tillamook, on Hoquarton slough. The Potter Realty Company caused the barge to be towed to Tillamook under an arrangement by which the defendant was to load it with wood, after which the barge owner was to take it to Bayocean. In the hold of the barge was some oil, left there from the last



shipment. After the scow was loaded and the tide was at ebb, it settled on some piling that had been cut off in the bottom of the slough, sprung a leak, and sank. Under these preliminary circumstances, the complaint charges negligence against the defendant, in the following language:

"That on or about said 13th day of August, 1918, and while said barge was carrying the oil and under the control heretofore stated, the defendant caused said barge to be taken from near defendant's dock, near Tillamook, Or., and towed downstream toward Tillamook Bay, to a point near the mouth of Hoquarton slough. That said defendant, while in control of said barge or scow as aforesaid, caused the same to be beached and stranded on the bank of Tillamook Bay at the point stated, in such a manner that the tide, ebbing and flowing, alternately surrounded the hull of the same and left it stranded on said bank.

"That in the process of towing said barge the defendant operated the same in such a manner that said barge became damaged, and at all times material herein the hull of said barge was in such a damaged condition, a hole having been punctured in the same, on or about the date above set forth. That as said barge was towed down toward Tillamook Bay, as aforesaid, and as long as the hull remained afloat, the oil which was in said hull remained in the hold, and would have remained in the hold if the barge had been towed out in Tillamook Bay, or if defendant had taken precautions to guard the same. But that defendant carelessly, willfully, and negligently, and with full knowledge of the consequences of said negligence, caused said barge to be stranded and placed on the shore of said Tillamook Bay, in such a manner that when the tide ebbed and flowed the oil and oily substance flowed out of the hole above referred to, and spread broadcast over the waters of Tillamook Bay and its tributary streams. That a very large quantity of oil and oily substance flowed out of said barge as aforesaid, and was carried by the wind and tide in all directions over said waters."

For injury, the plaintiff avers, in substance, that the oil saturated his net, so that it was unfit for fishing purposes, in that it became slippery and the material rotten and weak. The cause of action on behalf of his assignor is substantially the same.

The averments of the complaint were denied by the answer, which stated that the towing was done by the Potter Realty Company, and that the defendant did not have any control or direction over the scow or the movement thereof, beyond causing wood to be loaded upon it. This was traversed by the reply.

As a result of a jury trial there was a judgment for the plaintiff, and the defendant appeals.

J. C. Veazie, of Portland (Veazie, McCourt & Veazie, of Portland, on the brief), for appellant.

Joseph Mannix, of Tillamook (Talmage, Claussen & Mannix, of Tillamook, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] As one ground for nonsuit the defendant urges that the complaint charges a willful, purposeful injury, and that there was no evidence to sustain such a charge. It contends that a charge of designed injury is not sustained by proof of mere negligent injury. In our judgment, the complaint is not open to such criticism. No facts are stated indicating that the injury was intentionally inflicted. Nothing can be predicated in the way of averment on the use of the adverb "willfully." That is but a statement of a conclusion, and is not justified by the narration of facts contained in the complaint.

It is contended also by the defendant that it was not responsible for the acts of the individuals in charge of the tow from Tillamook towards Tillamook Bay. The actual work of towing the barge was done by Albert Biggs, an employé of the Potter Realty Company. He testified that that concern asked him to come to Tillamook and see that the lumber company got the scow, as it needed it. He said, speaking of the scow:

"Well, it had been brought here for the lumber company to load it with wood, and it got sunk and they [referring to the Potter Realty Company] asked me to see the people and see when they could get it ready so they could get it back and get this oil."

Arriving at Tillamook, he called at the office of the company, and inquired about the boat. Learning that they could not get a tug, he testified:

"I told him that my boat was here, and we were in a hurry for the scow, and we might help them out, and I was told there in the office to go ahead; and they wanted to know if I could not beach the scow down there somewhere about that old schooner where they could look at her, and I told them I thought I could. The boat and the tow and all did not work as I thought it would, and I saw I could not make it, and so I beached her at this point below the ditch."

He said he was assisted by Fred Grove, acting as a deck hand; that both of them were employes of the Potter Realty Company; that they were paid by that company and took their orders from it. The testimony of a witness, Van Tine, called for the plaintiff, was to the effect that he was one of the joint receivers of the Potter Realty Company, and as such authorized the scow to be taken to Tillamook in order that the defendant might load it with wood. Having learned that it was sunk, he testifies:

"I immediately ordered Mr. Grove and Mr. Albert Biggs to go to Tillamook and try to get

the scow in shape to be loaded. They went to Tillamook on Monday, the twelfth, and raised the boat and got the water out of it."

He further says:

"I sent them there to get the scow in shape to be loaded. We had had previous notice that the scow was not in shape to be loaded."

In *Sturgis v. Boyer*, 65 U. S. 110, 16 L. Ed. 591, the ship Wisconsin was being towed by the steam tug Hector, in New York Harbor. The tug was in charge of her own master and crew, and had complete control of the tow. Some of the crew of the Wisconsin were on board of her, but took no part in the management of the enterprise. While in tow, the flying jib boom of the ship struck a lighter laden with flour, and capsized her. On the part of the tug it was alleged that she was employed by the owners of the Wisconsin to tow her to a certain dock; and that it was in a sense merely the servant of the ship. The Supreme Court of the United States, speaking by Mr. Justice Clifford, disposed of the question in this manner:

"Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have his remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation. *Sproul v. Hemmingway*, 14 Pick. 1; 1 Para. Mar. L. 208; *The Brig James Gray v. The John Frazer et al.*, 21 How. 184."

This case is cited with approval in *The Eugene F. Moran*, 212 U. S. 468, 29 Sup. Ct. 339, 53 L. Ed. 600, *The J. P. Donaldson*, 167 U. S. 599, 17 Sup. Ct. 951, 42 L. Ed. 292, *The Violetta* (D. C.) 141 Fed. 690, and many other cases. See, also, *McLoughlin v. New York L. & T. Co.*, 7 Misc. Rep. 119, 27 N. Y. Supp. 248; *The Mabey & Cooper*, 14 Wall. 214, 20 L. Ed. 881; *The Belknap Fed. Cas.* No. 1,244; note in 65 L. R. A. 472.

[2] There is nothing in the evidence to show that the defendant had, or assumed to have, any control over the details of accomplishing the work. The tow was not taken where it had expected it to be stranded. The whole process of towing was under the supervision of the owner of the boat doing the towing. Laying aside the circumstance that Biggs and Grove were employees of the Potter Realty Company engaged in towing that company's barge, the situation most unfavorable to the defendant which can be drawn from the testimony is that Biggs might be called a contractor. This is scarcely contested by the plaintiff in argument, but he urges that it is within the exception to the general rule exonerating a defendant for the act of a contractor. The general exception to this rule is that any one contracting for the performance of a work inherently dangerous or liable to inflict damage upon another cannot shield himself behind a contractor employed for the purpose of performing the work. In this case it is not averred, and the evidence does not show, that the mere towing of the barge was inherently dangerous to any one. Indeed, the complaint says that the barge was damaged in the process of towing, and that as long as the hull remained afloat the oil which was in said hull remained there, and would have remained there if the barge had been towed out into Tillamook Bay. The injury was clearly the resultant of the act of some one in charge of the work as a contractor, at the most. It is difficult to see how the defendant can be made liable for the shortcoming, if any, of an employee of the Potter Realty Company in towing a barge, the property of the latter, and acting under its orders and pay. The authorities on the matter of the exception to the general rule exonerating the one who employs a contractor are collated in *Giaconi v. Astoria*, 60 Or. 12, 36, 113 Pac. 855, 118 Pac. 180.

[3] It is argued by the plaintiff that, as there is testimony to the effect that the defendant ultimately paid for the repairs made to the barge, it was responsible for the damage to the nets, because that fact indicates that it was in charge, at least, of the barge. This liability, however, does not follow; for one employing a contractor in work involving property of the former is not liable for the negligence of the latter in the work, with the exception already noted. For example, as shown in *Sturgis v. Boyer*, supra, the contract of towage was made with the tug by the actual owners of the tow, and yet, for the reason that they had nothing to do with the direction of the details of the work of towing, they were exonerated, and the whole responsibility for the damage was placed upon the tug. The present case is a stronger one for the defendant than that. There, some of the crew of the Wisconsin were aboard the tug. Here, there was no employee of the de-

fendant in any way concerned with the towing. It was exclusively in charge of Biggs and his deck hand, Grove, and they were both employed, paid by, and took their orders from the Potter Realty Company in respect to its own property.

These circumstances disclosed by the testimony of the plaintiff were sufficient, in our judgment, to lead the court to sustain a motion of involuntary nonsuit at the close of the plaintiff's case. The judgment is therefore reversed, and the cause remanded, with directions to enter judgment of nonsuit.

McBRIDE, O. J., and BENSON and HARRIS, JJ., concur.

(97 Or. 513)

**LARSON et al. v. WELLNER.\***

(Supreme Court of Oregon. July 27, 1920.)

**1. Habeas corpus §99(4)—Custody of child properly given to grandparents as against parent.**

In a proceeding between the father and grandparents regarding the custody of a child, court properly awarded custody to the grandparents, who were people of education and refinement, while the father was a man of a violent and uncontrollable temper, and lived in a place of the most primitive type, with a sister who was much given to the use of profane and filthy language in her ordinary conversation.

**2. Habeas corpus §99(3)—Custody of child may be taken from parents by court of equity.**

A court of equity may take a minor child from a parent and place it in the custody of a grandparent, where it will best protect and safeguard the interests of the child; L. O. L. § 1814, having no reference whatever to the powers exercised by a court of equity.

Appeal from Circuit Court, Multnomah County; George W. Stapleton, Judge.

Proceeding between Vincent F. Wellner and John C. Larson and another regarding the custody of a child. From a decree awarding the custody of the child to the latter, the former appeals. Affirmed.

On March 17, 1919, Vincent F. Wellner filed a petition in the circuit court for Multnomah county, for a writ of habeas corpus, wherein he sought to obtain the custody of his minor son, Burton Donald Wellner, who was then in the custody of his maternal grandparents, John C. Larson and Julia Larson. On the same day the Larsons filed their complaint in equity, asking that they be awarded the custody of the child. It was then stipulated that the complaint filed by the Larsons should be treated as a return to the writ in the habeas corpus proceeding, and to that pleading Wellner filed a reply, and the whole matter of the custody of the child was tried as one suit.

The facts of the case will be found in the opinion. There was a decree in which the custody of the boy was awarded to the grandparents, the Larsons, until he should arrive at the age at which he will be entitled under the law to elect his own guardian. From this decree, the plaintiff, Wellner, appeals.

W. T. Slater, of Portland (John Manning, of Portland, on the brief), for appellant.

Guy C. H. Corliss, of Portland, for respondents.

BENSON, J. (after stating the facts as above). In order clearly to understand the contention of the parties, it is necessary to go briefly into the history of the matters leading up to this litigation. On November 24, 1910, Vincent F. Wellner, the plaintiff in the habeas corpus proceeding here, was married to Evelyn C. Larson, at Minneapolis, Minn., and, with his wife, proceeded at once to his farm in Brule county, S. D. In the summer of 1911, the wife's parents, John C. and Julia Larson, purchased a farm, which was located about a mile from that of Wellner, and took up their residence there. On December 14, 1911, early in the morning, Wellner's wife ran across the fields from her home to that of her parents, complaining that her husband, in a fit of rage, had beaten, choked, and kicked her, throwing her out of the house, and tearing her clothing. She never returned to her husband's house, and shortly thereafter she began a suit for divorce, charging cruel and inhuman treatment at his hands, reciting, among other acts of cruelty, the assault of December 14, 1911. The husband appeared in the case and contested his wife's case vigorously. There was a decree entered in favor of the wife. The decree was not made at the time of the trial, which was had in the month of June, for the reason that it was learned by the court that the wife was then pregnant, and after the birth of the child, which occurred on September 2, 1912, the court, on September 14, 1912, filed findings of fact and conclusions of law in the case, and a decree granting the divorce to the wife. Among others, the court found the following facts:

"That the defendant is a man of extremely violent temper, and when he gets angry is in the habit of treating his wife with great cruelty. That at different times, from a short time after the date of their marriage until December 14, 1911, defendant without any justifiable cause became violently angry with the plaintiff, and called her by vile and degrading names, and on one of said occasions grabbed her by the arm and pushed her violently across the room, and on another occasion angrily wrenched a gasoline lamp pump out of her hand. That on December 14, 1911, without any cause, and over a trifling difference between them as to whether he should be permitted to read a letter which plaintiff had written before she mail-

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Rehearing denied October 5, 1920.

ed it, the defendant fell into a violent rage and made a physical attack upon the plaintiff, catching her by the hair and throwing her violently to the floor, and got her by the throat, and choked her so as to leave finger prints upon her neck and throat, which were black and blue four or five days afterwards. At the same time he kicked her out of the house, leaving black and blue marks upon her arms and body, and in the course of his attack tore practically all of the button holes out of her dress. That the plaintiff thereupon left the family home and has not since returned. That such treatment has endangered the life of the plaintiff, and she cannot continue to live with the defendant with safety."

Shortly after the decree was obtained, Mrs. Wellner, with her babe, accompanied her parents, the Larsons, to Oregon, locating first at Forest Grove, and subsequently at Portland, continuing to live with them until July, 1916, when she married a man by the name of Johnson, with whom she subsequently resided, but still in Portland. In October, 1918, during the epidemic of influenza, Mrs. Johnson and her husband both died of that disease within three days of each other, leaving the child, who is the subject of this controversy, in the care of his grandparents, the Larsons. Thereafter the Larsons instituted proceedings for the adoption of the boy, but were unsuccessful, as the father, Vincent F. Wellner, contested the action, and it was held that the father had not willfully deserted his son, and the case now before us followed immediately.

[1] The evidence is more or less conflicting, but after a careful reading and consideration of the entire record, we are satisfied that the trial court, which heard the evidence and made the decree in the divorce proceeding, was fully justified in its findings. We are convinced that Wellner was then a man of violent and uncontrollable temper, and that the intervening years have not materially changed his character in this respect. His farm is a mile and a half from the nearest schoolhouse, which appears to be of the frontier, primitive type. The only woman living in his home is his unmarried sister, 62 years of age, who is much given to the use of profane and filthy language in her ordinary conversation, and that she is far from neatness and cleanliness in her housekeeping operations. Upon the other hand, the grandparents, the Larsons, who have had the boy in their home almost continuously from the hour of his birth, appear to be people of some education and a degree of refinement, having a pleasant and comfortable home of their own, and are fairly prosperous. Their affection for and their devotion to the best interests of the boy are beyond any question, and

their home is situated in a city where the opportunities for the education of the child are peculiarly favorable. We are therefore not left in doubt as to what disposition of the matter would be for the best interest of the child.

[2] The learned counsel for the father, however, urges that this court is without legal discretion to consider any such problem, and calls our attention to section 1314, L. O. L., which reads as follows:

"Every guardian so appointed shall have the custody and tuition of the minor, and the care and management of his estate, and shall continue in office until the minor shall have arrived at the age of twenty-one years, or until the guardian shall have been discharged according to law: Provided, however, that the father of the minor, if living, and in case of his death, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, shall be entitled to the custody of the person of the minor, and to the care of his education."

The concluding clause of the section quoted, consisting of the proviso, is the portion thereof upon which defendant relies to support the contention that neither the trial court nor this court has any discretion in the matter, but is compelled, by the statute quoted, to award the custody of the boy to the father. The section quoted is found in chapter 10, title 16, L. O. L., which is devoted to the subject of prescribing the powers and duties of a county court in the appointment and control of guardians of minors. It has no reference whatever to the powers exercised by a court of equity, and does not undertake to limit the jurisdiction of such a court. This court has always exercised the power, in cases like the present one, to place the minor child in such custody as will best protect and safeguard the interests of the minor. The case of *Barnes v. Long*, 54 Or. 548, 104 Pac. 296, 25 L. R. A. (N. S.) 172, 21 Ann. Cas. 465, cited by appellant, expressly asserts the propriety of the exercise of such discretion, where it says:

"Of course, the court in the interest of the child may take it from the parents and make other provisions for it, but there must be some good cause for so doing."

Each case must be governed by its own facts, the court having in mind, at all times, the welfare and interests of the minor. We conclude, therefore, that the trial court reached a proper conclusion, and the decree is therefore affirmed.

McBRIDE, C. J., and BURNETT and HARRIS, JJ., concur.

(183 Cal. 422)

**MERZOIAN v. KLUDJIAN et al.**  
(S. F. 9256.)(Supreme Court of California. July 30, 1920.  
Rehearing Denied Aug. 26, 1920.)**1. Brokers  $\Leftrightarrow$ 86(5)—Evidence held insufficient to show prospective purchaser able to buy.**

In a broker's action to recover a commission for furnishing a purchaser ready, able, and willing to buy, evidence showing prospective purchaser's agreements, consisting of oral promises for securing money, *held* insufficient to show his ability to buy on agreed terms.

**2. Brokers  $\Leftrightarrow$ 63(5)—Vendors' refusal to sell held to excuse tender by purchaser.**

Where defendant vendors refused to sell before prospective purchaser had opportunity to show his ability to make the cash payment required, it was unnecessary for purchaser to tender the cash required to bind the sale.

**3. Appeal and error  $\Leftrightarrow$ 882(11) — Preventing plaintiff broker from testifying to his willingness to aid purchaser did not preclude objection that ability of purchaser was not shown.**

In an action for commission for furnishing a party ready, willing, and able to buy, objections by defendants, preventing plaintiff from testifying on his direct examination to his willingness to help the purchaser, did not preclude defendants from asserting the evidence was insufficient to show an able purchaser, so far as it was affected by plaintiff's willingness to extend him credit in making the initial payment, since such burden rested on plaintiff.

**4. Appeal and error  $\Leftrightarrow$ 843(1)—Where cause reversed on one ground discussion of others unnecessary.**

Where a case must be reversed on one ground, it is unnecessary to discuss other objections presented by appellant.

Angellotti, C. J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by A. Merzoian against L. Kludjian and another, individually and as partners. Judgment for plaintiff, and defendants appeal. Reversed.

Harry Sarkisian, of Fresno, for appellants.

F. W. Docker, G. L. Aynesworth, and Astor Elmassian, all of Fresno, for respondent.

**LAWLOR, J.** This is an appeal by the defendants, L. Kludjian, S. Kludjian, and the said L. Kludjian and S. Kludjian, doing business as Kludjian Bros., from a judgment in favor of the plaintiff, A. Merzoian, in an action brought to recover commissions which plaintiff alleged he had earned in securing for the defendants a purchaser for certain real estate which they owned and which they

had employed him as agent to sell on a commission of 5 per cent. The record of the appeal is presented under the alternative method.

On January 16, 1917, the defendants authorized the plaintiff in writing to sell a tract of 40 acres of land in Fresno county, together with certain personal property consisting of agricultural implements, live stock and other accessories used on the ranch. The selling price of this property was to be \$20,500; payable as follows: \$5,000.00 cash. Balance \$1,000.00 per year and interest." It is alleged in the complaint that on or about January 27 the plaintiff found a purchaser who agreed in writing to buy upon the owners' terms, and deposited with the plaintiff the sum of \$100; that thereafter and prior to February 2 plaintiff duly notified defendants that he had effected a sale of the property; that the proposed purchaser and the defendants were brought together for the purpose of consummating the sale; "that said purchaser did then and there \* \* \* offer to purchase \* \* \* the property"; that the defendants thereupon refused to make the sale; that the defendants had agreed to pay the plaintiff "a 5 per cent. commission on the selling price" of \$20,500, and that the plaintiff, having produced a purchaser who was ready, able, and willing to buy, is entitled to the commission. Judgment was rendered in accordance with the prayer of the complaint for \$1,025.

Appellants raise three questions:

"First and foremost of which is whether the prospective purchaser \* \* \* was ready, willing, and able to purchase; \* \* \* second, whether the defendants could have obtained a valid and binding contract from the prospective purchaser; \* \* \* and third, whether the prospective purchaser was produced as such during the life of the contract of employment of the agent and before revocation of the same."

[1] 1. We shall first consider whether John Hatchegian, the prospective purchaser, was ready, able, and willing to make the purchase, and whether the defendants could have obtained a contract from him. In this connection the court found "that at all times said John Hatchegian was ready, able, and willing to purchase said property." Is this finding sustained by the evidence? Hatchegian testified on direct examination:

"Q. About the latter part of January, 1917, did you have any conversation with Mr. Merzoian? A. Yes, sir. \* \* \* On I street. \* \* \* It was further said, he asked me \$5,000 for cash payment, and I said I didn't have \$5,000. I told him I only had \$2,000 cash, and there was another party, named Avadisian, said he was willing to lend \$500 more. \* \* \* Mr. Merzoian said at that time, 'In case Avadisian does not loan you \$500, I am willing to

help you with \$3,000 so you can purchase the place.' \* \* \* Q. Did you have any money in the bank or any place at that time? A. I had \$1,000 in the Bank of Italy, and about \$1,700 or \$1,600 in the First National Bank of Fresno. Then, aside from that, I had another note which was due right away, \$400. Q. And all together, then, you had in the neighborhood of \$2,000 or \$2,500, didn't you? A. I had \$2,500. I had \$2,500, and Mr. Avadisian was supposed to give me \$500. \* \* \* I went down and saw the cashier of the First National Bank, \* \* \* Walrond. I asked him if they were willing to give me \$500. They said, 'Yes, if you get a couple of fellows to sign on your note.' \* \* \* Mr. Merzoian at that time had a note for \$3,000, and he says his commission would amount to \$1,000, that he would deposit the \$3,000 in the bank and would get \$2,000 and give it to me."

On cross-examination, he gave the following testimony:

"Q. Now, did Avadisian ever have any conversation with you at any time before this particular conversation you have spoken of, wherein he promised to loan you \$500? A. Yes, lot of other occasions; many times. \* \* \* He has said on many occasions if I were to buy the place he would lend me \$500. \* \* \* Q. Did you at that time, or at any other time since, agree as to when you should return that \$500 to him? A. At any time I had money I was going to pay him back. Q. Is Mr. Avadisian related to you by blood? A. Godfather to my children. \* \* \* Q. At the time you signed this paper [his agreement with Merzoian for the purchase of the property] you had \$1,000 on deposit in the Bank of Italy, did you? A. Yes, sir. Q. How much money did you have on deposit in the First National Bank of Fresno? A. I don't remember correctly; it might be \$600 or \$500, I don't know just exactly; and I had a note for \$400. Q. Do you mean to tell me that on the 27th day of January, 1917, the day you signed this agreement, you had \$1,000 on deposit in the Bank of Italy? \* \* \* A. Yes, sir. Q. And you had \$500 or \$600 at the same time \* \* \* in the First National Bank of Fresno, did you? A. Why, I don't know, five or six, I don't know; I don't remember whether it was \$500 or \$600 that I had. \* \* \* That is all I had in money, \$1,000 in the Bank of Italy, and \$500 or \$600 in the First National Bank. \* \* \* I had two lots, deeded to my wife. \* \* \* That is all I had. \* \* \* At that time and now I had \$2,000, my personal money, and Avadisian was going to lend me \$500. That is how I make \$2,500. \* \* \* Q. You speak of a \$400 note. Who was that given to you by? \* \* \* A. One Michael Jacob. He has got 80 acres at Lone Star and 40 acres on California avenue. The nature of that note was so that I could demand my money at any time that I need it. "The Court: Ask him if he ever borrowed that \$500 from Mr. Avadisian. A. No; I didn't borrow at that time. \* \* \* Q. How much did Mr. Merzoian promise to help you? A. He said, 'I am willing to help you from \$2,500 to \$3,000.' Q. Did he loan you \$2,500 to \$3,000 at any time? A. No; he did not."

W. A. Piper, bookkeeper at the First National Bank of Fresno, testified that there had never been an account at that bank in the name of John Hatchegian.

The plaintiff succeeded in bringing together at the office of his attorney, Astor Elmassian, the defendants and the prospective purchaser, John Hatchegian. On direct examination the plaintiff testified as follows regarding this interview:

"Q. Now what was said at this meeting at Mr. Elmassian's office? \* \* \* A. Mr. Elmassian was present over there, and there was Mr. Kludjian brothers, Serop and Leon Kludjian, and Mr. Hatchegian, he like to buy the place. \* \* \* I gave them the \$100; told them, 'That is your deposit.' They said no, they won't take it; they don't like to sell. \* \* \* Kludjian brothers said they don't like to sell at all; they said, 'We have trouble with my brother, we don't like to sell the place.' Q. Was there anything said at that time about furnishing an abstract of the place? A. No. \* \* \* We said about that, but they said they don't like to sell."

On cross-examination, he further testified as to what was said at this interview:

"I talk about selling his place. That is all I told him [Kludjian]. I told him I got customer. \* \* \* They say they don't like to sell. That is all I know."

Regarding the same meeting in his office, Elmassian stated:

"When Mr. Hatchegian and Kludjian brothers and Mr. Merzoian came in, Mr. Merzoian told the Kludjian brothers that he had sold their property and got a deposit from Mr. Hatchegian of \$100, and that he wanted them to bring the abstract so the contract could be drawn up and conclude the business, and then he says Mr. Hatchegian had agreed to pay the \$5,000 and \$1,000 a year, and to that, as I believe, the older of the Kludjian brothers said they would not sell. \* \* \* He said they would not sell because they had had trouble with the other brother, who had not signed the contract. \* \* \* Q. Now, \* \* \* did Mr. Hatchegian make any statements \* \* \* to Kludjian brothers? A. Yes, he said he wanted to buy the place and pay \$5,000 cash and \$1,000 a year, but the elder brother of the Kludjian brothers said they would not sell."

He testified as follows on cross-examination:

"Q. On the meeting at your office \* \* \* Hatchegian had made an offer to buy that place, hadn't he? A. Yes. Q. And the Kludjians had refused to make the sale? A. Yes, sir. \* \* \* It appeared that they would not sell the place. They went out and they were mad; and that was the whole—the final transaction. \* \* \* Q. Then they absolutely—in your conversation—absolutely refused, said, 'No, we are not going to sell'? A. They did."

Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87, was an action to re-

cover commissions for the sale of mining stock. The plaintiff alleged that by a written contract he had been authorized to negotiate a sale of stock belonging to defendant's intestate; that he had a purchaser who was ready, able, and willing to buy, and that the defendant's intestate had refused to sell. The court, reversing the judgment of the lower court in favor of the plaintiff, said, (105 Cal. at page 522, 39 Pac. at page 203, 45 Am. St. Rep. 87):

"The evidence is also insufficient to show that the supposed purchaser had the ability to purchase the stock at the price named. The only evidence on that point is his own testimony. \* \* \* That testimony amounted to nothing more than a statement of his belief that persons not bound by contract to do so would have advanced the money; and it is clearly not such evidence as, under section 1835 of the Code of Civil Procedure, would justify the jury in finding that he had the ability to pay."

McCune v. Badger, 126 Wis. 186, 105 N. W. 667, was an action to recover a commission for the sale of real estate alleged to have been earned by plaintiff. The trial court directed a verdict for the defendant. We quote from the opinion of the court:

"We are unable to find any reasonably clear evidence that appellant found a purchaser able and willing to take respondent's property and pay therefor the amount in cash which it is conceded she was to have. \* \* \* The most appellant claims he accomplished was to produce a person willing to take the property so that respondent could realize her price upon condition of appellant's furnishing or procuring the money necessary therefor in excess of \$2,000, and that he had promise of loans to enable him to do so. He did not pretend his party was ever in circumstances to accept a deed of the property and pay the required amount of money therefor, except upon condition that certain persons, who had promised to loan the money to him on the property, redeemed the promise. \* \* \* The arrangement claimed to have been made contemplated the passing of the title to the property to the proposed purchaser in order to enable him or the appellant to borrow money thereon with which to pay therefor."

In the instant case, the evidence we have quoted (and no other evidence was introduced as to the alleged readiness, ability, and willingness of the prospective purchaser), considered in the light most favorable to respondent, shows that Hatchegian had \$1,000 in the Bank of Italy, \$500 or \$600 in the First National Bank of Fresno, a demand note for \$400, and the verbal promises, made without any consideration therefor, of Avadisian and the plaintiff to lend him \$500 and \$2,000, respectively. Hatchegian, as we have seen, admitted that he had not borrowed the money from Avadisian or the plaintiff. He testified that he had "two lots deeded to my wife," but he did not state whether he could have borrowed money on

that property. Moreover, it cannot be said that his testimony is at all certain as to his available assets, and, as we have shown, an official of one of the banks in which he asserted he had money on deposit stated that they had never had an account there in his name. In our opinion, the facts clearly fall within the rule announced in *Mattingly v. Pennie*, supra, and *McCune v. Badger*, supra.

Respondent cites *McCabe v. Jones*, 141 Wis. 540, 124 N. W. 486, an action by a real estate broker to recover commissions for negotiating a sale of real property, where the evidence was held sufficient to sustain a finding that the purchaser procured by the plaintiff was "able" to make the purchase. According to the opinion, "the parties agreed that, if plaintiff would induce Leach to purchase defendant's farm and personal property at the price of \$13,000 and pay therefor \$7,000 in cash and convey by good title Leach's residence property in Oshkosh, free of incumbrance, defendant would sell at that price and would pay plaintiff \$250." The court continued:

"The trial judge reversed the answer to the second question because in his judgment the evidence was conclusive that Leach was not ready, able, and willing to make the trade, and the only question in the case is whether this ruling is correct. The evidence on this question was substantially as follows: Leach's homestead in Oshkosh was subject to a mortgage of \$2,000. Leach testified that he owned \$10,000 worth of unincumbered property in Oshkosh outside of his homestead; that he arranged with one Elmer Clark to let him have \$7,000 upon mortgage on the Jones [defendant's] farm at the time the papers should be exchanged; that he had also provided to turn over his homestead clear of incumbrance; that these arrangements were complete before and at the time when the trade was to be completed. Clark testified that, in accordance with Leach's request he had the \$7,000 ready in hand to loan to Leach on the Jones farm, and kept the money ready for two months. \* \* \* There was no evidence to contradict this testimony of Leach and Clark, nor was there any evidence tending to throw doubt upon their good faith or upon the ability of either of them to carry out the arrangements which they testified they were ready and willing to carry out."

In our opinion, the facts which we have italicized are clearly distinguishable from those in the case at bar.

[2] It appears from the evidence, which we have already set forth, that the appellants' refusal to sell to Hatchegian was made before he had an opportunity to show whether he was able to make the cash payment of \$5,000, and that such refusal could not have been based upon the asserted inability of Hatchegian to complete the purchase. This refusal to proceed with the transaction rendered it unnecessary for Hatchegian to tender the cash required to bind the sale. 9 Corpus Juris, p. 600, and cases there cited.

This point, however, is not urged by the respondent. His brief is devoted, principally, to a discussion of appellants' contention as to the insufficiency of the evidence to show that Hatchegian was ready, able, and willing to make the purchase.

[3] Respondent claims that the appellants are precluded from questioning the sufficiency of the evidence as to the financial ability of Hatchegian so far as it is affected by the respondent's willingness to extend him credit in making the initial payment. We quote from the direct examination of the respondent:

"Q. Did you, Mr. Merzolan, make any statement about being willing to help Mr. Hatchegian purchase the place? A. Yes, sir. Q. And did you make it at that time? A. Yes, sir.

"Mr. Sarkisian (attorney for the defendants): Now, if your honor please, we object to that; that is only a matter of defense.

"The Court: That is right. Mr. Sarkisian. Please, your honor, that is anticipating the defense.

"The Court: Perhaps the prospective purchaser would be the most competent to testify to his ability to pay. I think perhaps we had better wait for that."

With regard to this ruling respondent's contention in his supplemental brief thus states his position:

"The ground upon which the objection of defendant was made and upon which the court ruled out this evidence was that the matter was properly one of defense; that it was rebuttal only and could not be introduced as a part of the plaintiff's original case; that the burden was on the defendants to prove the contrary, and that in the absence of such proof it would stand admitted that the persons who had offered to loan Hatchegian money to make this purchase \* \* \* were able to make their promises good. Having prevailed upon this theory and kept out all evidence for the plaintiff upon this point, he cannot now be heard to complain that the trial court applied his theory consistently and gave judgment against him without any evidence upon this point to sustain its findings."

The respondent does not contend that the exclusion of this testimony constituted error. It may be observed, however, since the judgment must be reversed and the cause remanded for a new trial, that it was a part of the plaintiff's case in chief to show that Hatchegian was ready, able, and willing to make the purchase, and this could be done by proof either that he had the funds in hand, in whole or in part, or that he commanded resources upon which he could obtain the requisite credit. What respondent does contend is that appellants are precluded from asserting that the evidence is insufficient to show that Hatchegian was financially responsive. We do not think this contention can be sustained. Hatchegian himself did not have sufficient funds. He was re-

lying in part upon credit. From what we have already said, it is plain that his resources consisted, apart from the \$1,000 in the bank and the \$400 note, not of tangible credits, but of unenforceable promises. It is not even claimed that he had a promise from his wife to convey to him the two lots which he declared stood in her name. It was upon these considerations that we reached the conclusion that the evidence does not support the findings that plaintiff produced a purchaser who was ready, able, and willing to buy the property.

[4] 2. In view of the insufficiency of the evidence, it will not be necessary to discuss the third question presented by appellants—whether the contract of agency was revoked before the plaintiff produced the purchaser. Judgment reversed.

We concur: SHAW, J.; OLNEY, J.; LENNON, J.; WILBUR, J.

ANGELLOTTI, C. J. I dissent, for the reason that I am of the opinion that the evidence sufficiently supports the finding of the trial court that the proposed purchaser was "ready, able, and willing to purchase said property upon the terms and conditions set forth in said instrument."

(183 Cal. 270)

**MARTIN v. HILDEBRAND et al.**  
(S. F. 9004.)

(Supreme Court of California. June 25, 1920. Rehearing Denied July 22, 1920.)

1. Appeal and error  $\S$  501(3)—Bill of exceptions insufficient to permit consideration of evidence.

Where bill of exceptions contains no specifications of the particulars wherein the evidence is insufficient, the question of sufficiency of the evidence to sustain the findings cannot be considered.

2. Mortgages  $\S$  300—Offer to purchase not sufficient tender.

An offer to purchase a note and mortgage and a tender of the amount due thereon did not operate either to extinguish the obligation for the debt or to terminate the lien of the mortgage, and holder of mortgage on foreclosure was entitled to interest up to foreclosure and a reasonable attorney's fee.

3. Mortgages  $\S$  580—Expenses in suit as to title to mortgage not taxable on foreclosure.

On foreclosure of a mortgage providing that mortgagors should pay all moneys expended by the mortgagee for the prosecution or defense of any action in regard to the property, expenses incurred in a suit wherein holder obtained an assignment were erroneously taxed as costs.



## In Bank.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by George J. Martin against Ernest H. Hildebrand and others. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Paul A. McCarthy, R. W. Gillogley, and Walter Christie, all of San Francisco, for appellants.

John H. Crabbe, of San Francisco, for respondent.

SHAW, J. The plaintiff's complaint states a cause of action in favor of the plaintiff for the foreclosure of a mortgage on certain land executed by the defendants Hildebrand and Lettich to the Humboldt Savings Bank to secure the payment of a note of \$3,000 dated December 26, 1912, due December 26, 1914, and bearing interest at 6 per cent. per annum payable monthly in advance and compounded monthly if not paid when due. The mortgage was assigned to the plaintiff by an instrument dated February 5, 1916, which was delivered to the plaintiff on July 27, 1916.

The defendants' answer alleged that on August 9, 1916, the defendants Hildebrand and Lettich offered to the plaintiff the sum of \$3,146.60 and demanded of plaintiff the return and cancellation of said note and mortgage and a satisfaction thereof, which offer the plaintiff refused, and that defendants have ever since been ready, willing, and able to pay said sum of money in discharge of said note and mortgage.

The court found "that on August 9, 1916, the defendants, Hildebrand and Lettich, offered to plaintiff in gold coin, the sum of \$3,146.50, and demanded from plaintiff an assignment of said note and mortgage"; that said defendants did not then state whether the offer was on their own behalf as junior mortgagees, or as owners, or as agents for the owner of the real property; and that the plaintiff rejected said offer because it was insufficient in manner and in the amount offered.

[1] A motion for a new trial was made on the general ground of the "insufficiency of the evidence to justify the decision." The appeal is supported by a bill of exceptions which contains no specifications of the particulars wherein the evidence is insufficient. Consequently "the question of sufficiency of the evidence to sustain the findings cannot be considered." *Millar v. Millar*, 175 Cal. 799, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; *Hawley v. Harrington*, 152 Cal. 188, 92 Pac. 177; *Carter v. Canty*, 186 Pac. 347. The defense that the mortgage lien was extinguished by a tender of payment must therefore be considered upon the findings alone.

[2] According to the findings, the offer made by the defendants to the plaintiff on August 9 was not an offer to pay or discharge the mortgage debt, but was, in effect, an offer of the money, coupled with a demand for an assignment of the mortgage to the defendants. It was an offer to purchase the note and mortgage, not an offer to pay or discharge the mortgage debt. Such an offer does not operate either to extinguish the obligation for the debt or to terminate the lien of the mortgage. The court did not err in giving judgment for the amount due on the mortgage with interest, including the reasonable fee for plaintiff's attorney in foreclosing the mortgage, and costs.

[3] In addition to these items the court allowed to the plaintiff and included in the judgment, sums amounting to \$159.50 on account of expenditures made by the plaintiff before the assignment to him of the said mortgage as the costs and expenses of certain litigation arising out of an action by Martin against the defendants to quiet the title to the same tract of land. In that case an order was made requiring the Humboldt Savings Bank to assign the note and mortgage to the plaintiff, and the defendants sought to annul the order by a proceeding in certiorari in the Supreme Court, in which they were unsuccessful. *Hildebrand v. Superior Court*, 173 Cal. 86, 159 Pac. 147. The \$159.50 above mentioned was for costs and attorney fees incurred by the plaintiff in making his defense thereto. We are of the opinion that they were improperly chargeable as costs in this foreclosure proceeding. They were not incurred on behalf of the holder of the mortgage, or for its benefit, nor to protect the mortgaged property, but solely for the purpose of carrying out the desire of the plaintiff to obtain an assignment of the mortgage to himself. The mortgage provided that the mortgagors should pay all moneys expended by the mortgagee "for the prosecution or defense of any action in regard to said property." But this did not require them to pay sums expended by a would-be purchaser of the mortgage in the effort to obtain an assignment thereof. It follows therefore that the judgment is excessive in the amount of \$159.50 and is to that extent erroneous. It will be unnecessary to reverse the judgment for this error. The proper result can be reached by a modification thereof deducting that sum from the amount of the judgment and affirming it as so modified.

It is ordered by the court that the judgment appealed from be modified by deducting from the amount thereof the sum of \$159.50 and that as so modified said judgment be affirmed.

We concur: ANGELLOTTI, O. J.; OLNEY, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.; SLOANE, J.

(188 Cal. 332)

**In re BENVENUTO'S ESTATE.**  
(L. A. 6375.)

(Supreme Court of California. July 27, 1920.  
Rehearing Denied Aug. 23, 1920.)

**1. Executors and administrators §137—Preliminary order authorizing sale of property unnecessary.**

The effect of the amendment of Code Civ. Proc. § 1536, by St. 1919, p. 1179, in omitting the requirement that a sale of a decedent's property must be on order of court, is that a preliminary order is not required to authorize the administrator or executor to negotiate a sale of property for the purposes for which a sale is authorized by the section.

**2. Executors and administrators §137—Decision as to necessity for sale required on hearing of return for confirmation.**

The effect of the amendment of 1919 upon Code Civ. Proc. § 1536, regulating the sale of decedent's estates, is that the questions whether a sale is necessary and for the best interest of the estate are now decided on the hearing of the return of sale and application for confirmation, instead of on a petition for an order of sale, as formerly provided by sections 1540, 1542, 1543, and 1544.

**3. Descent and distribution §3—Decedent's property vests in heirs at death, subject to laws then in force.**

The property of an intestate decedent vests in his heirs on his death, subject to the burdens imposed on it by the law in force at that time for the purpose of paying the debts of the decedent and the expenses of the administration of the estate, and also subject to the sale by the executor or administrator for such reasons and purposes as may then be authorized by law.

**4. Constitutional law §93(1)—Extent to which the Legislature may, by amendment of law after death of intestate, impose additional burdens thereon, stated.**

The Legislature cannot, by amending the law after the death of an intestate, impose on his property any new or additional burdens, or authorize a sale thereof for new reasons or other purposes; but it may enact new laws prescribing a different mode of procedure for making and confirming sales to satisfy such purposes or carry out such objects as were provided for by the law as it was enforced at his death.

**5. Executors and administrators §351—Additional bond for sale required; "ordered."**

Code Civ. Proc. § 1389, providing that the court may direct the giving of an additional bond whenever the sale of any real estate belonging to the estate "is ordered," unless the bond already given is sufficient, is not made inapplicable by the amendment of 1919 eliminating the necessity for a preliminary order for sale, since the sale is "ordered" when it is confirmed and the deed is directed to be made.

**6. Constitutional law §306—Executors and administrators §337—Amendment of statute regulating sale of decedent's property held not to deprive heirs of right to notice.**

The amendment of 1919 to the law relating to the sale of decedent's property, eliminating the necessity of a preliminary order of sale, is not invalid as depriving the heirs of their right to personal notice of the sale proceedings, as provided in Code Civ. Proc. § 1380, since the notice required to be given on the filing of a return of sale is sufficient to constitute due process of law.

**7. Constitutional law §93(1)—Executors and administrators §361—Amendment of statute regulating sale of decedent's property on credit held valid.**

The amendment of 1919, repealing Code Civ. Proc. § 1544, prohibiting the administrator from selling real property on a credit exceeding one year and making the limit of credit to be given by the administrator discretionary, held not invalid as to pending administration cases; it being a mere incident of the power to sell property for the payment of debts.

**8. Executors and administrators §320—Amendments regulating sale held prospective.**

The amendments of 1919 to the law regulating the sale of decedent's property are prospective, in that they do not apply to proceedings already completed at the time they were enacted, but are applicable to all proceedings begun thereafter, including pending administrations, so that they cannot be considered retroactive without expressed declaration to that effect, when applied to the sale of the property of a decedent who died before the amendments were enacted.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of Pietro Benvenuto, deceased. From an order confirming a sale of real estate by Jarrett T. Richards, administrator, Pastine Maddalena Benvenuto appeals. Affirmed.

A. C. Postel, of Santa Barbara (C. H. Brock, of Los Angeles, of counsel), for appellant.

Richards, Heaney & Price, of Santa Barbara, for respondent.

SHAW, J. This is an appeal from an order confirming a sale of real estate made by the administrator of the estate of said decedent. The administrator did not file any petition for an order authorizing a sale, nor was such order ever made. He filed a return of the sale and asked confirmation thereof by the court. Notice of the hearing on the return was given as provided by section 1552 of the Code of Civil Procedure as amended in 1919. At the hearing the court made findings in accordance with the allegations of the return, and thereupon confirmed the sale. Herein the administrator and the court below proceeded under the authority of the provi-

(191 P.)

sions of the act which took effect July 25, 1919, amending sections 1516, 1517, 1522, 1523, 1525, 1536, 1545, 1547, 1549, 1552, 1554, 1555, 1559, 1565, and 1570 of the Code of Civil Procedure, and of the act taking effect on the same date repealing sections 1537, 1538, 1539, 1540, 1542, 1543, and 1544. Stats. 1919, p. 1177.

The decedent died intestate on November 22, 1911. His property, of course, descended to and vested in his heirs at that date, subject to administration in accordance with the law then in force. It is contended by the appellant, who is the widow and heir of said decedent, that the amendment of 1919 is invalid with respect to the estates of persons who died before the amendment took effect. She claims that it imposes additional burdens upon the property, and, if operative, would divest rights of the heirs which were previously vested in them. The amendment made no change in section 1516, except that it omits the words "as the court may direct" from the clause declaring that the property of the estate "may be sold as the court may direct, in the manner prescribed in this chapter." Section 1517, prior to the amendment of 1919, provided that—

"No sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter."

The amended section omits this clause and in lieu thereof declares that—

"The executor or administrator may sell any property of the estate of a decedent without order of court, and at either public or private sale, as the executor or administrator may determine."

The remainder of the section declares expressly "that no sale of such property is valid unless" reported under oath to and confirmed by the court. Section 1536, prior to the amendment, read as follows:

"When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration or legacies; or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate, upon the order of the court."

[1] In the section as amended the italicized words are omitted. The effect is that a preliminary order of the court is no longer required in order to authorize the administrator or executor to negotiate a sale of the property of the estate for the purposes and reasons for which a sale is authorized by the section. It is further to be noted that section 1380 of the said Code provides that any person interested in an estate may make

a written request to the executor or administrator, stating his post office address and that he requires special notice of the filing of petitions for sales of property and certain other petitions described, and that thereafter notice of the filing of such petitions shall be served upon such party within two days after the filing thereof, either personally or by United States mail, and that the court, upon the hearing of the petition, shall find and declare that such notice has been given. The appellant, prior to the sale in question, gave to the administrator the notice as provided in this section.

[2] The amendment of section 1552 made no change in the manner of giving notice of the hearing of the return of sale. The notice was given in the present case in the manner prescribed and in addition thereto the notice as required by section 1380 as aforesaid. The appellant appeared at the hearing. In its order confirming the sale the court states that the sale was made without any order of the court first had or obtained, and without serving any notice upon said appellant of the application for such order, but that the appellant received due personal notice of the filing of the return of sale and of the date of the hearing thereof. The amendment to section 1552, however, provided that upon such hearing the court "must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale, and if good reason does not exist for such sale," or if it was unfair, or for less than its value, the court may vacate the sale or direct a new sale. The change made by the amendment in this respect is that the questions whether a sale is necessary for payment of debts, expenses of administration or legacies, and whether a sale would be for the advantage, benefit, and best interests of the estate, as provided in section 1536, are now to be decided upon the hearing of the return of sale and application for confirmation thereof, instead of upon the hearing of the petition for an order of sale as formerly provided by sections 1540, 1542, 1543, and 1544, which sections were repealed by the amending act of 1919.

[3, 4] The principles governing the question of the validity of the amendments, with respect to estates of persons previously deceased, are well established. The property of an intestate decedent vests in his heirs upon his death, subject to the burdens imposed upon it by the law in force at that time for the purposes of paying the debts of the decedent and the expenses of the administration of the estate, and also subject to sale by the executor or administrator for such reasons and purposes as may be then authorized by law. But the Legislature cannot, by amending the law after his death, impose upon the property of a decedent any new or

additional burdens, or authorize a sale thereof for new reasons or other purposes. It may, however, enact new laws prescribing a different mode of procedure for making and confirming sales to satisfy such purposes or carry out such objects as were provided for by the law in force at his death.

In *Brenham v. Story*, 39 Cal. 188, one Charles White died intestate in 1853. The law then in force made his property subject to sale only for the payment of his debts and the expenses of administration. In 1861 a special act (special laws being then permitted by the Constitution) was passed by the Legislature purporting to authorize the administrator of the estate of White to sell his real estate, without first having obtained an order of court therefor, "as in the judgment of the said administrator will best promote the interest of those entitled to the estate." St. 1861, p. 152. It further provided for a return of sale and for confirmation thereof by the court. The court said that the estate of the decedent was subject to the payment of his debts and expenses of administration, which were burdens upon it, in the nature of liens; that it was competent for the Legislature, after the death of a decedent, to enact "laws which prescribe the manner in which these paramount claims shall be satisfied"; that such laws "are held to be entirely remedial"; that "such acts have been uniformly held valid where it appeared to be in execution of these liens." The sale was held void, not because of the provision in the act that the sale could be made without first obtaining an order to sell, but because it authorized a sale by the administrator when such sale "would advance the interests of those entitled to the estate; the sale was to be in the interest of the heirs as owners, and not to satisfy the paramount lien imposed by law upon the property of the decedent," and it was said that—

"The Legislature has no more right to order a sale of his (the heir's) vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way."

So in *Estate of Packer*, 125 Cal. 397, 58 Pac. 59, 73 Am. St. Rep. 53, a similar ruling was made. Packer died in 1891. In 1893 sections 1536 and 1537 were amended, so as to provide, as 1536 now provides, that a sale of property of a decedent could be made when it was "for the advantage, benefit, and best interests of the estate and those interested therein." The court held that the property of decedents who had died before said amendments were enacted could not be sold for that reason; the court saying that the Legislature could not, after the title had vested in the heir, "empower the administrator to sell the inheritance for purposes not authorized at the time the title vested and to which it

was not subject when it vested." See, also, *Pryor v. Downey*, 50 Cal. 409, 19 Am. Rep. 656; *Estate of Porter*, 129 Cal. 89, 61 Pac. 659, 79 Am. St. Rep. 78; *Murphy v. Farmers' & Merchants' Bank*, 131 Cal. 115, 63 Pac. 368, 731; *Estate of Newlove*, 142 Cal. 379, 75 Pac. 1083; *Estate of Bazzuro*, 161 Cal. 74, 118 Pac. 434.

With respect to the power of the Legislature to provide new methods of procedure for the making of sales for purposes authorized by law at the time of the death of the decedent, the decisions also establish the rule above stated. It was clearly stated in *Brenham v. Story*, supra, as above related. In *Murphy v. Farmers' & Merchants' Bank*, supra, after a testator's death, sections 1577 and 1578 of the Code were amended so as to authorize the administrator, upon the order of the court, to mortgage the property of the estate to provide money for the payment of the debts. It was held that the devisee took the land subject to a charge for the debts of the deceased and to the law authorizing a sale for payment thereof, and that "to authorize the mortgage of the property for the express purpose of raising money with which to pay these charges is but to change the form of the lien and adds no new burden not already borne by the property, or to which the property may be subjected under the law as it existed when the testator died," and that the amended law was valid with respect to estates of decedents whose death occurred prior to its passage. The decision in *Estate of Freud*, 131 Cal. 668, 674, 63 Pac. 1080, 82 Am. St. Rep. 407, is to the same effect. The rule is thus stated by Judge Cooley:

"As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence, and it may abolish old remedies and substitute new, or even without substituting any, if a reasonable remedy still remains. \* \* \* And any rule or regulation in regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation." Cooley's Const. Llm. (7th Ed.) p. 515.

And with regard to matters of defense, the same author says:

"A party has no vested right in a defense based upon an informality not affecting his substantial equities." Id. p. 529.

In 12 Corpus Juris, at page 975, it is said:

"Existing remedies may be modified or impaired, particular remedies may be taken away, one particular remedy may be made the exclusive one, or one remedy may be substituted for another. \* \* \* There must remain, however, a remedy that is not merely colorable, but is real and substantial."

To all these points many cases are cited in the footnotes. In the light of these authorities we proceed to examine the objections raised by the appellant.

Section 1389, Code of Civil Procedure, provides that the court must direct the giving of an additional bond, "whenever the sale of any real estate belonging to an estate is ordered," unless the bond already given is sufficient as therein prescribed. The appellant claims that, as this may be done only when a sale of real estate "is ordered," the repeal of the sections which provide for the filing of a petition for sale, the making and service of an order to show cause, and the making of an order directing a sale (sections 1537, 1538, 1539, 1542, 1543, 1544) deprives the appellant of the opportunity to ask for an additional bond and the court of the power to require one, and thereby deprives her of the protection which such bond would afford. If this were the effect of the repeal, perhaps the objection would be good.

[6] But we think section 1389 remains applicable to the mode of sale now provided. The court has power, under section 1389, to require an additional bond when a sale "is ordered." By the law as amended the administrator is authorized to make what is in substance no more than an agreement of sale fixing the price and the terms thereof. He makes return of this to the court for approval and confirmation. Section 1517. Thereupon notice must be given, as the law provides, of the time of hearing the return. Upon the hearing the court must examine witnesses and determine whether the sale is a proper one, and it may order a new sale for the causes therein stated, or it may vacate the sale, or approve the one already made. Section 1552. If it approves the sale, it must thereupon make an order confirming the sale and direct a conveyance to be executed. Section 1554. The conveyance must thereupon be made by the executor to the purchaser, and it operates to convey to him all the right, title, and interest of the decedent in the premises at the time of his death. Section 1555. These proceedings constitute an order of sale, and thereby a sale "is ordered." It requires no stretch of construction to bring these proceedings within the meaning of that term as used in section 1389, and to hold that a sale "is ordered" when it is confirmed and the deed is directed to be made. The notice to be given upon the filing of the return of sale is sufficient to constitute due process of law, and it affords to the parties interested the opportunity to appear and ask for an additional bond in case they consider the bond already given insufficient. The amended law does not in this respect deprive the heirs of any right which they previously had, but merely changes to a very slight extent the time and place of asserting such right.

[8] It is also claimed that the heirs are de-

prived of the right to have personal notice of the proceedings for the sale as provided in section 1380. Under the authorities above cited this could not be considered fatal to the validity of the law as applied to descents cast, for, as above stated, the Code would still provide due process of law before a sale could be actually made. But the liberal construction which the Code declares it must receive "to effect its objects and promote justice" (section 4) justifies the conclusion that the phrase "filing of petitions for sales" in section 1380 may be held to apply to the report or return of sale required by section 1552. Such return must state the terms of the sale agreed on and the purposes for which the money is to be used. It may ask—that is, petition—for a hearing, or the hearing may be asked "by petition subsequently." The sale is not as yet complete, and the return and petition, in substance and in fact, constitute a petition for the sale agreed on. Undoubtedly, if the Code had not previously contained other provisions relating to petitions for sale, section 1380 would be understood to apply to such return and petition for confirmation of the sale. We perceive no sound reason for refusing to give it that meaning with the Code as it now stands. In the present case it was so construed, and the personal service notice was given to the appellant accordingly.

Objection is made to the amended section 1559 giving the administrator authority to employ a real estate broker to negotiate a sale and to charge his commission to the estate. Previously the section required an order from the court to authorize the employment of such broker. We need not determine whether or not this objection is good. No broker was employed. The question is not presented, and as section 1559 is not an essential part of the procedure for the sale, its invalidity, as applied to pending administrations, would not affect the sale here involved.

[7] Section 1544, which was repealed, prohibited the administrator from selling real property upon a credit exceeding one year. Under the scheme of sale provided by the amended sections of 1919, no limit is placed upon the credit which may be given by the administrator upon a sale, except the discretion of the court, and no limit is placed upon that discretion. It is contended that this imposes an additional burden upon the heirs and therefore is inapplicable to cases pending at the time the amendment was enacted. Under the authority of *Murphy v. Farmers' & Merchants' Bank*, supra, we think this enlargement of discretion as to the time of credit was within the power of the Legislature and a mere incident of the power to sell property for the payment of debts. The appellant refers to other sections prescribing proceedings with relation to sales of land which has been devised by will. It is unnecessary to consider these sections. They

do not apply to sales by the administrator and have no application to the present case.

[8] Appellant further contends that under section 3, providing that no part of the Code "is retroactive, unless expressly so declared," these sections cannot be held to apply to proceedings pending at the time they were enacted, because of the fact that there is no express declaration that they shall so apply. It is not necessary to hold that the sections are retroactive. They are prospective in that they do not apply to proceedings already completed at the time they were enacted, but they do apply to all proceedings begun thereafter. That they were intended so to apply is obvious from the fact that at the same time and as a part of the same scheme the Legislature repealed the sections which provided for the filing of the petitions for sale and orders of sale prior to the making of any sale by the administrator. Unless the scheme as changed by the amendments applies to pending administrations, there would be no mode provided for the sale of property thereunder. There can be no doubt that the legislative intent was that proceedings subsequent to the enactment of the amendments should be governed by the provisions therein contained.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; LAW-  
LOR, J.; WILBUR, J.; OLNEY, J.; LEN-  
NON, J.

(183 Cal. 326)

Ex parte HINKELMAN. (Cr. 2283.)

(Supreme Court of California. July 27, 1920.)

1. Municipal corporations §707—"Diffuse" defined.

Relative to meaning of phrase "diffusing type of lens," as used in Motor Vehicle Act, § 13, subd. (k), as amended by St. 1919, p. 211, § 10, subd. (k), to diffuse is to spread widely, to scatter or disperse, and any lens in an automobile light, not made of plain glass, would, to some extent, diffuse the rays of light passing through it.

2. Criminal law §304(4)—No judicial notice taken of meaning of "diffusing type of lens."

The phrase "diffusing type of lens," used in Motor Vehicle Act, § 13, subd. (k), as amended by St. 1919, p. 211, § 10, subd. (k), is apparently a trade-name of recent origin, and its use has not as yet become sufficiently general to enable a court to take judicial notice of its trade meaning.

3. Indictment and Information §110(47)—Complaint using trade-name of unknown meaning, used in statute, sufficient.

A charge that defendant's headlight was of the "diffusing type of lens," a trade-name used in Motor Vehicle Act, § 13, subd. (k), as amended by St. 1919, p. 211, § 10, subd. (k),

of whose meaning the court cannot take judicial notice, was nevertheless sufficient; the meaning of the term being a matter of proof at the trial.

4. Municipal corporations §707—Use of untested headlight by automobile criminal, although not dangerous.

Use of a headlight of more power than had been sanctioned by a testing agent, as provided in Motor Vehicle Act, § 13, subd. (j), as amended by St. 1919, p. 210, § 10, subd. (j), was a violation of such act, although such lights did not produce a dangerous glare.

5. Municipal corporations §707—Motor Vehicle Act, making it offense to use headlights not sanctioned by testing, valid.

Motor Vehicle Act, § 13, as amended by St. 1919, p. 206, § 10, making it an offense to use a headlight that has not been tested and sanctioned by a testing agency, is valid.

In Bank.

Application by Lee H. Hinkelman for a writ of habeas corpus, prayed to be directed to the Chief of Police, City and County of San Francisco, to secure the release of petitioner from custody. Petition remanded.

James M. Oliver and Raymond Benjamin, both of San Francisco, for petitioner.

U. S. Webb, of San Francisco, for respondent.

SHAW, J. Hinkelman was imprisoned on a warrant of arrest issued out of the police court of the city and county of San Francisco on a complaint charging him with violating sections 13 and 32 of the Motor Vehicle Act (St. 1915, pp. 405, 413, as amended by St. 1919, pp. 206, 225, §§ 10, 16). He applied for a writ of habeas corpus, claiming that the complaint does not charge a public offense, and that sections 13 and 32 of said act, so far as they relate to the offense charged, are unconstitutional.

Section 32 declares it to be a misdemeanor for any person to violate any provisions of the act. The particular violation here charged is the driving of an automobile on a public street equipped with a headlight more brilliant and set at a different angle than is permitted by the provisions of section 13. This section makes elaborate and complex regulations relating to headlights. The portions thereof applying to the present case may be summarized as follows:

Subdivision (a) provides that, "at all times during the period from a half hour after sunset to a half hour before sunrise, every automobile while on the public highway shall carry at the front at least two lighted lamps." Subdivision (f) provides that during the time above stated "the headlights of all automobiles upon the highways shall give a light of sufficient power and so distributed as pro-

vided herein." The material provisions of subdivision (g) are as follows:

"The headlights of motor vehicles shall be so arranged, adjusted, and constructed when the car is fully loaded, that any pair of headlights under the conditions of use must produce a light which: (1) is not less than 1,200 apparent candle power at a point two hundred feet directly in front of the lens, when measured on a level surface on which the car stands and at some point between such surface and a horizontal line passing through the top of the lens; (2) does not exceed 2,400 apparent candle power at a point one hundred feet directly in front and five feet above such level surface and which has no greater power at a height above five feet at that distance; and (3) does not exceed 800 apparent candle power "at a distance of one hundred feet ahead of the car and seven feet or more to the left of the axis of the same and five feet above the level surface on which the vehicle stands."

Subdivision (h) provides that no headlight referred to in subdivision (f) shall be used upon the highways until it shall have been tested as provided in subdivision (h). This subdivision makes elaborate provisions for the making of such tests by testing agency to be appointed by the superintendent of the motor vehicle department. Subdivision (i) requires the superintendent of the motor vehicle department to make a written report of the result of the test and file a copy thereof with each county clerk in the state and with the official of each city, town, or county whose duty it is to enforce the law. Subdivision (j) provides:

"It shall be unlawful for any manufactured device that is sold commercially to be used in connection with the headlight upon a motor vehicle to enable the same to comply with the provisions of subdivision (f) hereof unless such device shall have been first tested as provided in subdivision (h) hereof"

—and shall have been reported favorably by the testing agency, as complying with the requirements of the section, and such report incorporated into the report of the superintendent of the department, and a copy thereof filed in the office of the county clerk of the county in which the device is used, and sent to the city, county, or town police or traffic officers. Subdivision (k) contains the clause which has caused the difficulty in the present case. It reads as follows:

"Diffusing type of lens may be used with a candle power not sufficiently great to produce a dangerous glare. The maximum of such candle power shall be established by the testing agency selected by the superintendent of the motor vehicle department, based upon tests as hereinabove provided. Any device so certified shall be equipped with light bulbs labeled with the true candle power thereof, not exceeding that prescribed."

The complaint on which Hinkelman was arrested charged that he did unlawfully

drive along and upon a public highway at half past 8 o'clock p. m. an automobile occupied by himself alone, carrying at the front thereof two lighted head lamps—

"each equipped with a device that is sold commercially to be used in connection with head lamps on motor vehicles to enable them to comply with the provisions of section 13, subdivision (f), of the Motor Vehicle Act, which said device was purchased by the defendant in 1918 and attached to said head lamps by defendant, to wit, a diffusing type of lens, known as a 'Warner lens,' which said type of device was, during the month of July, 1919, tested by the testing agency appointed by the superintendent of the motor vehicle department of the state of California and reported to said superintendent by said testing agency as substantially complying with the requirements of section 13, of the California Motor Vehicle Act, when used with light bulbs of a specific candle power prescribed by said testing agency, and adjusted at a specific angle designated by said testing agency; that said defendant did then and there drive said automobile with said head lamps adjusted at an angle other than designated by said testing agency and equipped with said device and did then and there use said device with light bulbs exceeding in amount the candle power prescribed by said testing agency, though not sufficiently great as to produce a dangerous glare."

The two main purposes of the section are to compel the driver of an automobile to use thereon headlights which (a) shall cast in front of the automobile a light of sufficient power to enable him, when driving in the dark, to see objects in the road at a distance of two hundred feet ahead, and which (b) shall not unduly dazzle the eyes of persons in front who may be looking toward him. The requirement of subdivision (g) that, at an elevation above the level surface equal to the elevation of the top of his lens and 200 feet ahead, the light shall not be less than 1,200 apparent candle power, is intended to meet the first mentioned purpose. The requirements that at a point 100 feet directly in front of the car the light shall not exceed 2,400 apparent candle power, and that at a point 100 feet ahead, 7 feet to the left and 5 feet above the surface, it shall not exceed 800 apparent candle power, are intended to serve the last-mentioned purpose.

[1-3] The meaning of the clause in subdivision (k) above quoted is not clear. The phrase "diffusing type of lens" is not defined in the act. To diffuse is to spread widely, to scatter, or disperse. Any lens not made of plain glass would to some extent diffuse the rays of light passing through it. The phrase is apparently a trade name of recent origin. Its use has not as yet become sufficiently general to enable a court to take judicial notice of its trade meaning. The charge is that the defendant's headlight was of that type. As a pleading this is sufficient and the meaning of the term would be

a matter of proof at the trial. The question whether such a law is sufficiently certain to make the penalty valid is not here decided. But whatever this phrase may mean, it is clear that under the provisions of this clause all lenses of the "diffusing type" must be submitted to the testing agency for approval and subjected to the same tests as to the maximum candle power that are required for other types of lenses. It declares that the maximum candle power of such lenses "shall be established by the testing agency . . . based upon tests as hereinabove provided," and that the device so tested shall have light bulbs "not exceeding that prescribed." This obviously refers to subdivisions (g), (h), and (j). It therefore means that such diffusing type of lens shall not throw a light which, at 100 feet ahead and at a height of 5 feet from the level surface, shall exceed 2,400 candle power, or which, at said height and said distance ahead and 7 feet to the left, shall exceed 800 candle power, as provided in subdivision (g), and also that such device, if sold commercially, cannot be used by any person, unless it has been tested to ascertain this maximum, as provided in subdivision (h), and approved and certified, as provided in subdivision (j). It also makes such lenses subject to another clause in subdivision (h), not above mentioned, which is as follows:

"Provided, however, that if the test indicates that a device which is unacceptable with either of the test lamps will come within the specifications with lamps of another candle power or of the other type, the device may be passed with corresponding limitations as to the incandescent lamps to be used in connection with it."

[4] The complaint shows a violation of the act. It charges that the Warner type of lens was sold commercially, was tested by the testing agency as provided in the act, and was by it reported as complying with section 13 "when used with light bulbs" of a stated candle power, but that the defendant used Warner lenses with light bulbs exceeding the candle power so limited. Warner lenses equipped with light bulbs of the candle power used by the defendant may have been tested, but the complaint shows that they had not been approved or reported as permissible. The defendant is therefore, in effect, charged with using in connection with his headlight a "manufactured device that is sold commercially," which had not been first approved by the testing agency, or reported by said agency to the superintendent of the motor vehicle department as substantially complying with section 13 of the act, contrary to the provisions of subdivisions (h) and (j) above set forth. The fact that the headlights used did not produce a dangerous glare did not make it lawful for Hinkelman to use a headlight sold commercially that had not been tested and sanctioned by the

testing agency as provided in subdivision (j). The complaint is therefore sufficient to justify the warrant upon which Hinkelman is detained in custody.

[5] We see no constitutional objection to the validity of these provisions. It may be true that the Legislature has no power to delegate to the testing agency or to any other body the authority to make regulations in the nature of laws prescribing the quality of headlights which shall be used by persons driving automobiles. But the act itself, in subdivision (g), prescribes the qualities of headlights. The office of the testing agency is to furnish a means for the convenient determination of the question whether or not a given light does comply with the regulations laid down in the act. The Legislature has provided that no such light shall be used until the testing agency shall have ascertained and reported that it does comply with the law. Were it not for such provision for a testing agency no one could be reasonably certain that he is complying with the law and no officer of the state could be reasonably certain that the user was not complying with the law, without an elaborate test of the particular light in use. This would entail great expense and inconvenience both to the state in enforcing the law and to persons charged with a violation of it in establishing the defense that they had not violated it. In such cases it is proper for the state to establish an agency for the ascertainment of the facts with respect to any particular kind of headlight that is sold commercially and for general use.

The petitioner is remanded to the custody of the officer.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.; SLOANE, J.; LENNON, J.

(183 Cal. 800)

Ex parte TEATSEN. (Cr. 2282.)

(Supreme Court of California. July 27, 1920.)

In Bank.

Application by John F. Teatsen for a writ of habeas corpus, prayed to be directed to the Chief of Police, City and County of San Francisco, to secure the release of petitioner from custody. Petitioner remanded.

James M. Oliver and Raymond Benjamin, both of San Francisco, for petitioner.

U. S. Webb, of San Francisco, for respondent.

SHAW, J. The application for a writ of habeas corpus in this case is based on the same facts as are set forth in the Case of Hinkelman, 191 Pac. 682, decided concurrently herewith, except that Teatsen is charged with driving an empty motor truck of one ton capacity, instead of an ordinary automobile, and equipped with a Dillon lens, instead of a



Warner lens. Said Dillon lens is also of the diffusive type referred to in section 13 of the Motor Vehicle Act (St. 1919, p. 206). The law on the subject of such vehicles and lenses is the same as applicable to automobiles carrying Warner lenses, and the principles stated in the Case of Hinkelman are decisive of the present case.

It is therefore ordered that the said John F. Teatsen be remanded to the custody of the officer.

We concur: ANGELLOTTI, C. J.; LAW-  
LOR, J.; WILBUR, J.; SLOANE, J.; LEN-  
NON, J.; OLNEY, J.

(183 Cal. 348)

Application of DOWDALL. (S. F. 9401.)

(Supreme Court of California. July 26, 1920.  
On Rehearing Aug. 25, 1920.)

1. Prohibition  $\Leftrightarrow$  11—Court having jurisdiction cannot be restrained from exercising it, even if proceeding erroneously.

Superior court of certain county having jurisdiction of the estate of a decedent under Code Civ. Proc. § 1699, will not be restrained by writ of prohibition from exercising jurisdiction in action for settlement of accounts of testamentary trustees and for termination of trust, notwithstanding pendency of similar action in superior court of another county, since the former court has jurisdiction in the matter, and its action cannot therefore be controlled by writ of prohibition under section 1102, even if proceeding erroneously.

On Rehearing.

2. Trusts  $\Leftrightarrow$  298—Superior court retains jurisdiction of estate for settlement of a trustee's accounts.

Where will creates a trust, the superior court, sitting in probate upon the distribution of the estate, retains jurisdiction of the estate for the purpose of settlement of the trustee's accounts, under Code Civ. Proc. § 1699.

3. Courts  $\Leftrightarrow$  475(2) — Where jurisdiction of settlement of account of testamentary trustee is primarily in court having jurisdiction of distribution of estate, bill in equity should be suspended.

The superior court, which, sitting in probate, has jurisdiction of distribution of estate, has primary jurisdiction of the settlement of accounts under testamentary trust, and if a bill in equity is filed in any other superior court for the purpose of settling the trustee's accounts, the latter court, upon being informed of the jurisdiction of the court in probate, and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case, and allow the account to be settled by such court in probate, if proceedings in such court are prosecuted with diligence and good faith.

4. Judgment  $\Leftrightarrow$  543 — Judgment of court in equity, settling accounts of testamentary trustee, valid and binding on court in probate, in subsequent proceeding for settlement thereof.

Where bill is filed in a superior court for settlement of the account of testamentary trustees, and no suggestion is made that the court in which will was probated has primary jurisdiction of the settlement of such accounts, the judgment of former court rendered on such bill is valid and binding on the court in probate on subsequent proceeding therein for settlement of such accounts.

In Bank.

In the matter of the application of Hannah Dowdall for a writ of prohibition to the Superior Court of the City and County of San Francisco, and Frank H. Dunne, Judge thereof. Writ denied.

Walter R. Dunn, of Oakland, for applicant.  
Sanderson & Davis, of San Francisco, for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal, First Appellate District, while acting as justice pro tempore of this court in place of Mr. Justice MELVIN. It is adopted as the opinion of the court.

This is an application for a writ of prohibition directed to the superior court of the city and county of San Francisco, sitting in probate, enjoining it from proceeding with the settlement of the account of certain trustees of a trust created by the will of John Nuttall, deceased.

John Nuttall had by his last will created a trust in favor of the petitioner, which was to continue after the distribution of his estate. His estate was distributed more than 25 years prior to the commencement of this proceeding; and, while the trustees apparently were in touch with the petitioner, and with one another concerning the affairs of the trust during the whole of this period, some 10 years had elapsed since the filing by them of any account. In the month of January, 1920, the petitioner, as the beneficiary of said trust, commenced an action against said trustees in the superior court of Alameda county, where they reside, and where a portion of the real property subject to the trust is situated, by which she sought an injunction to prevent an alleged contemplated sale of part of said property for an inadequate price, and also prayed for an accounting and for the termination of the trust. The trustees appeared generally in that action, and in their answer alleged that under the trust they had no power to sell the property without the consent of the beneficiary, plaintiff in that action, and that they had never attempted to do so; that an offer had been made to them to purchase said property; that the said plaintiff had

an undivided one-third interest therein, the remaining two-thirds belonging to said trustees individually; that they, believing that the price offered was advantageous, had requested said plaintiff to join with them in a sale thereof, but this she refused to do, and thereupon commenced her said action to restrain said trustees from making such sale. They also alleged in their answer that under the terms of the trust they were permitted in their discretion to terminate it after 5 years from the making of the decree of distribution in the estate of said John Nuttall, deceased, but that the trust had never been terminated, and they had continued in charge of the property thereunder by reason of the express desire and request of said beneficiary; and they further alleged that said plaintiff was indebted to them in a certain amount on account of fees and advances in connection with their administration of the trust. Subsequent to the filing of this answer, and when a motion noticed to be heard in said action came on for hearing, said motion was dropped from the calendar in pursuance of an oral stipulation, which was thereafter to be reduced to writing, and whereby it was agreed that the trustees should file their account in the superior court of the city and county of San Francisco (respondent) in the matter of the estate of John Nuttall, deceased. Later this account was filed, but when the parties attempted to reduce to writing their oral stipulation it developed that they could not agree as to the terms thereof, in view of which the petitioner, on February 13, 1920, after notice moved the court in Alameda county to set the case pending there for trial. The judge of that court, upon being apprised of the status of the two proceedings, and that the account of the trustees had been filed in the superior court of San Francisco, declared that, while he believed that he had concurrent jurisdiction with the said San Francisco court to settle said account, he would not, under the circumstances disclosed, interfere with the proceeding there, and he thereupon continued the hearing of the motion to set the case for trial to a day subsequent to the hearing of the account by that court.

When said hearing came on before said San Francisco court the petitioner there applied for an order suspending proceedings in said matter pending the determination of the action in Alameda county, upon the ground that by the commencement of that action the superior court of the city and county of San Francisco was divested of further jurisdiction to hear or determine said matter. That motion was denied, whereupon this proceeding was inaugurated.

[1] On behalf of the respondent it is urged that its jurisdiction to settle the account of said trustees arises by virtue of the provisions of section 1699 of the Code of Civil Procedure, which, in part, provides:

"Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts."

The petitioner, on the other hand, contends that while this section may confer upon the San Francisco court having jurisdiction of the estate of John Nuttall, deceased, power to settle the account of said trustees, it is at most a jurisdiction existing concurrently with that of the superior court of Alameda county, and that the jurisdiction of the latter is broader in that it can grant the injunctive relief demanded; and that, having acquired jurisdiction for this purpose, it should be permitted to take control and to dispose of the whole controversy (citing: 1 Pomeroy, Eq. Jur. §§ 231-237).

It appears, however, by the uncontradicted affidavit filed on behalf of the respondent herein, that since the granting by this court of the order to show cause why the writ of prohibition prayed for in this proceeding should not issue, the petitioner has consented to the sale of the real property which by her action in the superior court of Alameda county she sought to enjoin and has joined in the conveyance thereof to the purchaser, so that the only relief she is now seeking is an accounting by the trustees and the termination of the trust. The trustees having filed in the superior court of the city and county of San Francisco their account as such trustees, and prayed its settlement and their discharge, it results that if such court is allowed to proceed the petitioner will secure the very relief that she now seeks in the superior court of the county of Alameda. The latter court, recognizing the jurisdiction of the respondent, has by the exercise of proper judicial comity deferred action upon the suit pending before it, and under the circumstances as they now exist it is difficult to understand why the petitioner is still seeking the writ of prohibition against the respondent. In any case it is clear that the respondent has jurisdiction of the matter (Code Civ. Proc. § 1699, supra), so that its action cannot be controlled by writ of prohibition (Code Civ. Proc. § 1102), and, even if proceeding erroneously, it would still be exempt from control by this writ (S. P. Ry. Co. v. Sup. Ct., 63 Cal. 607).

Writ denied.

ANGELLOTTI, C. J., and OLNEY, J.  
SHAW, J., LENNON, J., and WILBUR, J.,  
concur.

On Rehearing.

PER CURIAM. [2, 3] The petition for rehearing is denied. In view of the argument and the possible misconception of the effect of our opinion, we deem it proper to add some further remarks. By section 1699 of the Code of Civil Procedure the superior

court, sitting in probate upon the distribution of an estate wherein the will creates a trust, retains jurisdiction of the estate for the purpose of the settlement of the accounts under the trust. It follows from this that in this particular case the superior court of San Francisco has had jurisdiction of the estate for the purpose of settling the trustees' accounts ever since the decree of distribution of the estate of John Nuttall, deceased, was made, more than 25 years ago. That jurisdiction remains until the accounts are closed, and the trustee discharged. It is also true that the superior court of each county in the state has general jurisdiction in equity to settle trustees' accounts and to entertain actions for injunctions. This jurisdiction is, in a sense, concurrent with that of the superior court, which, by virtue of the decree of distribution, has jurisdiction of a trust created by will. The latter, however, is the primary jurisdiction, and if a bill in equity is filed in any other superior court for the purpose of settling the account of such trustee, that court, upon being informed of the jurisdiction of the court in probate, and that an account is to be or has been filed therein for settlement, should postpone the proceeding in its own case, and allow the account to be settled by the court having primary jurisdiction thereof. We assume, of course, that the proposition to settle the account in the court in probate is made in good faith, and it will be prosecuted with diligence. Some discretion is vested in the court on this point, and if it appears that the suggestion of the primary jurisdiction of the court in probate is made for delay or in bad faith, we have no doubt that the other superior court might properly proceed to judgment on the bill in equity.

[4] The court entertaining the bill in equity is not without jurisdiction. If no suggestion of the primary jurisdiction of the court in probate is made to it, the judgment of such court in the suit in equity will undoubtedly be valid, and upon any subsequent proceeding in the court in probate under its jurisdiction such judgment would be binding upon that court.

SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J., and LAWLOR, J., concur.

(183 Cal. 431)

In re WALL'S ESTATE. (L. A. 6410.)

(Supreme Court of California. July 30, 1920.)

1. Appeal and error  $\S$  979(2)—New trial  $\S$  68—Grant of new trial for insufficiency of evidence discretionary.

The trial court in granting a motion for a new trial, particularly for insufficiency of evidence to support verdict or findings, has a wide

discretion, and its action will not be disturbed unless abuse of discretion clearly appears.

2. Costs  $\S$  263—\$200 penalty for useless appeal, delaying a \$75,000 estate one year, not excessive.

Where an appeal from an order granting a new trial after verdict against probating a codicil clearly appears to have been for vexation and delaying the estate, which was valued at nearly \$75,000, a \$200 penalty for such useless appeal, causing almost a year's delay, is not excessive.

#### Department 1.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Helen A. Gries and another offered for probate the will of Nellie M. Wall, deceased, together with a codicil, and Arnold E. Wall and another contested the probate of the codicil, which was denied, and from a court order granting a motion for new trial the contestants appeal. Affirmed.

E. B. Coll, of Los Angeles, for appellants. Pierce, Critchlow & Barrette, Lucius K. Chase, Walter L. Mann, and Dockweiler, Mott & Dockweiler, all of Los Angeles, for respondents.

SHAW, J. This is an appeal from an order granting a motion for a new trial with respect to a part of the judgment.

The respondents offered for probate a document purporting to be the will of the decedent, and another document purporting to be a codicil thereto. The appellants contested the probate of the codicil on the ground that the same was not executed by the decedent either in the manner prescribed by section 1276 of the Civil Code or at all. The jury returned a special verdict to the effect that said Nellie M. Wall did not sign the said codicil, nor acknowledge nor declare to the subscribing witnesses that the same was her will, and that said witnesses did not sign the codicil at the request of Nellie M. Wall in her presence and in the presence of each other. Judgment was entered in accordance with the verdict, denying probate to the codicil. Thereupon the proponents moved for a new trial of the issues relating to the codicil on the grounds of newly discovered evidence; insufficiency of the evidence to justify the verdict; that the verdict was against the law, and for errors of law occurring at the trial. The court granted the motion on all of said grounds, and set aside the part of the judgment which denied probate to said codicil.

[1] The trial court in acting upon a motion for a new trial, particularly on the ground of insufficiency of the evidence to support the verdict or findings, has a wide discretion, and its action thereon, either for or against the motion, will not be disturbed on

appeal, unless it clearly appears to the appellate court that the discretion was abused. This proposition has been so often decided that it is unnecessary to cite authorities in support of it. In the present case, three eye-witnesses, daughters of the decedent, testified directly and positively that the decedent acknowledged her signature to the document proposed as a codicil to them, and declared the same to be a codicil to her will, and that two of them, namely, Helen A. Gries and Bessie Elliott, then and there at her request, signed their names thereto as witnesses to the execution thereof in her presence and in the presence of each other. It is difficult to conceive of clearer or more positive evidence establishing the execution of the will than was presented in this case. The contradiction thereof consisted of the evidence of the three other children of the decedent, to the effect that in their opinion the signature to the codicil was not the signature of the decedent, and the testimony of a handwriting expert to the effect that, after comparing the same with numerous admittedly genuine signatures of the decedent, it was his opinion that the signature to the codicil was not genuine. There was also some testimony of circumstances tending to show that the subscribing witnesses to the will were not present at the house of the decedent on the day the will was signed by her, as claimed by the proponents. In support of the genuineness of the signature there was the additional testimony of two bank cashiers, who had been for some years accustomed to identifying the signature of the decedent on checks and other documents in connection with her account at the bank, each of whom testified, in effect, that they believed the signature to the codicil to be her genuine signature.

[2] It is obvious that in this state of the evidence it was within the discretion of the court to grant a new trial. If he believed the evidence of the witnesses for the proponents, it was his duty to do so. While it is true that on cross-examination the said witnesses contradicted themselves and showed evidence of considerable agitation, there was nothing from which, as a matter of law, we can say the court should have refused to credit their testimony. The judge who tried the case was the judge who granted the new trial, and he saw and heard the witnesses as they were testifying, and was in a much better position to determine their credibility than this court could possibly be. It is unnecessary to consider the other points presented in the motion for a new trial. Upon this ground alone the order must be affirmed. This proposition is so well established that we are unable to perceive any reason for the taking of this appeal, except a desire for vexation and delay. It is a proper case for the imposition of a penalty on the appel-

lants. It appears that the estate was of the value of something near \$75,000. A penalty of \$200 for a useless appeal which has caused a delay of almost a year cannot be considered excessive.

The judgment is affirmed, and it is ordered that the respondents recover of the appellants the sum of \$200 as damages on account of the appeal, and their costs.

We concur: OLNEY, J.; LAWLOR, J.

(183 Cal. 415)

INYO COUNTY v. GIVEN et al. (L. A. 6044.)

(Supreme Court of California. July 28, 1920.)

1. Appeal and error  $\S$ 916(1)—Denial taken as true on appeal from judgment on pleadings.

Defendant's denials of allegations of complaint must be taken as true on appeal from judgment for plaintiff on the pleadings.

2. Dedication  $\S$ 1—Governed by principles affecting conveyances and gifts.

A dedication, being a voluntary transfer of an interest in land, partakes both of the nature of a grant and of a gift, and is governed by the fundamental principles which control such transactions.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dedication.]

3. Dedication  $\S$ 31—Not binding until acceptance.

A dedication, like a contract, consists of an offer and acceptance, and is not binding until acceptance, proof of which must be unequivocal.

4. Dedication  $\S$ 37—Acceptance may be "actual" or "implied."

Acceptance of dedication may be actual or implied, being "actual" when formal acceptance is made by the proper authorities, and "implied" when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication.

[Ed. Note.—For other definitions, see Words and Phrases, Actual Acceptance; Implied Acceptance.]

5. Dedication  $\S$ 29—Sale of lots with reference to map not irrevocable dedication before acceptance.

The mere making of sales of lots with reference to a map showing streets does not constitute an irrevocable dedication to the public, an acceptance being necessary to constitute dedication as between owner and public.

6. Dedication  $\S$ 35(1)—Order of abandonment not acceptance of offer of dedication.

Board of supervisors' order, vacating and abandoning certain streets delineated on plat, did not constitute an acceptance of the offer of dedication.

**7. Dedication  $\S$  35(1)—Rescission of abandonment not an acceptance of offer of dedication.**

Board of supervisors' order rescinding an order vacating and abandoning certain streets and avenues delineated on a plat, did not constitute an acceptance of an offer of dedication, where prior to the order of abandonment the offer of dedication had been withdrawn; the only effect of the order rescinding the abandonment being to leave the matter in the condition in which it was prior to the order.

**8. Dedication  $\S$  35(1)—Suit 13 years after rescission of offer not acceptance of dedication.**

Commencement of action by county to have certain street declared a public highway, and to abate an obstruction thereon, 13 years after offer of dedication had been made, and after it had been rescinded, held not to constitute an acceptance of offer of dedication.

**9. Dedication  $\S$  65—Street became dedicatrix's property on abandonment.**

Under Pol. Code,  $\S$  2643, board of supervisors of county had power to abandon rights of public in streets, and on such abandonment the proffered easement reverted, and the land became the private property of the dedicatrix.

**Department 2.**

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by the County of Inyo against Paul M. Given and another. Judgment for plaintiff, and defendants appeal Reversed.

A. H. Swallow, of Bishop, for appellants.  
Jess Hession, of Independence, for respondent.

The following opinion was prepared by Mr. Justice KERRIGAN of the District Court of Appeal for the First Appellate District while acting as justice pro tempore in this court in place of Mr. Justice MELVIN. It is adopted as the opinion of this court.

This action was brought by the county of Inyo to have a certain street decreed a public highway and to remove and abate an obstruction thereon. As judgment went for plaintiff on the pleadings a review of the same becomes necessary. Plaintiff alleged, in substance, that in December, 1900, one A. M. Given filed in the recorder's office of Inyo county a plat of the Given addition to the town of Big Pine, and that on said plat certain streets, avenues, and alleys were delineated, including a street known as Washington street; that subsequently Given sold lots in said addition to certain persons, and that said Washington street was dedicated by Given to the use of the public, and particularly to certain purchasers named in the complaint; that thereafter in December, 1913, defendant Paul Given made an oral application to the board of supervisors, with-

out any petition in writing, for an order vacating and abandoning certain of these streets and avenues delineated on said plat, including that portion of Washington street north of the north line of Center street. That to procure this order it is alleged defendant made certain false representations to the board of supervisors concerning the sale of said lots, and that as a result thereof the board in December, 1913, made an order without the knowledge, consent, or acquiescence of any of the abutting owners, vacating certain of the streets, including that portion of Washington street above mentioned. Further allegations recite that in so doing the board exceeded its authority and that thereafter in January, 1914, after learning of the false representations, it made an order revoking and rescinding that portion of the order and resolution relating to Washington street. It is also charged that while Washington street was a public highway, dedicated as aforesaid, defendant Lena T. Given placed certain obstructions thereon, and that she refused to remove the same upon demand being made. Defendants demurred to the complaint on the ground that it failed to state a cause of action. The demurrer was overruled. Defendants answering, denied that the portion of Washington street referred to had ever been opened or used as a street or public highway, or that it was ever accepted as such by the county, and alleged that no lots abutting upon the streets or portions thereof vacated by the order of the board had ever been sold to any person. They also denied that any false representations were ever made to the board to induce the members thereof to make the revoking order, or that the board ever relied upon any such representations in making the same. On the trial defendants moved for judgment on the pleadings on the ground that the amended complaint did not state facts sufficient to constitute a cause of action or entitle the plaintiff to any relief against the defendants, or either of them. The trial court held, however, that the board of supervisors had no authority or jurisdiction to make the order vacating and abandoning the streets, and further concluded that as the answer did not controvert the allegations of the complaint constituting dedication, it did not state facts sufficient to constitute a defense, and ordered judgment for the plaintiff on the pleadings. It is defendants' contention that the court erred in overruling their demurrer, and further erred in not giving judgment in their favor. We are of the opinion that the judgment as rendered finds no support in the record.

[1] The allegations of the complaint with reference to the dedication of the land recite that defendants' predecessors in interest had sold to different persons lots in the tract

according to the map or plat, and that there was thereby created an irrevocable easement in the streets and avenues delineated on such map. As above indicated the answer of defendants not only specifically alleges that no lots had ever been sold on the streets or portions thereof vacated by the order of December, 1913, but it also denies that any part of that portion of Washington street affected by the order had ever been opened or used or accepted by the public as a highway. These denials of plaintiff's conclusion that there was a dedication must be taken as true; judgment having been entered on the pleadings.

[2-4] Counsel for both parties have discussed at length the questions of the power of boards of supervisors to abandon highways, or to revoke, upon a proper showing, an order made with reference thereto. To our minds, however, the controlling question in this case is whether or not there has been an offer and acceptance of dedication of the street in question to public use as a public highway. Considering a dedication as a voluntary transfer of an interest in land, it partakes both of a nature of a grant and of a gift, and is governed by the fundamental principles which control such transactions. Hence a dedication, like a contract, consists of an offer and acceptance, and it is settled law that a dedication is not binding until acceptance, proof of which must be unequivocal. 18 Corpus Juris, p. 72. The acceptance may be actual or implied. It is actual when formal acceptance is made by the proper authorities, and implied when a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication. *Elliott v. McIntosh* (App.) 183 Pac. 692. Two things, however, are necessary to a complete dedication, an offer and acceptance. A dedication without acceptance is, in law, merely an offer to dedicate, and such offer does not impose any burdens nor confer any rights, unless there is an acceptance. The rule therefore is that acceptance on the part of the public is necessary to a valid dedication of land as a highway. 1 *Elliott on Roads and Streets*, § 122; 8 *Rul. Cas. Law*, p. 898. Respondent claims, however, that defendants are estopped to deny that the streets delineated on the map were accepted, by reason of the filing of the map and the sale of lots with reference thereto, and it was upon this theory, no doubt, that the trial court based its decision.

That some confusion exists in the authorities in this state where the subject has received consideration there can be no doubt. Some of the cases confuse the doctrine of dedication with other doctrines pertinent only to private interrelations growing out of sales. The case of *Town of San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405, is of

such a character. It is there held that where an owner of land lays off a town and makes a map thereof showing it to be divided into streets, alleys, and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets, to the use of the public, and that in such a case no formal acceptance is necessary by the town authorities. The rule announced in this case is mere dictum, as it appeared that there was an acceptance. The rule declared in that case is one of constructive dedication, and undoubtedly could be invoked in an action between the dedicator and his grantees. But the purchasers here, if there be any, are not complaining. This action is one brought by a county to abate an obstruction upon property which it claims to be a public highway. There is a distinction between the rights accruing to the public generally and the purchasers of lots according to a map upon an offer of dedication. *Eltिंगe v. Santos*, 171 Cal. 278, 152 Pac. 915; *People v. Reed*, 81 Cal. 70, 79, 22 Pac. 474, 15 Am. St. Rep. 22.

[5] As before stated, so far as the public is concerned, there must be an acceptance to complete an offer of dedication. Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer. There can be no dedication without the participation of both. *City of Anaheim v. Langenberger*, 184 Cal. 608, 610, 66 Pac. 855. Contrary to the doctrine announced in the *Le Breton* Case, the mere making of sales of lots with reference to a map does not therefore constitute an irrevocable dedication to the public. As between an owner of land and the public, this act alone is not sufficient to constitute dedication. An acceptance must be had either by user or by some formal act. See note, 57 Am. St. Rep. 753. So far, therefore, as the *Le Breton* opinion can be construed as militating against the rule, it should have no weight. *People v. Reed*, supra. The rule that such act simply constitutes an offer to dedicate which does not become effectual until acceptance is reflected in a long line of cases in this state. *People v. Reed*, supra; *Archer v. Salinas City*, 93 Cal. 53, 28 Pac. 859, 16 L. B. A. 145; *Schmitt v. San Francisco*, 100 Cal. 307, 34 Pac. 961; *Koshland v. Spring*, 116 Cal. 689, 48 Pac. 58; *Prescott v. Edwards*, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186; *Niles v. City of Los Angeles*, 125 Cal. 572, 58 Pac. 190; *City of Anaheim v. Langenberger*, supra; *City of Los Angeles v. McCollum*, 156 Cal. 148, 103 Pac. 914, 23 L. R. A. (N. S.) 378; *Eltिंगe v. Santos*, supra; *Elliott v. McIntosh*, supra.

[6, 7] Here the answer denied that the streets in question had ever been opened or used as a street or public highway, or that it was ever accepted as such by the county, and it further denied that lots abutting thereon had

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ever been sold to any person. The affect of the allegations of the answer therefore is that the land in question, not having been accepted, is not a public street, unless it can be said that the effect of either of the orders of the board amounted to an acceptance of the offer of dedication. It is not contended, nor could it successfully be, that the order of abandonment amounted to an acceptance. If it had any effect in this relation it can be construed only as a rejection of the offer. The manifest object of the petition to the board was to remove any presumption to dedication from the record that the filing of the map or plat of the property had created, for at the time the application was made, so the complaint avers, the plaintiffs had erected a fence across the property, thereby evidencing their intention to revoke the offer of dedication. The only effect, if any, of this order of the board rescinding its vacating order was to leave the matter in the condition it was prior to the order of abandonment, and at that time, as above shown, the offer of dedication had been withdrawn.

[8] The only other act or circumstance that could possibly be construed as an acceptance is the filing of the present action, but the mere filing of this action 13 years after the offer was made, and after it was rescinded, can in no manner be construed as an acceptance. *City of Anaheim v. Langenberger*, 134 Cal. 611, 86 Pac. 855. There is, therefore, nothing so far as the pleadings show that would in any manner indicate an acceptance of the offer of dedication.

[9] It might be said in conclusion that it is very doubtful if the board had power to set aside the order abandoning the highway. If we assume that the streets and portions thereof in question had become highways, there is no question but that the board of supervisors, acting in its legislative capacity, had the power to abandon the rights of the public therein (Pol. Code, § 2643), and no petition was necessary to bring about this action. *Symons v. San Francisco*, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453; *Brown v. Board of Supervisors*, 124 Cal. 274, 57 Pac. 82; *Swift v. Board of Supervisors*, 16 Cal. App. 72, 116 Pac. 317. Having done so, the proffered easement reverted, and the land thereby became the private property of the dedicant. *Keena v. Board of Supervisors*, 89 Cal. 11, 26 Pac. 615. In the absence of a new offer of dedication the only manner in which plaintiff could again acquire the property would be by condemnation proceedings.

It is true that the complaint alleged fraud in the procurement of the abandoning order, but this is denied in the answer, and, judgment having been had on the pleadings, this denial stands admitted as true. The conclusion we have reached that there was no ac-

ceptance of the offer makes further discussion of this question unnecessary.

From what we have said it follows that the judgment should be, and it is hereby, reversed.

WILBUR, SLOANE, and LENNON, JJ., concur.

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MERCANTILE TRUST CO. OF SAN FRANCISCO v. ALL PERSONS CLAIMING, etc. (McGLADE, Respondent). (S. F. 8428.)

(Supreme Court of California. July 27, 1920.)

1. Appeal and error §714(5)—Brief cannot be looked to to show that court struck out evidence.

Where a record showed the proper admission of an abstract under Code Civ. Proc. § 1855a, as secondary evidence of a lease destroyed by fire, and decision of court was seemingly made with such evidence in the record, information in the brief that court admitted evidence only tentatively, and later struck it out, cannot be considered.

2. Appeal and error §843(1)—Where reversal is required on one ground, other grounds not considered.

Where a reversal is necessary upon one ground, other grounds for reversal need not be considered.

3. Evidence §588—Testimony held not overcome by geometrical inconsistency.

In a proceeding to quiet title to property in a block in a city, a decree for defendant held plainly not supported by the evidence, since the evidence upon which the witnesses all agreed, and which was supported by all probabilities, cannot be overcome by its inconsistency geometrically with an estimated street frontage.

4. Evidence §372(12)—Abstract of record of destroyed lease admissible as ancient document, although instrument was defective.

In view of the provisions of Code Civ. Proc. § 1951, that the record of an instrument affecting real property may be used in evidence, and Civ. Code, § 1207, that the record of any instrument recorded prior to January, 1915, may be so used notwithstanding defect in execution or in the certificate of acknowledgment or the absence thereof, and that where record was made within 15 years, genuineness of instrument must be proved, there is a prima facie presumption that such an instrument, more than 15 years old, and recorded before January, 1915, is genuine, although the record shows an instrument which would not prove itself because of such defects.

5. Evidence §370(8)—Abstract of destroyed record admissible without other proof of genuineness.

The fundamental purpose of Code Civ. Proc. § 1855a, is to make abstracts of record available

as secondary evidence, where the records were destroyed, and where such abstract shows the record of an instrument which, if not destroyed, could have been introduced without other proof of its genuineness, and would have raised a prima facie presumption of its genuineness, such abstract is admissible without other proof of genuineness.

6. Evidence  $\Leftrightarrow$ 372(12)—Abstract of recorded lease held admissible without further proof of genuineness regardless of certificate of acknowledgment.

An abstract of a lease recorded more than 15 years before trial is sufficient as secondary evidence of the record under Civ. Code, § 1207, regardless of whether there was a certificate of acknowledgment or not, and is admissible in evidence without further proof, in a case where secondary evidence is admissible.

7. Evidence  $\Leftrightarrow$ 70—Abstract not noting defect raises presumption of proper acknowledgment.

Where an abstracter under duty to note the absence of a certificate of acknowledgment conforming to statutory requirements made no record thereon such failure raises the presumption that it had a proper certificate, which presumption is strengthened by the fact of recording, which could not lawfully be done without such certificate, making the abstract competent prima facie evidence thereof in quieting title.

8. Evidence  $\Leftrightarrow$ 372(12)—Scope of curative act in respect to abstract of destroyed recorded instruments.

Where abstract of destroyed record of a lease, made more than 15 years before, was offered as evidence, and the lease was executed by a party affixing his mark, any defect in not showing that the execution was witnessed, as required by Civ. Code, § 14, and Code Civ. Proc. § 17, come directly within the curative provision of Civ. Code, § 1207; but, where the abstracter under duty to note any such defect has not done so, the abstract is evidence that there was no such defect.

9. Evidence  $\Leftrightarrow$ 372(10)—Ancient documents rule held not applicable in suit to quiet title.

In a suit to quiet title against defendant claiming by adverse possession, where abstract of record of destroyed lease, made more than 15 years before, was offered in evidence, objection that payments of rent were as consistent with the defendant's theory of tenancy in only a part of the property as with the plaintiff's theory of tenancy in all is suggestive of a rule applicable to ancient documents, but which has no reference to a record which itself proves the instrument or to secondary evidence of that record; no such requirement being contained in the Code sections making an abstract competent primary evidence, where the record was destroyed.

10. Evidence  $\Leftrightarrow$ 273(4)—Lease defectively executed admissible as showing acknowledgment of tenancy.

In an action to quiet title, an acknowledgment by defendant that he held the property,

not as owner or adverse claimant, but as tenant, made in his lease, is not affected as evidence of a declaration against interest by the fact that the lease may not have been validly executed on the part of lessor by his attorney in fact; the power of attorney not being shown.

11. Evidence  $\Leftrightarrow$ 186(9)—Abstract of destroyed record of lease held admissible, being presumed to set out all material points.

In an action to quiet title against defendant, who claimed by adverse possession, where abstract of destroyed record of lease was objected to as being a mere summary, such abstract was admissible, as it must be presumed to set out all the material points of the lease as recorded.

12. Evidence  $\Leftrightarrow$ 372(4)—Exactitude and certainty of proof of ancient instruments not required.

In a suit to quiet title, the same degree of exactitude and certainty of proof cannot be required in dealing with old instruments and muniments of title as with the recently executed ones, particularly where the record has been destroyed and the Code sections, making available abstracts of such records, may not be given a construction which would avoid their purpose.

In Bank.

Appeal from Superior Court City and County of San Francisco; George A. Sturtevant, Judge.

Suit by the Mercantile Trust Company of San Francisco against all persons claiming any interest in, or lien upon, certain described real property or any part thereof to quiet title, in which Mary F. McGlade appeared as a defendant. Judgment for the named defendant, and plaintiff appeals. Reversed.

Morrison, Dunne & Brobeck, of San Francisco (R. L. McWilliams, of San Francisco, of counsel), for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

OLNEY, J. This is a so-called "all persons" suit, brought to establish the title of the plaintiff to certain real estate in the city of San Francisco. One Mary F. McGlade appeared in the action as a defendant and answered, claiming to be herself the owner of a one-half interest in a portion of the property, with the result that as to this portion the action assumed the character of an ordinary suit to quiet title by the plaintiff against Mrs. McGlade. The trial court found that Mrs. McGlade was in fact the owner of the interest claimed by her, and gave judgment accordingly, from which the plaintiff appeals. One of the grounds urged by the plaintiff for reversal is that the evidence does not justify the finding of ownership in the defendant.

The property as to which the plaintiff sought to establish title was the major portion of the block lying between Washington



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and Oregon streets on its southerly and northerly sides, respectively, and fronting on its eastern side on The Embarcadero, formerly East street, which forms the waterfront of the city. Washington and Oregon streets run very nearly east and west, but The Embarcadero at this point runs nearly northwesterly and southeasterly, so that Washington street starts from it at an angle, and the corner of the block formed by Washington street and The Embarcadero is a gore or an acute angle of about 45 degrees. The portion of the property in which the defendant claims an interest is this gore.

The plaintiff is admittedly the owner of the record title to all the property to which it sought to establish title, including the gore. It acquired it from one Richard D. Chandler subsequent to the San Francisco fire and earthquake of 1906. Chandler had acquired it in 1882 from one Garrison, who in turn had acquired it from the state in 1854. The defendant's claim is of title by adverse possession of the corner on the part of her father, one Drobaz, who died in 1905, and to a one-half interest in whose estate she succeeded. Included in the property originally acquired by Garrison from the state and subsequently conveyed by him to Chandler, and passing from the latter to the plaintiff, was the lot immediately to the west of the corner. Drobaz appears in possession of this lot in 1866, admittedly as a tenant of Garrison, and continued in such possession, paying rent therefor, first to Garrison and then to Chandler, until the time of his death. After his death this possession as tenant was continued by his heirs until all the improvements were destroyed by the fire of 1906. Along with the possession of this lot, Drobaz had possession of the corner, and the final question in the present controversy is as to whether he held such possession as tenant, or under a claim of adverse and independent ownership. Drobaz never paid any taxes on the property, but the block was not accurately described on the tax assessment maps, and it seems to be assumed that the corner was never assessed.

The lot to the west of the corner was improved with a two-story building when Drobaz appears in 1866 in possession of it as tenant. The corner to the east was unimproved, and had not been filled, and was still covered by the waters of the bay. Between 1866 and 1875 Drobaz inclosed the corner with a small fence and used it for drying nets, and filled it in. In 1875 he constructed a building on it immediately against the building on the lot to the west. Both buildings were destroyed by fire about 1877, and thereupon Drobaz erected a new building covering both pieces of property. The new building was apparently built as a unit, and without reference to any difference in ownership between the eastern and western portions of the land it occupied. There was, however, a stairway leading to the second story from Washington

street, which, according to the testimony of all the witnesses on the point, was on, or approximately on, the east line of the old building occupied by Drobaz as tenant. This new building remained until the fire of 1906, when all possession by the heirs of Drobaz ceased, without any attempt on their part to retake possession and without any assertion of interest until after the commencement of the present action in 1911.

[1, 2] There was considerable evidence introduced in addition to that showing the foregoing, some of which tended to show a claim of ownership by Drobaz to the corner, and other of which tended to show that he occupied it only as a tenant in conjunction with the lot to the west, which he admittedly held in that capacity. It is not necessary, however, for the purposes of this opinion to state more than one bit of this evidence. The public records of San Francisco were for the most part destroyed by the fire of 1906, and for the purpose of permitting the use of secondary evidence of them, the Legislature in 1911 adopted a new section of the Code of Civil Procedure numbered 1855a. The material part of it reads:

"When, in any action, it is desired to prove the contents of any public record or document, lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents (a) any abstract of title made and issued and certified as correct prior to such loss or destruction, and purporting to have been prepared and made in the ordinary course of business by any person, firm or corporation engaged in the business of preparing and making abstracts of title prior to such loss or destruction; \* \* \* the same may, without further proof, be admitted in evidence for the purpose aforesaid. \* \* \*

Pursuant to this section, there was received in evidence on behalf of the plaintiff an old abstract of title for the purpose of proving the record of a certain lease. This lease, according to the abstract, was one by Garrison to Drobaz covering all the property occupied by the latter, that is, covering the corner now in dispute, as well as the lot to the west, and describing it all as a single piece without division. It was made, according to the abstract, in 1876, which, it is to be noted, was about the time that Drobaz first constructed a building on the corner. So far as the bill of exceptions shows, the abstract was admitted for the purpose of showing the record of this lease without objection, was never stricken out, and the decision of the trial court was made with it as a part of the evidence before it. We are informed by the briefs, however, that it was admitted in evidence only tentatively, and that finally the court concluded that it was not admissible, and made its decision as if it were not in evidence. If this were the fact, as undoubtedly it was, since both sides assume it, the plain-

tiff should have insisted upon some ruling being made by the lower court which would appear in the bill of exceptions, and show the rejection of the evidence. As the record now stands, the question as to its admissibility is not presented, and the decision of the lower court against the plaintiff appears as if made with this evidence before it, although its very cogent and persuasive character is plain. Whether, in spite of its character in this respect, there was other evidence sufficient to overcome it and to sustain the decision, we need not consider, however, since a reversal is necessary on another ground.

[3] The whole theory of the defendant's case is that, while Drobaz was tenant of the lot to the west of the corner, he was not a tenant as to the property east of the east line of the building on that lot. The proof is plain, and is not controverted that west of this line the property he occupied was occupied by him only as a tenant. The proof by the defendant as to the location of the westerly boundary of the property in which she claimed an interest by reason of the adverse possession of her father was always as to the location of the east line of the old building to the west of the corner, and of the stairway built on that line when the old building was destroyed in 1877 and a new one erected covering both pieces of land. The evidence is also unanimous that this line ran at right angles to Washington street. It is evident, also, that almost necessarily it must have so run. The lot to the west fronted on Washington street, and was not a corner lot. There was nothing to require a building upon it to be built upon a bias. It is almost inconceivable that a building erected on such a lot would run, not at right angles with the street on which it fronted, but on a bias of about 45 degrees. Nevertheless, the property in which the judgment decrees that the defendant has an interest is described as a parallelogram whose frontage on Washington street is the distance between the corner on The Embarcadero and a point which it appears clearly from the evidence was located as the point where the east line of the old building began, and whose sides are the line of The Embarcadero on the east, and a line parallel thereto on the west. In other words, the west line of the property in which the defendant is decreed to have an interest runs northwesterly from a point on Washington street and at an angle of about 45 degrees with it, while the west line of the property in which alone, according to the proof, the defendant claims or can have an interest runs from the same point northerly and at right angles to Washington street. The major portion of the property described in the decree is west of this right angle line, and is a part of the property admittedly occupied by Drobaz as tenant and the plaintiff's title to which was not questioned at the trial.

The defendant's only answer to this point

is that the witnesses testified that the gore occupied by Drobaz had a length on The Embarcadero of 70 or 73 feet, and that this is inconsistent with a west line running at right angles to Washington street, since such a line would intersect The Embarcadero at a point considerably less than 70 or 73 feet from the corner. But the witnesses were all testifying from memory as to a fact observed many years before. Estimates of distances are rarely accurate, even when the observations on which they are based are fresh. The testimony, on the other hand, that the building on the lot to the west ran at right angles to the street is quite reliable. If the building had run on a bias, particularly a bias anything like as great as 45 degrees, it would have been a most noticeable thing, certain to be observed and remembered. It would be wholly unreasonable to allow the evidence to this effect on which all the witnesses agree and which is supported by all the probabilities of the situation to be overcome by its inconsistency geometrically with the estimated frontage of the gore on The Embarcadero. In this respect the decree is plainly not supported by the evidence, and a new trial should be had.

[4] For the guidance of the court and parties upon a new trial, it is advisable that we pass upon the admissibility of the evidence as to the lease by Garrison to Drobaz, previously mentioned, since the question is certain to arise, and, although not in reality presented by the present record, has been fully argued before us.

No objection is made to the abstract for want of any of the preliminary matters required by section 1855a, Code of Civil Procedure, previously quoted. The objections made are some seven in number. The first and most fundamental is that there was no proof other than the abstract itself of the genuineness of the lease. The same point is put by counsel in a little different form in the reiterated objection that other than the abstract there was no proof that the lease ever in fact existed. Closely connected with the point also is the second objection that the abstract does not show that the instrument as recorded bore any certificate of acknowledgment. This objection is closely connected with the first, because if the record did show a proper certificate of acknowledgment, it would, under our Code, have proved *prima facie* the execution of the original instrument. Both objections, however, involve a misconception of the statutory provisions permitting (1) the use in evidence of the record of an instrument instead of the instrument itself, and (2) the use of an abstract where the record has been destroyed.

First, in regard to the use of a record. Our Code provides (section 1851, Code Civ. Proc.) that the record of any instrument affecting real property may be used in evidence with

like effect as the original instrument itself. If the record purports to show an instrument which would prove itself, so to speak, as where it bears a proper certificate of acknowledgment of execution, the record is admissible without other proof of the existence or genuineness of the instrument and, in fact, for the very purpose of showing that such a genuine instrument did exist. There is also at least one case other than this just mentioned where the record alone is admissible and sufficient for the same purpose. That case is the one of a record made before January 1, 1915, and also made more than 15 years before the time at which it is sought to use it in evidence. Section 1207, Civil Code, provides, in effect, that the record of any instrument recorded prior to January 1, 1915, may be used in evidence "notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate." The section further provides that when the record was made within 15 years of the time it is sought to use it in evidence, proof must first be made of the genuineness of the instrument. The plain and necessary implication is that such proof is not required where the record is more than 15 years old. The result is that, even though the record shows an instrument which would not prove itself because of the want of a proper certificate of acknowledgment or some defect in the manner of execution, yet if the record be 15 years old and was made prior to January 1, 1915, these latter facts are the equivalent, and serve the purpose of the proof of genuineness ordinarily required as a prerequisite to the introduction in evidence of an instrument or its record. They raise, in other words, a prima facie presumption that the instrument is genuine.

[5] Second, in regard to the use of an abstract of the records. The fundamental purpose of section 1855a, Code of Civil Procedure, heretofore quoted, is to make available as secondary evidence of the record, where the latter has been destroyed, abstracts of the record made under such circumstances as to be reasonably reliable. Such secondary evidence, when introduced in a proper case, proves primarily the record, and, the record being proved, the effect is exactly the same to the extent to which it is proved as if it were itself used in evidence instead of being proven by the secondary evidence of the abstract. In other words, if the secondary evidence of the abstract proves the record of an instrument, which record, if not destroyed, could have been introduced in evidence without other proof of the genuineness of the instrument recorded, and would have the effect of raising a prima facie presumption of genuineness, then the

abstract may be introduced without such other proof and with like effect.

[6] Applying these propositions to the case at bar, no objection is made as we have said, that the case is not one where a proper abstract may be used as secondary evidence, or that the particular abstract did not conform to the statutory requirements. The abstract showed, furthermore, the record of a lease executed ostensibly by Drobaz as lessee, recorded prior to January 1, 1915, and more than 15 years before the time of trial. It was sufficient, therefore, as secondary evidence of a record which, under section 1207, Civil Code, regardless of whether there was a certificate of acknowledgment or not, was admissible in evidence without other proof of the genuineness of the instrument recorded, and raised a prima facie presumption of such genuineness. The abstract being sufficient as such secondary evidence, and the case being one where secondary evidence was admissible, it follows that it was admissible without further proof, and had the effect of making a prima facie showing that the lease whose record it showed was genuine.

[7] We would not, however, rest the disposition of these objections entirely on the fact that the record proven was one which came within the provisions of section 1207, Civil Code, with the possible implication that we did not consider the abstract sufficient to prove a record showing an instrument bearing a due certificate of acknowledgment, so that without section 1207, Civil Code, the record would be admissible in evidence without further proof. The abstract, to be sure, contains no notation of an acknowledgment of execution of the lease. But it contains no notation that the record failed to show such acknowledgment. An abstract is but a summary of the record. It does not purport to set it out in full. Some abstractors always note the acknowledgment; others do not. The present abstract in some instances notes it, and in others it does not. Among the latter instances are a number of instruments such as mortgages and trust deeds to banks or bankers which it is inconceivable were not acknowledged. But while a competent abstractor may or may not note the fact of acknowledgment if it appear, he will invariably note its absence if it does not appear. The absence of a certificate of acknowledgment conforming to the statutory requirements for such certificates is a defect which it is his duty to catch and note. If he does not note its absence or some defect in it, he in effect certifies that the record shows an instrument which is properly acknowledged.

In *Attebery v. Blair*, 244 Ill. 363, 91 N. E. 475, 135 Am. St. Rep. 342, an abstract was offered in evidence under a statute much the

same as ours to prove the destroyed record of certain deeds. It was objected that the abstract did not show that the deeds were under seal, a requisite for their validity according to the Illinois law. The court held in effect that if the record had not shown that the deeds were under seal, it was the duty of the abstractor to note that fact, and, there being no note to that effect, the abstract was evidence that seals were shown by the record. There is no distinction in principle between this case and the present one where the abstract does not note a want of a certificate of acknowledgment or any defect in it. See, also, Warvelle on Abstracts (3d Ed.) p. 244.

We might add that the presumption arising from the fact that the abstract does not note a defective or lacking certificate of acknowledgment is strengthened by the fact that the instrument should not have been recorded unless it bore a proper certificate; and yet it was recorded. Altogether, we have no hesitation in holding that the abstract was sufficient to prove prima facie as a matter of secondary evidence that the record of the lease showed a due certificate of acknowledgment entitling the lease to record, and making the record sufficient evidence in itself without recourse to the curative provisions of section 1207, Civil Code.

[8] What has already been said answers the third objection, which is that the abstract shows that Drobaz, who was illiterate, executed the lease by affixing his mark without showing that the execution in that fashion was witnessed, as required by section 14 of the Civil Code and section 17 of the Code of Civil Procedure. If this defect existed, it came directly within the curative provisions of section 1207, which apply to defects in the manner of execution as well as in the matter of acknowledgments. Furthermore, such a defect is one which again it was the duty of the abstractor to catch and note, and his certificate without such note appearing is in effect a certificate that the defect did not appear in the record, so that the abstract is sufficient prima facie evidence that it did not exist.

[9] The fourth objection is that there is no proof that anything was done under the lease, that is, the facts which appear, such as the payment of rental by Drobaz and his possession of the property, are as consistent with the defendant's theory that Drobaz was the tenant only of the property to the west of the gore as with the plaintiff's theory that he was tenant as to all that he occupied. The rule suggested by the objection is one applicable to ancient documents. It has no reference to a record which of itself proves the instrument or to secondary evidence of that record. It is not a requirement of the Code sections which make the record competent primary evidence and the

abstract competent secondary evidence of the record.

[10] The fifth objection is that according to the abstract the lease was actually executed, not by Garrison himself, but by one Pratt on his behalf as his attorney in fact, and the existence of a power of attorney by Garrison to Pratt was not shown. Of course, if one were claiming title through Garrison by means of an instrument purported to be executed for him by some attorney in fact, or were seeking to rely upon such an instrument as against him or against an interest at the time in him, proof of authority on the part of his purported agent would be essential, unless the instrument were an ancient one and the circumstances such that authority would be presumed. But in the present case it is sought to use the instrument, not against Garrison or any interest he had, but against the interest of the other party to it, Drobaz. As a declaration against interest on the part of Drobaz, an acknowledgment by him that he held the property not as owner but as tenant, the effect of the instrument is not changed by the fact that it may not have been validly executed on the part of Garrison.

The sixth objection is that the lease calls for a monthly rental of \$250, while so far as the evidence shows the only rental paid by Drobaz was \$150 a month. If there were this discrepancy in fact between the terms of the purported lease and the actual conduct of the parties, it would seem that it would affect only the weight to be given to the evidence, not its admissibility. The claimed discrepancy, however, does not in fact exist. The only evidence as to the amount of rental paid by Drobaz is as to rental paid subsequent to the expiration of the term of the lease. There is no evidence whatever as to the amount of rental actually paid by Drobaz during the time the lease, if genuine and acted upon by the parties, would have been in force.

[11] The seventh and last objection is that the abstract is but a summary of the contents of the lease, and does not purport to state them in full, and it may be that there were further terms not set out which would materially change the weight and effect to be given to the instrument. But it was the duty of the abstractor to set out the substance of all material terms. *Taylor v. Williams*, 2 Colo. App. 559, 31 Pac. 504; *Attebery v. Blair*, 244 Ill. 363, 91 N. E. 475, 135 Am. St. Rep. 342; Warvelle on Abstracts (3d Ed.) p. 2; 1 Cor. Juris, 366. The strong probability and the presumption are that there were no material terms not set out.

[12] Upon this whole subject we would say that in dealing with old instruments and muniments of title, the parties and witnesses to which are dead, and as to whose execution or the circumstances under which

they were executed, or as to whose exact contents in case they or the original record of them is lost, certain and positive evidence is not possible, the same exactitude and certainty of proof cannot be required as is properly required in the case of more recent events. The courts must go upon probabilities and presumptions. To do otherwise would be to destroy valid titles, not to sustain them. In the present case the abstract in question was made by one of the best-known and most reliable abstractors of the early years of San Francisco. It is before us, and we venture to say that no lawyer of experience in the examination of titles in that city but would, on examining the abstract, feel reasonably certain that it set forth with accuracy the material terms of the instruments noted in it and defects in acknowledgment or execution which would be manifest on the face of the record. The courts should not, by a narrow construction of the Code sections which make this evidence available, blind themselves to the light which it affords, in many cases, because of the wholesale destruction of our public records, the only reliable light which can now be had.

Our conclusion is that the abstract was admissible for the purpose of proving the lease and its execution by Drobaz.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; WILBUR, J.

(183 Cal. 400)

UNION TANK LINE CO. v. RICHARDSON,  
State Treasurer. (S. F. 8954.)

(Supreme Court of California. July 28, 1920.  
Rehearing Denied Aug. 28, 1920.)

1. Taxation  $\S$  164—All "car-loaning companies operating upon railroads in this state" subject to tax.

Const. art. 13, § 14, relating to taxation of car-loaning companies "operating upon railroads in this state," held applicable to all car-loaning companies which are carrying on their business upon railroads in the state.

2. Taxation  $\S$  168—Oil tank line corporation held liable for gross earnings tax; "car-loaning companies operating upon railroads in this state."

Oil tank line company, incorporated in and with principal place of business in other states, which leased tank cars to corporation within the state by lease executed in other state providing for payments to be made in other state, held subject to gross earnings tax under Const. art. 13, § 14, subd. "a," imposing such tax on "car-loaning and other car companies operating upon railroads in this state."

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the Union Tank Line Company against Friend W. Richardson, as Treasurer of the State of California. Judgment for plaintiff, and defendant appeals. Reversed.

U. S. Webb, Raymond Benjamin, and Frank L. Guereña, all of San Francisco, for appellant.

Morrison, Dunne & Brobeck, of San Francisco (Herbert W. Clark, of San Francisco, of counsel), for respondent.

LAWLOR, J. This is an appeal from a judgment in favor of the plaintiff, the Union Tank Line Company, a corporation, in an action brought to recover from the defendant, Friend W. Richardson, as treasurer of the state of California, taxes paid under protest.

There is no dispute as to the facts. The plaintiff is a new Jersey corporation, having its principal place of business in the state of New York. It was doing, and was qualified to do, business in this state, where it had a managing agent. The company was engaged in the acquiring, by purchase or otherwise, of oil tank cars and the leasing thereof to shippers throughout the United States. All contracts between the plaintiff and shippers were entered into and executed in New York at the plaintiff's office, where, it appears, all payments under such contracts were made to the company. Plaintiff maintained and operated repair shops for the repair of its cars in the city of Richmond, county of Contra Costa, and in the town of El Segundo, Los Angeles county. At some time prior to March 1, 1913, plaintiff entered into a contract with the Standard Oil Company of California by which the former undertook to lease to the latter, for its use and service in the transportation of petroleum oil and other oil products within and outside of the state, such cars as might be required. In this agreement it was provided that the oil company should repair plaintiff's cars at prices which should be mutually agreed upon from time to time; that the oil company should furnish the labor and should use materials specified by the plaintiff; that all materials should be inspected by the plaintiff's agents; that the tracks of the oil company at Richmond and El Segundo should be considered "home tracks" for any part of the plaintiff's equipment, and that the plaintiff should have free and reasonable use of those tracks; that the oil company should "perform, or assume the expense of, all switching within or about its plant where such switching is occasioned by the natural operation of the plant or by instructions of the car company"; "that the time any car

shall be considered to be in the possession of the oil company shall be from the day the car is placed until it is unloaded, both inclusive, and that any car prior to the time of its being placed, or ordered placed for loading, by the oil company, and after the time it is unloaded shall be subject" to the plaintiff's orders and not to those of the oil company, "except that the oil company shall carry out the instructions of the car company with respect to the distribution of its empty cars"; and that plaintiff's cars should not be sublet without the plaintiff's consent. This contract was the only contract of lease into which the plaintiff entered with any person or corporation in California, and none of plaintiff's cars other than those furnished to the oil company was operated over rail lines in this state. It is admitted that, although the plaintiff, as already shown, reserved the right to direct the movements of its cars after unloading, that right was not exercised during the period in question. The rail carriers in the state which hauled plaintiff's cars paid to the plaintiff three-fourths of one cent per mile per car, while the oil company paid a rental to the plaintiff and regular freight rates to the carriers. Plaintiff owns no railroad or rolling stock in this state other than the cars leased to the oil company. Plaintiff's vice president and treasurer testified that the provision in the contract above referred to regarding the use of the oil company's "home tracks" was for the purpose of avoiding demurrage charges, that plaintiff did not allocate particular cars for the use of the oil company, and that, to his knowledge, no cars had been sublet by the oil company either with or without the plaintiff's consent.

In 1916 the state board of equalization assessed and levied against the plaintiff the tax authorized by subdivision (a) of section 14 of article 13 of the Constitution. In accordance with that constitutional provision, the tax was measured by the gross receipts from the operations of the company within the state. The tax was paid to the defendant under protest, and thereafter this action was commenced to recover the amount thus paid. The court made findings of fact and conclusions of law and gave judgment for plaintiff in the sum of \$4,712.54, the amount prayed for.

In the first paragraph of section 14 of article 13 of the Constitution it is provided that—

"Taxes levied, assessed and collected \* \* \* upon railroads, including \* \* \* refrigerator, oil, stock, fruit, and other *car-loaning and other car companies operating upon railroads* in this state \* \* \* shall be levied, assessed and collected in the manner hereinafter provided." (Italics ours.)

It is conceded that the only question on this appeal is "whether the respondent was

a car-loaning company operating upon railroads in this state within the meaning of the above-quoted section."

[1] It is to be observed that the verb "operate" may be used either transitively or intransitively (*Rhodes v. Matthews*, 67 Ind. 131, 140), and that it is used here intransitively—"operating upon railroads in this state." (Italics ours.) This must be so, because the language of the section is not confined to car-loaning companies operating cars. If it had been intended to limit the scope of the taxing provisions to those companies which operated cars, language appropriate to a clear expression of such intention would presumably have been chosen. The American Universities New Unabridged Dictionary defines "operate," when used in the intransitive, as follows: "To have or produce a desired result or effect; to act effectively." And Funk & Wagnalls' Standard Dictionary gives to the word the meaning, "To effect any result; have agency; act." If we substitute one of these definitions for the word itself as it is used in the section, the context reads, "car-loaning companies \* \* \* acting effectively upon railroads in this state." The only interpretation which can reasonably be given to this portion of the section is that it authorizes the taxation in the manner prescribed of all car-loaning companies which are carrying on their business upon railroads in this state.

[2] And, adopting this interpretation, we think that the plaintiff clearly comes within the purview of the section. While it is true that the only contract under which plaintiff's cars were sent into this state was executed outside of the state, nevertheless that contract was performed by the plaintiff by delivering cars over, and by permitting its lessee to use those cars upon, the railroads within the state. There is nothing in the section which requires that, in order for a public service company to be taxable thereunder, all its business must be transacted within the state. The fact that a portion of plaintiff's business (the execution of its contracts and all payments thereunder) is carried on outside of the state is immaterial in this connection. Likewise it is immaterial that the plaintiff does not use its cars in this state for the transportation of its own products, for it cannot be reasonably contended that the section relates only to cars so used when it expressly designates *car-loaning companies*. A car-loaning company obviously does not loan them to itself for the transportation of its own products.

Plaintiff cites *Wright v. Union Tank Line Co.*, 143 Ga. 765, 85 S. E. 994, to show that under these facts the plaintiff was not "doing business" in the state. The distinguishing feature of that case, however, was that the state of Georgia was endeavoring to collect from the plaintiff, not only a tax upon

tangible property, but also a tax upon its franchise to do business in Georgia. No such question is involved here.

Section 14 of article 13 was adopted by amendment in 1910. It was the result of a movement inaugurated in 1905 to separate the systems of state and local taxation. The first paragraph (which we have quoted) provides that all taxes upon those public utilities which are enumerated therein shall be levied in the manner prescribed in the following subdivisions and shall be for state purposes only. Subdivision (a) prescribes the manner of collecting taxes on railroads, express companies, telegraph and telephone companies, gas and electric companies; subdivision (b) for taxes on insurance companies; subdivision (c) for taxes on banks, and subdivision (d) for taxes on franchises. The following rule of construction is enunciated in 12 Corpus Juris, at page 710:

"The court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted, with a view to ascertaining its objects and purposes."

In 1905 a commission was appointed by the Governor to devise a plan for the separation of state from local taxation. That commission reported in 1907, but the amendment which it recommended at that time failed of adoption at the general election of 1908. Another commission was appointed in 1909 "to recommend a plan for the revision and reform" of "the system of revenue and taxation in force in this state." It was this commission, then, which formulated this amendment and presented it to the Governor in 1910 in the form of a report which reads (page 18):

"The amendment opens the way for a separation of state from local taxation. \* \* \* The taxes reserved for the state are: \* \* \* (2) On the property of \* \* \* refrigerator, and all other our companies. \* \* \*" (Italics ours.)

To hold that plaintiff, because of the terms of its contract with the Standard Oil Company under which it relinquished to the lessee the control over its cars, was not subject to the payment of the tax authorized by subdivision (a) would be in effect to hold that any concern conducting a business in this state of one of the classes enumerated in the section could evade the payment of this tax by entering into a similar arrangement by which it would receive the earnings of its property in the state while the control thereof was stipulated to be in a lessee.

Plaintiff has caused certain of its oil cars to come into California and to be hauled over and upon the railroads in this state. It is

therefore in the language of the Constitution, "operating upon railroads in this state."

Judgment reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; WILBUR, J.; SLOANE, J.

(48 Cal. App. 181)

STEVENS v. PARKFORD et al. (Civ. 2785.)

(District Court of Appeal, Second District, Division 1, California. June 10, 1920.)

1. Sales  $\S$ 273(5)—No implied warranty that refrigerating plant contracted for would answer purpose.

In sale of a refrigerating plant, furnished precisely according to order, there was no implied warranty the machine would answer the particular purpose for which it was intended.

2. Sales  $\S$ 441(3)—Evidence held not to show refrigerating plant did not comply with guaranty.

In an action for the price of a refrigerating plant sold, evidence held insufficient to justify the finding that the plant did not produce refrigeration in accordance with plaintiff seller's guaranty that it would be equal to the melting of one ton of ice daily.

3. Sales  $\S$ 65—Seller entitled to recover, irrespective of his performance of separate contract.

Plaintiff, who properly installed certain cold storage receptacles for defendant in accordance with specifications, is entitled to payment without regard to whether or not he failed to comply with his separate contract, made months before, under which he installed a refrigerating plant.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Will P. Stevens against E. A. Parkford and C. B. Ford. From a judgment for defendants, plaintiff appeals. Reversed.

Andrew M. Strong, of Los Angeles, for appellant.

Warner & Jones, of Ontario, for respondents.

SHAW, J. Plaintiff, insisting that the findings are not supported by the evidence, appeals from a judgment entered in favor of defendants.

The complaint sets forth three causes of action. By the first count it is alleged that in December, 1914, plaintiff sold, delivered, and installed in defendants' hotel, known as the Casa Blanca Hotel, certain described cooling boxes, for which defendants agreed to pay him the sum of \$537.50, all of which is unpaid. The second count declares upon a written contract, dated October 21, 1914, under and pursuant to which it is alleged that

plaintiff furnished and installed in said hotel a one-ton refrigerating plant and appurtenances to be used in connection therewith, for which defendants agreed to pay the sum of \$763, no part of which has been paid. The third count is for \$17.50 alleged to be due for a pump and oil sold defendants, as to which, since judgment therefor was rendered in favor of plaintiff, there appears to be no controversy.

While the court found that plaintiff furnished and properly installed the cooling boxes, for which defendants agreed to pay him the sum of \$537.50, it further found that payment therefor so to be made by defendants was conditional and dependent upon the refrigerating system operating according to warranties set forth in the contract, dated October 21st, for the installation of the same; in other words, payment for the cooling boxes was made to depend upon the successful operation of the refrigerating plant, which, as found, "did not operate according to the provisions and warranties set forth in said contract," and did not produce refrigeration in accordance with the guaranty contained in the contract dated October 21, 1914, under which the refrigerating plant was installed.

[1] The contract for the refrigerating plant contained full and complete specifications therefor, and not a scintilla of evidence, in so far as we are advised, was offered tending to show that, as installed, it was not constructed in strict accordance with the specifications therefor. In other words, as to the refrigerating plant, defendants got precisely what they contracted for, and there was no implied warranty that the machine would answer the particular purpose for which the buyers intended to use it. *Seitz v. Brewers' Refrigerating Mach. Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; *Fuchs & Lang Mfg. Co. v. Kittredge & Co.*, 242 Ill. 88, 89 N. E. 723; *Bancroft v. San Francisco Tool Co.*, 120 Cal. 228, 52 Pac. 496. Hence, to sustain the finding complained of, we must look to the express warranties, if any, contained in the contract. Other than as to furnishing and installing the machinery in a workmanlike manner as provided in the specifications and as to which no complaint is made, the only obligation assumed by plaintiff is the following:

"I guarantee that the above-described machine and apparatus will produce refrigeration equal to the melting of \* \* \* tons of ice daily (with continuous operation)."

Since the contract provides for a "one-ton refrigeration machine," the guaranty should be read as providing for refrigeration equal to the melting of one ton of ice daily, and the provision "with continuous operation" is modified by another provision in the contract that "length of operation to be not over eight

hours per day, provided all doors are kept closed, except when in actual service." So the guaranty was that the apparatus, operated eight hours per day, with the doors closed, except when in actual use, would produce refrigeration equal to the melting of one ton of ice per day. The record is entirely silent as to the performance of the machinery under the condition so expressed. The entire evidence offered by defendants was to the effect that the apparatus did not work satisfactorily, in that meats, poultry, milk, and cream on occasions deteriorated and became unfit for use. But plaintiff's guaranty was, not that the apparatus would produce refrigeration sufficient to preserve commodities placed in the cooling boxes, but solely that it would, subject to the conditions stated, produce refrigeration equal to the melting of one ton of ice daily, and as to which no evidence whatsoever was introduced. For aught that appears to the contrary, such degree of refrigeration might have been produced, and, notwithstanding such fact, the commodities placed in the cold storage receptacles deteriorated.

[2] Since no question is raised as to the construction of the plant in accordance with the specifications, and the only guaranty was as to the degree of refrigeration to be produced, that was the only question which the court was called upon to try. The fact that it did not perform the service satisfactorily to defendants, or that meats, fruits, and milk deteriorated, is wholly immaterial, provided the apparatus produced the degree of refrigeration guaranteed by plaintiff. The evidence is insufficient to justify the finding that the plant did not produce refrigeration in accordance with the plaintiff's guaranty.

[3] The court also erred in finding that the cold storage boxes installed by plaintiff under his contract were covered by the contract for the installation of the refrigerating plant. The two contracts were entirely distinct and separate. That for the cold storage boxes, constructed in accordance with specifications, was made months after the contract for the refrigerating plant, and the position of plaintiff in reference thereto is precisely that of a third party who had put in the cooling boxes. While it is true that the contract of October 21, 1914, under which the refrigerating plant was installed, required defendants to provide the storage chambers and insulate and construct them in accordance with plaintiff's plans and instructions therefor, the construction thereof by plaintiff, under a contract wherein no reference was made to the prior contract for other work, did not render payment dependent upon whether or not the refrigerating plant should operate successfully. If done by a third party, he would have been entitled to payment, regardless of whether the refrigerating plant produced refrigeration equal



to the melting of one ton of ice per day or not. And so plaintiff, having properly installed the cold storage receptacles in accordance with the specifications, is entitled to payment, without regard to whether or not he failed to comply with the contract under which he installed the refrigerating plant.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(48 Cal. App. 67)

**GRIZZEL v. GOOD FELLOWS GROTTO, GRILL & OYSTER HOUSE. (Civ. 3205.)**

(District Court of Appeal, Second District, Division 2, California. June 8, 1920.)

**Master and servant §—330(3)—Evidence held to show employer of injured mechanic was independent contractor and want of negligence on owner's part.**

Judgment for owner of building, sued by carpenter injured in work thereon, *held* sustained by the evidence, showing plaintiff's employer was an independent contractor for the work, and failing to show any negligence of defendant.

Appeal from Superior Court, Los Angeles County; Louis W. Meyers, Judge.

Action by Elam Grizzel against the Good Fellows Grotto, Grill & Oyster House. Judgment for defendant, and plaintiff appeals. Affirmed.

David A. Jacobs, of Los Angeles, for appellant.

Duke Stone, of Los Angeles, for respondent.

THOMAS, J. Plaintiff brings this action against the defendant to recover damages for personal injuries sustained while employed in the making of certain repairs on a building owned by defendant. The record discloses the fact that plaintiff was, at the time of the trial, a man 42 years of age, and a carpenter with some 10 or 12 years' experience in that calling in the city of Los Angeles; that as the result of a conversation had with one Aaron he went to work on the said building. According to his own testimony, plaintiff had no conversation in reference to his being employed, or his employment on said work, with any one except the said Aaron. In that conversation plaintiff made no inquiry as to whether Aaron was the agent, acting in any capacity for the defendant, or whether he was acting in the matter as an independent contractor.

It further appears from the record that Aaron had entered into a verbal contract with the defendant to construct a certain skylight in the building already referred to, that the price to be paid by defend-

ant to said Aaron was stated and agreed upon, that the price so agreed upon was a lump sum, and that for this lump sum Aaron was to furnish all materials and labor. As to these facts there is no conflict in the evidence. After the conversation between Aaron and plaintiff, the latter went to work and proceeded to put in the skylight. After the opening in the ceiling was made, and because of some mistake or miscalculation of said Aaron, by reason of which the opening was not cut in the proper place, plaintiff was directed by Aaron to extend the same. During this work it was necessary to saw off certain rafters of the building, and to do this plaintiff and another man employed by Aaron placed a "2x10" scantling board across the opening and sat upon it. While thus proceeding to saw off the rafters, the ceiling, for some reason not disclosed by the evidence, gave way, causing plaintiff to fall, from which he sustained the injuries, damages for which are here sought. The case was tried to the court without a jury; the court finding for the defendant on all the issues.

The theory upon which this action is prosecuted by plaintiff is that Aaron was the ostensible agent of the defendant. The defendant, on the other hand, contends that Aaron was an independent contractor. The only evidence contained in the record—and we have read all of it—to support plaintiff's contention as to the claimed ostensible agency is the fact that plaintiff saw a card posted in defendant's place of business by the contents of which it was made to appear that the work was being done by day labor, and that the owner's name was "Good Fellows Grotto." In the blank space on this card, after the words, "Contractor's Name," appeared the words: "None. Day work." This card, as shown by the record without conflict, was the usual and ordinary "permit," which had been obtained by Aaron from the city authorities of the city of Los Angeles to perform the work. It appears that the defendant corporation, or any of its officers, or any one acting for it, knew nothing about this card. It also appears that the plaintiff, after his injuries, and within the time provided by law, made application to the Industrial Accident Commission for compensation against Aaron, and in that application, among other things, gave the name of D. W. Aaron as his employer; that after full hearing on said application at which plaintiff testified that Aaron was his employer, the commission made an award in his favor on account of the same injuries set up in this action; and that thereafter plaintiff made application to the commission to set aside such judgment of award that he might prosecute this action, which application was granted. It is contended by respondent that, appel-

lant having elected to take compensation against Aaron, the commission was without authority of law, and was not authorized by section 81 of the Workmen's Compensation Act, as it then existed, to set aside said award, and that the judgment entered in this action may be sustained on this ground alone. We think it unnecessary to pass upon this point. As we see it, irrespective of the alleged ostensible agency of Aaron, as claimed by plaintiff, or the absence of jurisdiction of the Industrial Accident Commission to set aside its said award, as claimed by defendant, and even though the action were involved directly against the defendant without the theory of "ostensible agency," the judgment finds ample support in the evidence. In our opinion the evidence shows without conflict: (1) That Aaron was, so far as this case is concerned, an independent contractor; and (2) that there is no proof of negligence on the part of defendant. Either of these propositions, standing alone, would be sufficient to support the judgment entered. Both propositions are, we think, sound.

Having considered all the points raised by appellant, we deem it unnecessary to cite authorities to sustain the conclusion we have reached.

Judgment affirmed.

We concur: FINLAYSON, P. J.; WEL-  
LER, J.

(48 Cal. App. 84)

**BROWN v. BROWN. (Civ. 3423.)**

(District Court of Appeal, First District, Division 1, California. June 7, 1920.)

**1. Appeal and error §907(3)—Evidence presumed to support all findings.**

Appeal being on the judgment roll alone, without any bill of exceptions or other record of the proceedings, the evidence must be assumed to support all the findings.

**2. Husband and wife §31(2)—Payment of incumbrance held a partial discharge of antenuptial agreement.**

Payment by wife of incumbrance on house bought by her *held* but a payment on account of purchase price, within her prenuptial agreement to purchase the house with her funds for the parties in their joint names and as joint tenants, and so not to entitle her to a lien as against, or reimbursement from, the husband.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Emma R. Brown, also known as Emma Strawn Brown, against Robert D. Brown. Judgment for defendant, and plaintiff appeals. Affirmed.

John F. Poole and Stutsman & Stutsman, all of Los Angeles, for appellant.

Edgar K. Brown and L. B. George, both of Los Angeles, for respondent.

**WASTE, P. J.** Plaintiff brought this action against her husband, alleging in her complaint that certain real property in the city of Los Angeles, purchased by her with her separate funds, was, without her consent and through the unauthorized act of the defendant, deeded to plaintiff and defendant, as joint tenants; that after the execution of the deed defendant assured plaintiff that his apparent interest in said property was merely held by him in trust and for her benefit; that, relying upon these assurances, plaintiff paid \$6,500 from her separate funds, in discharging a mortgage and a deed of trust on said property, and in securing the release and satisfaction of the debts secured thereby; that thereafter defendant repudiated the trust and denied any interest of plaintiff in the property, and has not paid any part of the purchase price, or of the amount expended in securing the release and discharge of the incumbrances thereon. Plaintiff further alleges that through fear and intimidation, and without any consideration on her part the defendant, some two years after the purchase, compelled her to sign a contract, reciting that the parties were owners, as joint tenants, of the real property in question, and agreeing that it be sold for the sum of \$7,000, the proceeds of the sale to be equally divided between them.

On these facts plaintiff prayed for a decree that the interest of the defendant in the property be declared to be held in trust for her, and that he deed the same to her, and, if such recovery could not be had, that the court impose a lien upon defendant's interest in the property in favor of the plaintiff in the sum of \$7,000, the aggregate amount of the purchase price and the incumbrances discharged by her. She also prayed that the agreement entered into between her husband and herself be canceled and set aside.

The lower court found that the real property in question was purchased by the plaintiff, and the title thereto taken in the joint names of plaintiff and defendant, with full rights of survivorship between them, with the plaintiff's consent, and in performance, upon her part, of a prenuptial agreement between the parties, the consideration for which was the marriage of the parties and the defendant's release of his interest in certain property of the plaintiff in Illinois. There were other findings, to the effect that the subsequent agreement, whereby the parties acknowledged their respective interests in the property in Los Angeles to be that of joint tenants, was executed by the plaintiff voluntarily, and of her own free will, and

was not induced by the improper act or through undue influence of the defendant. From the judgment entered in favor of the defendant, plaintiff appeals, claiming that the findings are inconsistent and conflicting, and that the pretended joint tenancy agreement, between the parties, on which the court based its judgment, was without consideration, and consequently void.

[1] As the appeal is taken upon the judgment roll alone, without any bill of exceptions or other record of the proceedings, we must assume that the evidence was sufficient to support all the findings of the court. *Avery v. Clark*, 87 Cal. 619, 629, 25 Pac. 919, 22 Am. St. Rep. 272; *Paine v. San Bernardino Valley Traction Co.*, 143 Cal. 654, 657, 77 Pac. 659. Thus viewed, we find nothing in the alleged inconsistencies in the findings to warrant serious consideration of appellant's contentions.

[2] Appellant argues, in effect, that as the agreement found by the court between the parties related to the purchase by plaintiff, with her own funds, of a home for the parties and in their joint names as joint tenants, and did not specify that she should discharge any incumbrances thereon, the court's finding "that the plaintiff discharged the incumbrances upon said property pursuant to her express agreement" has no support. Aside from the fact that, under the authority of the cases cited, the finding is deemed to be sustained by the evidence, we are of the opinion that the discharge of the incumbrances, amounting to \$6,500, was but a payment on account of the purchase price to that extent. The court found that the consideration for the property was \$8,900 and that the cash paid down was \$400. For the same reason, and because of the fact, as found by the trial court, that the property in Los Angeles was acquired in fulfillment of the contract in which plaintiff agreed to purchase the property with her separate funds in the joint names of plaintiff and defendant and for their joint use and benefit as a home, the finding that the defendant "has not reimbursed plaintiff for any part of the purchase price, or the incumbrances of and upon said property," is not inconsistent with the other finding, which is really only a conclusion that plaintiff has no lien upon the property. From the facts appearing in the judgment roll we are satisfied the lower court was correct in reaching the conclusion that the discharge of the incumbrances on the property was part of the act of purchase, and that consequently plaintiff was not entitled to reimbursement from her cotenant under the terms of the prenuptial contract. No lien arose in her favor, therefore, by reason of such payments. The contention that the finding, that no money was paid for the execution of the joint tenancy agreement, is inconsistent with and contradictory of the fur-

ther finding that "there was a good and valuable consideration therefor," falls with its own statement.

The appellant assumes that the court based its judgment upon the joint tenancy stipulation, executed some two years after the purchase of the Los Angeles property, and asserts that that agreement is not supported by any consideration. In making this contention she is evidently mistaken. The court rests its decision upon the prenuptial contract, and the deed by which the Los Angeles property was acquired, which latter instrument expressly designates the grantees as joint tenants. The facts appearing from the judgment roll warrant this conclusion, and the inferences which may be drawn therefrom afford ample support to the lower court's judgment. To hold otherwise would result in declaring an absurdity, for the respective rights of the parties were fixed and determined by the prenuptial agreement, and the deed by which the property was acquired. Nothing in addition to those rights was gained or lost, by either party, by reason of the subsequent agreement.

This conclusion on our part renders it unnecessary to consider the contentions of the appellant, that by this later agreement the defendant obtained an advantage over the plaintiff in violation of the fiduciary relations existing between husbands and wives, thereby rendering the transaction void. Furthermore, the finding of the trial court is that the agreement, whatever its effect, was not improperly secured by the defendant.

The judgment is affirmed.

We concur: WELCH, Judge pro tem.; RICHARDS, J.

(47 Cal. App. 753)

ROSS v. SAN FRANCISCO-OAKLAND TERMINAL RYS. CO. et al. (Civ. 3244.)

(District Court of Appeal, First District, Division 1, California. May 27, 1920. Hearing Denied by Supreme Court July 28, 1920.)

1. Trial  $\Rightarrow$  139(1)—To justify submission of question of fact, proof must raise more than conjecture.

To justify the submission of any question of fact to the jury, the proof must raise more than a mere conjecture or surmise that the fact is as alleged, and must be such that a rational mind can reasonably draw from it the conclusion that the fact exists.

2. Trial  $\Rightarrow$  139(1) — Directed verdict proper unless substantial evidence tends to establish case.

A directed verdict is proper, unless there is substantial evidence tending to prove for plaintiff all the controverted facts necessary to establish his case.

3. Trial  $\S$  143—Conflicting evidence to deprive court of right to direct verdict must be substantial.

To warrant a court in directing verdict, it is not necessary that there should be an absence of conflict in the evidence, but to deprive the court of the right, if there is a conflict, it must be substantial.

4. Street railroads  $\S$  112(2)—Res ipsa loquitur doctrine inapplicable to collision between car and pedestrian.

The doctrine of res ipsa loquitur has no application to the case of a collision between a street car and a pedestrian on the street, which is as likely to be due to the fault of the person struck, or some third person, or to some unforeseen and unpreventable cause, as to the negligence of the car's crew.

5. Street railroads  $\S$  85(6)—Duties of railroad and pedestrian reciprocal.

The duties of a street railroad and of a pedestrian crossing the street at the tracks were reciprocal, each being required to approach the crossing with due regard for the rights of the other, and failure of either to observe due care being negligence on his or its part.

6. Street railroads  $\S$  117(22) — Contributory negligence of pedestrian crossing ahead of car is ordinarily for jury.

If in view of his distance from an approaching street car, the rate of its speed, and all other circumstances, a reasonably prudent man would accept the hazard and undertake to cross the street at a track ahead of the car, a pedestrian may do so, and the propriety of his conduct is ordinarily a question for jury.

7. Negligence  $\S$  134(11)—Proof of negligence unconnected with injury does not make case.

Mere proof of a defendant's negligence, without connecting such negligence with plaintiff's injury, does not make out a case.

8. Negligence  $\S$  134(2) — Circumstantial evidence sufficient.

The connection between defendant's negligence and plaintiff's injury may be made by circumstantial evidence.

9. Death  $\S$  58(1)—Care on part of pedestrian killed by street car presumed.

In the absence of anything to the contrary, when a pedestrian attempting to cross a street is killed by the street railway's car, there is a presumption that he exercised ordinary care.

10. Appeal and error  $\S$  1001(1)—Rule that if probabilities are balanced plaintiff must fail does not control appellate court.

The principle of law that if the probabilities are equally balanced on the issue whether the accident involved was produced by a cause for which defendant was responsible plaintiff must fail is more applicable to guide the jury in its deliberations on the facts than as a rule to guide the appellate court as to the sufficiency of evidence.

11. Street railroads  $\S$  114(14)—Evidence held to show traveler rightfully on streets.

In an action against a street railroad company for death of a 16 year old boy crossing its

tracks, circumstantial evidence held to justify the jury in assuming that the boy was going to his home, and was therefore a traveler rightfully on the street when killed.

12. Evidence  $\S$  589—Jury can scrutinize testimony of defendant.

In an action against a street railroad company for a death on its tracks, the jury had a right closely to scrutinize the testimony of the motorman of the car claimed to have killed decedent, he being a defendant and an interested witness, in view of all the circumstances, to see if he was on the lookout for approaching pedestrians, as his testimony seemed to imply.

13. Evidence  $\S$  20(2)—Slowing of street cars before crossings perhaps a matter of common knowledge.

It is almost, if not quite, a matter of common knowledge that street cars slow their speed materially or come to a full stop before attempting street crossings.

14. Street railroads  $\S$  98(6) — Reliance on practice of stopping cars permissible.

The settled practice of stopping street cars at a usual place as before a crossing, becomes a rule of conduct on which the public has a right to rely to a reasonable extent, and departure therefrom is vitally important in determining the question of negligence of a motorman toward a pedestrian attempting to cross the tracks.

15. Death  $\S$  58(1)—Reliance by deceased on rule for operation of street cars may be inferred from circumstances.

It may be inferred from circumstantial evidence that a pedestrian killed by a street railway's car at a crossing had knowledge of the rule governing the operation of cars, and put some reliance on it.

16. Street railroads  $\S$  93(2) — Motorman's failure to stop held to show negligence.

A motorman's failure to stop before a crossing, as his slowing of a car at the point indicated he would, tended to show negligence on his part and on the part of the street railway toward pedestrians.

17. Street railroads  $\S$  98(6) — Pedestrian crossing entitled to rely on motorman's obedience to rules and use of care.

A pedestrian about to cross a street railroad's tracks was entitled to act on the belief that the operator of the car would obey the rules of the company, run at the customary speed at the point, give usual warning signals, and take the usual precautions to avoid injury to others, not being bound in law to a belief the car would not check its speed as it drew near the crossing.

18. Street railroads  $\S$  117(8)—Negligence as to person crossing held jury question.

In an action against a street railway for death of a boy on its tracks at a crossing, whether or not the manner in which the motorman operated the car at the crossing was such that he should have assumed that persons might ignorantly attempt to cross in front so near the car as to make collision probable, held for the jury.

(191 P.)

19. Evidence  $\Rightarrow$  219(2)—Testimony that motorman attempted to suppress evidence admissible.

In an action against a street railway and its motorman for death of a boy on its track at a crossing in the nighttime, testimony of motorman by deposition that immediately after accident a shoe worn by decedent was found back of the pony truck of the car, and that he put it out of sight in a garbage can, held admissible as admission by suppression of evidence.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by A. Ross against the San Francisco-Oakland Terminal Railways Company and S. Serpico. From judgment for defendants, plaintiff appeals. Reversed.

Hearing denied by Supreme Court; Olney, J., dissenting.

Elston, Clark & Nichols, of Berkeley, for appellant.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco, for respondents.

WASTE, P. J. This is an action against the defendant street railway company, and its motorman, S. Serpico, for damages resulting from the death of plaintiff's minor son, Andrew Ross.

It is charged in the complaint that at the time he was killed, Andrew Ross, a boy of the age of 16 years, was walking across Telegraph avenue in the city of Berkeley, when a street car of the defendant company, operated by Serpico at a high, excessive, and careless rate of speed, ran over him, causing his death. It is alleged in a second count that at the time of the accident the motorman so operated the street car as to lead the boy to believe that it was about to come to a full stop, allowing him to continue safely in his course of walking across the street in front of the car, and that, so believing, he attempted to cross the track of defendant, when he was suddenly struck by the car and killed.

The court shut out testimony considered vital by the plaintiff, and at the conclusion of the trial instructed the jury to find for the defendants. From the judgment entered the plaintiff appeals.

There were no eyewitnesses to the accident, which occurred at the intersection of Telegraph and Ashby avenues, on both of which streets the defendant operated its street railway system. Shortly before 1 o'clock on the morning of February 15, 1918, Andrew Ross, then alive and well, escorted a young lady friend to the place where she was working in Berkeley, a point about five blocks north of Ashby avenue, and three blocks east of Telegraph avenue. Leaving his companion at the front steps, he walked west on Derby street towards Telegraph avenue. At that time Ross lived at 2150 Woolsey street, which is three blocks south of Ashby avenue, and two blocks west of Telegraph avenue. It is thus

apparent that in order for him to reach his home, from the place where he left his friend, it was necessary for him to cross both Telegraph and Ashby avenues.

As some time prior to 1:20 o'clock, the motorman on a car of the defendant, running south on Telegraph avenue, discovered the body of Ross lying on the south side of Ashby avenue, near the west rail of the Telegraph avenue track. A sergeant of police, who was summoned, found the boy in a dying condition. He was semiconscious, but could not talk. One of his legs was crushed off, and pieces of the left foot and left shoe were gone. His clothing was badly torn, and he had the appearance of having been rolled and crumpled underneath something. He died soon after being removed to the emergency hospital.

Between the time Ross left his friend, east of the crossing, and the time he was found, car 397 of the defendant company had passed that point. It was a car, which on leaving Berkeley after its final trip, had turned into Telegraph avenue to run to the car barn in Oakland for the night. The car never stopped after entering Telegraph avenue. It slowed down, but did not stop at Dwight Way, on which an intersecting line of the defendant was operated. The motorman gave it "a big kick" after crossing that street; that is, he applied the power for a time, then shut it off, and allowed the car to coast toward Oakland, the grade on Telegraph avenue being down hill, without applying the brakes at any point to check its speed, which, so he testified, was 15 or 16 miles per hour. As he neared Ashby avenue Serpico had his car under full control, and about 100 feet north of that street he applied the brakes, and gradually reduced the speed to 4 or 5 miles per hour. When the front of his car was about 25 feet from the car rails on Ashby avenue, he "gave it some more juice," and went on towards the carhouse, without stopping, as he was required by the rules of the company to do, before crossing Ashby avenue, on which was operated a cross-line of the same company. After the car had passed over the intersecting rails of the cross-line tracks, and had proceeded some 10 or 15 feet, Serpico and the conductor, who was sitting in the forward compartment of the car with him, felt a jar, or jolt, different from that caused by the trucks running over the cross-rails. The car jumped two or three times, the cause of which, the motorman testified, he "thought was a stone on the track \* \* \* he supposed it was a medium-sized rock." The car was not stopped, but proceeded to the car barn. Serpico testified that he heard no outcry at the time, and saw no one crossing, or near the car track, although the streets at that point were well lighted.

When the car turned in at the barn it was discovered that the middle guard on the westerly side was missing, and the rear guard

was hanging by a single hook. There was blood on the side of the car, on the flange of the front drive wheel, and hair and blood on the air compressor, a few feet back of the wheel. The missing side guard was later picked up near the spot where the body of Ross was discovered. A subsequent investigation of the scene of the accident disclosed the fact that his body had been dragged from a point almost on a line with the northerly crossing of Ashby avenue clear across that street, and close beside the westerly rail of the south-bound track. The marks and blood stains on the ground indicated that he had been rolled, or dragged, some distance before any part of the car ran over his body, which lay at just about the spot where the crew of the car felt the jar, or jolt, as it passed over something.

From the foregoing facts, which appear without contradiction, no one can doubt for an instant that the boy, Ross, was killed by being run over by the street car of the defendant railway company, operated by the employé, and codefendant, Serpico. Respondents in their brief apparently concede the point, but argue that the proximate cause of the injury and death rests in surmise and conjecture, and that the evidence fails to establish that it was proximately caused by the negligence of the defendants. That was the view adopted by the lower court, as indicated by its action in removing the cause from the consideration of the jury. The appellant contends that it was error for the court to direct a verdict in the case, claiming that upon the evidence the presumption was that the boy was killed through the negligence of the defendant; that although that presumption might be rebutted it was a question for the jury whether the facts and circumstances in the case did so. The respondents answer that there was no evidence tending in any way to show that the plaintiff's son was killed by any act of it; and particularly contends that, if it be admitted that the boy was killed by the street car, there is nothing tending in the slightest to show any negligence on its part. The ruling of the lower court presents the main issue for determination upon this appeal.

[1-4] In order to justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture, or surmise, that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists. When the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury. *Janin v. London, etc., Bank*, 92 Cal. 14, 27, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82. A directed verdict is proper, unless there is substantial evidence tending to prove in favor of a plaintiff all the controverted facts necessary to establish his case. In other words, a di-

rected verdict is proper whenever upon the whole evidence the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. *Estate of Baldwin*, 162 Cal. 471, 473, 123 Pac. 267. The doctrine of *res ipsa loquitur* has no just or proper application to the case of a collision between a street car and a pedestrian on the street. Such mishap is quite as likely to be due to the fault of the person struck, or of some third person, or to some unforeseen and unpreventable cause, as to the negligence of those operating the car. *Tower v. Humboldt Transit Co.*, 176 Cal. 602, 607, 169 Pac. 227. Consequently it was not sufficient for the plaintiff in the instant case to merely show the happening of the accident. It was necessary that he go further, and fasten the blame for the injury upon the defendants.

[5, 6] At the time of the happening of the accident in question, the duty of the defendants, and of the decedent, were reciprocal. Each was required to approach the crossing with a due regard for the rights of the other, and if either failed to observe the care required, it was negligence for which the guilty party is responsible. *Bickel v. Penn. R. R. Co.*, 217 Pa. 456, 462, 66 Atl. 756, 118 Am. St. Rep. 926. In *Kansas City, etc., R. R. Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344, the court held that, while it is the duty of a pedestrian upon a city street, who is about to cross the track of an electric street railway company, to exercise his faculties, and take ordinary care to avoid collisions with the cars, if he does look and listen he will be held to an apprehension of that which he should have seen and heard, and if he fails to look and listen he will be held to the same liability in case of disaster as if he had done so. But a traveler may cross an electric street railway track in front of an approaching car which he sees and hears and not be negligent. If, in view of his distance from the car, the rate of its speed, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross the highway, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury. See, also, *Baltimore & Ohio R. R. Co. v. Griffith*, 159 U. S. 603, 611, 16 Sup. Ct. 105, 40 L. Ed. 274.

In support of the action of the lower court in the instant case, in directing the jury to return a verdict in favor of the defendants, the respondents rely upon *Puckhaber v. Southern Pacific Co.*, 132 Cal. 363, 64 Pac. 480, as deciding this case. As was said by the writer of that decision, the facts of the

case were of the most meager character. Upon a dark and foggy morning, about half past 5 o'clock, the mutilated dead body of a young man, a total stranger in the locality, was found lying upon a side track in the railroad yards of the defendant, near the dead body of another man, also a stranger in the village. There was no witness to any accident. It was claimed by the plaintiff that the deceased was killed by a backing engine and tender which passed over the particular spot to the roundhouse about an hour earlier on the same morning. The negligence of the defendant was claimed to be established by showing that the tender of the engine had no light upon the rear end. The court held that, conceding these facts, the case was still too weak to support a verdict, for the reason that there was a total lack of evidence showing any causal connection between the absence of a light upon the tender and the death of the deceased. This was held to be true, even though it be assumed to be the law of this state that, in the absence of evidence upon the subject, it will not be presumed that the deceased was himself guilty of negligence. The court said:

"It is as necessary for the plaintiffs to show that the defendant's negligence caused the injury as it is for them to show that defendant was guilty of negligence, or that the party was injured." *Puckhaber v. Southern Pacific Co.*, supra, 132 Cal. 365, 64 Pac. 481.

[7, 8] By proving a defendant's negligence, without in some way fastening that negligence to the injury, a case is not made out. *Union, etc., Co. v. S. F. Gas. Co.*, 168 Cal. 58, 62, 141 Pac. 807. These rules, however, do not require demonstration of the connection between the proved, or admitted, negligence and the resulting injury. It is not necessary that an eyewitness be produced to testify directly to the fact. The connection may be made by circumstantial evidence in the same way that any other fact can be so proved. *County of Alameda v. Tieslau*, 30 Cal. App. Dec. 546, 549, 186 Pac. 398. The conclusion reached by the court in the *Puckhaber* decision was, no doubt, correct upon the facts there considered. The circumstances disclosed in other cases, possibly possessing some degree of similarity, may not fit the facts of that case. *Peters v. McKay*, 136 Cal. 73, 76, 68 Pac. 478.

[9] While, as before stated, the presumption arising from the doctrine of *res ipsa loquitur* does not apply to accidents like the one in which young Ross was killed, another, and an equally binding, presumption does arise, to wit, that the deceased, in such cases, exercised ordinary care. The rule of law referred to in the *Puckhaber* decision is, perhaps, more clearly stated in a later case, in which the court said:

"When death is caused under circumstances such as this, without eyewitnesses, the law

comes to the aid of the plaintiff who is pressing a suit for damages for the death, and that law is found in the presumption of the Code of Civil Procedure, namely, that a person takes ordinary care of his own concerns. Code Civ. Proc. § 1963, subd. 4. \* \* \* This is a controvertible presumption, it is true, but until controverted it is evidence in accordance with which the jury is bound to decide. Code Civ. Proc. § 1961." *Crabbe v. Mammoth Channel G. M. Co.*, 168 Cal. 500, 506, 143 Pac. 714.

In applying this principle of law to personal injury cases the Supreme Court of the United States has said:

"The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions, based on human feelings or expression, that have surer foundation." *Baltimore & Potomac R. R. v. Landrigan*, 191 U. S. 461, 474., 24 Sup. Ct. 137, 140, 48 L. Ed. 262.

When recourse must be had to this rule of human conduct, in determining the question of responsibility in cases of accidents, like the one now being considered, "it is fair to presume, until the contrary is proven, and this presumption is sustained by a rule of law that one who was killed while crossing a railroad track was exercising due and proper care for the protection of his \* \* \* life. The presumption which arises in favor of the instincts of self-preservation and the known disposition of men to avoid injury and personal harm to themselves is sufficient to constitute prima facie evidence that the person killed was at the time of the accident free from contributory negligence." *Fleener v. Oregon Short Line R. R. Co.*, 16 Idaho, 781, 802, 102 Pac. 897, 903.

Existing facts and circumstances very similar to those surrounding the death of the boy Ross, in this case, have been frequently considered by the courts, in the light of the foregoing rule of self-preservation. In *Robbins v. Penn. Co.*, 257 Fed. 671, 168 O. C. A. 621, the decedent left the house of a friend, which was on the east side of the street, and south of the two railroad tracks, for the purpose of mailing a letter at the post office, which was on the west side of the street, and on the north side of the tracks. At the time she started on this errand the south track was occupied by a long, slowly moving east-bound freight train. At about the time the caboose, at the rear of this train passed out of the street, an engine drawing a short west-bound train on the northerly track, and running at a speed of 55 to 60 miles an hour, suddenly burst into view, without ringing of bell, or blowing of whistle. The proof tended to show that it was this west-bound train on the northerly track which struck and killed the decedent. No one saw the decedent

after she left her friend's house, and the point of collision was left to inference. The trial court directed a verdict in favor of the defendant, one of the grounds being that the plaintiff had not sustained the burden of showing that the defendant's alleged negligence was the direct and proximate cause of decedent's death. The trial judge concluded that the "decedent must either have crossed behind the east-bound train immediately on its clearing the sidewalk, when she was not in position to see the west-bound train, or have gone ahead without looking to see whether a train was coming from the east. This conclusion is not," said the Circuit Court of Appeals, in reversing the lower court, "in our opinion inevitable, at least on the theory that the collision occurred at the west crossing. Defendant had the burden of proving decedent's negligence. The law presumes that, following the instinct of self-preservation, she exercised due caution, and that before crossing the tracks she looked and listened for approaching trains." After citing a number of cases, some of which we have already alluded to, the court considered the circumstances, and held that as different inferences might be drawn from the circumstances surrounding the accident, the decision of the question rested with the jury.

A case having some of the essential features of the case at bar was considered by the United States Supreme Court in *Baltimore & Potomac R. R. v. Landrigan*, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. The deceased was employed on the night force of the railroad company. The usual and direct route to his home took him over a well-lighted crossing. A few minutes after he left the roundhouse his body was found near the crossing, with flesh and blood scattered along the track. There were no witnesses to the accident. At that time a switching crew was making up a train, one of the Pullman cars of which broke loose by reason of an alleged defective method of coupling, and was shunted over the crossing. A passenger train passed the same point just about the same time. On these facts the trial court refused to direct the jury to render a verdict for the defendant, but submitted the case to the jury, which found for the plaintiff. On appeal it was held that it was not error for the lower court to instruct the jury that in the absence of all evidence to the contrary there was a presumption that the deceased stopped, looked and listened before attempting to cross the tracks, citing *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, 366, 16 Sup. Ct. 1104, 41 L. Ed. 186. The railroad company also contended that as there was no evidence from which it could be determined that it was the uncoupled Pullman car, and not the passing express train, which injured the deceased, it was error to submit the issue to the jury. The Supreme Court held that the ac-

tion of the lower court was right, saying, "There was certainly evidence on the issue from which reasonable men might draw different conclusions."

In *Dalton v. Chicago, etc., Ry. Co.*, 104 Iowa, 26, 73 N. W. 349, a highway crossing accident occurred at night. The decedent was struck by a passing train of the defendant. There were no witnesses to the conduct of the deceased. The contrary not appearing, it was held that it must be presumed that the decedent exercised care on approaching and going upon the crossing, and that whether the circumstances were such as to overcome that presumption was a question for the jury. Other cases to the same effect are *Eckhard v. St. Louis Transit Co.*, 190 Mo. 593, 89 S. W. 602, 608; *Lewis v. Rio Grande Western Ry. Co.*, 40 Utah, 483, 123 Pac. 98, 99; *Lotz v. B. & O. Ry. Co.*, 247 Penn. 206, 93 Atl. 274; *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 210, 29 Sup. Ct. 270, 53 L. Ed. 453; *Korab v. Chicago, etc., Ry. Co.*, 149 Iowa, 711, 128 N. W. 529, 41 L. R. A. (N. S.) 32, 83. In the last case cited, in which no witnesses appeared to testify to the accident, the court set aside a directed verdict in favor of the defendant, and held the decedent's administrator entitled to the benefit of the presumption of due care on the part of the deceased, saying:

"If the record is such that, under the rule to which we have referred, a presumption of due care obtains, then proof of an act which may or may not have been negligent according to the circumstances under which it was done will not justify a holding as a matter of law that the presumption of care is thereby rebutted."

The respondent contends that we should view the evidence as presenting only a question of probabilities, and cites *Tremelling v. Southern Pacific Co.* (Utah) 170 Pac. 80, 83, to the effect that—

"If the probabilities are equally balanced that the accident was produced by a cause for which the defendant is responsible or by one for which he is not, the plaintiff must fail."

[10] This principle of law is more applicable as a rule to guide the jury in its deliberations upon the facts than it is as a rule to guide the appellate court in passing on the sufficiency of the evidence. *Peters v. McKay*, 136 Cal. 73, 76, 68 Pac. 478. The foregoing cases bearing on the point and others which have been examined by us present facts with many essentials similar to the circumstances surrounding the accident in which Ross was killed. In few, if any, were the facts as strong. Yet the action of the trial courts in refusing to direct verdicts for the defendants was upheld on the one hand, and the granting of such relief was reversed on the other.

[11, 12] In the instant case, the decedent was a traveler. The plaintiff sought to intro-



duce evidence to establish that the decedent Ross, on leaving his friend at her doorstep, a few minutes before he was killed, stated to her that he was going to his home, the purpose being to show that his intended route would take him across the tracks of the defendant, and that he was a traveler crossing the street when killed, and not a trespasser suddenly approaching the car from the west, and attempting to steal a ride, as was suggested by the defense, at the trial. This testimony was excluded by the court. Whether or not the action of the trial court, in refusing to admit the declaration as to the boy's intention, was error, we are of the opinion that, in the absence of testimony, the jury had the right to assume that he was going to his home, and was therefore a traveler, rightfully upon the streets. The hour of the night, the circumstance that he had just escorted his friend to her home, coupled with the further facts that he was a sober, industrious, working boy, and that his home was situated in a southerly and westerly direction, across the intersecting tracks of the company at Ashby and Telegraph avenues, in almost a direct line from the point where he left his companion—all these circumstances readily give rise to such an inference. The intersection of the streets mentioned, according to the testimony, was well lighted, and the car was equipped with a headlight. The details of the accident, it is true, were few, but they were related by a defendant, who was also an employé of the railway company. He was an interested witness, and although he testified that he did not see the boy before the accident or at any time, yet, there being no obstruction to the view, the jury would have the right to closely scrutinize his testimony, in view of all the circumstances, to see if he was on the lookout for approaching pedestrians, as his testimony would seem to imply. *Wahlgren v. Market Street Railway Co.*, 132 Cal. 656, 665, 62 Pac. 306; 64 Pac. 993.

[13-15] The motorman was also guilty of a violation of the rules of the company requiring him to bring his car to a full stop before crossing Dwight Way and the Ashby avenue tracks. After passing the former street, he had "given his car a big kick," and it was coasting on the downgrade toward the car house, on its last trip late at night, at a rate of speed which, if the testimony of the motorman be true, would not be considered excessive. By his own testimony, Serpico would make it appear that when about 100 feet north of the Ashby avenue tracks, he retarded the speed of his car from 15 or 16 miles an hour to 4 or 5 miles an hour, at which speed he was going when he was about 25 feet north of the crossing. He then "gave it more juice." It is very easy to infer from the circumstances that young Ross was acquainted with the rule requiring the cars to

stop before crossing intersecting tracks. He had been living in the vicinity some little time, and it is almost, if not quite, a matter of common knowledge that the street cars do slow their speed materially, or come to a full stop, at such points. The settled practice of stopping a street car at a particular place becomes a rule of conduct upon which the public has a right to rely to a reasonable extent, and a departure from such rule is a vitally important element in determining the question of negligence, for it constitutes a departure from the standard of safety which the defendant has itself adopted. *Godfrey v. Old Colony Street Railway Co.*, 223 Mass. 419, 111 N. E. 878; *Kostuch v. St. Paul Street Railway Co.*, 78 Minn. 459, 81 N. W. 215; *McDivitt v. Des Moines Street Railway Co.*, 141 Iowa, 689, 118 N. W. 459, 462. It may be inferred from circumstantial evidence that a deceased person had knowledge of a rule governing the operation of cars, and that he put some reliance upon it. *Boston & M. R. R. v. Rafalko*, 228 Fed. 440, 143 C. O. A. 22.

[16, 17] In addition to the presumption, in the instant case, the motorman by the operation of his car gave every indication that it was his intention to comply with the rule. He slowed his car from a rate of speed at which he was coasting toward the car barn, as he approached the crossing. His failure to finally stop, as his handling of the car indicated he would, tended to show negligence on his part. *Simoneau v. Pacific Electric Ry. Co.*, 159 Cal. 494, 503, 115 Pac. 320. Ross was entitled to act upon the belief that the operator of the street car would, upon his part, obey the rules of the company, and run the car at the speed which was customary at the particular place, and that he would give the usual warnings and signals, and take the usual precautions to avoid injury to others. He was not, in law, bound to believe that the car, provided he saw it some distance away, would not check its speed as it drew near the intersecting crossing. *Scott v. San Bernardino Valley Ry. Co.*, 152 Cal. 604, 610, 93 Pac. 677.

[18] Under the circumstances of this case, we do not feel that it can be said, as a matter of law, that the motorman ought not reasonably to have expected that persons might attempt to cross the track at a point which would in fact be dangerously near, but which to them would not appear so. The circumstances might be such as to charge him with knowledge of this likelihood. Due care would be required of him in such case, to anticipate such probability, and the results reasonably arising from the consequences of his own action. It should have been left to the jury to say whether or not the manner in which he operated the car at the Ashby crossing was such that he should have assumed that persons might ignorantly attempt

to cross in front so near the approaching car as to make a collision probable. *Bressee v. Los Angeles Traction Co.*, 149 Cal. 131, 138, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; *Runnels v. United Railroads*, 175 Cal. 528, 533, 166 Pac. 18; *Drouillard v. Southern Pacific Co.*, 36 Cal. App. 447, 451, 172 Pac. 405; *Haughey v. Pittsburg Ry. Co.*, 210 Pa. 863, 366, 59 Atl. 1110; *Phillips v. Milwaukee & N. R. Co.*, 77 Wis. 349, 46 N. W. 543, 9 L. R. A. 521; *Tegels v. Great Northern Ry. Co.*, 120 Minn. 31, 138 N. W. 945.

[19] The plaintiff's son being dead, and there being no eyewitnesses to the accident, the plaintiff was compelled to rely upon the motorman, Serpico, who was also a defendant in the action, to establish the circumstances surrounding the accident. He did not appear at the trial in person, but his deposition was read in evidence. Therein he testified that when his car reached the car barn immediately after the accident, a shoe, admitted to be one the deceased was wearing, was found back of the pony truck of the car. Serpico testified that at that time, "I was so nervous and mixed up—I know something had happened. I don't know if I picked up the shoe or the conductor gave it to me, \* \* \* I put it in a garbage can what the city uses; \* \* \* it has a tin lid that lifts up and down. \* \* \* After it was in there of course it was out of sight." When this testimony was offered the court sustained the objection of the defendants that it "bore no relation whatever to the case," and excluded the testimony from the jury. Only this general objection was made. We think this was error. Serpico was a defendant, and the employé of his codefendant. A strong inference arising from his action, and certainly a most plausible explanation of his conduct, is that he was attempting to conceal evidence, which in his mind had an important bearing upon the "something" that had happened. His conduct was indicative of a belief, and in the nature of an admission, that his cause could best be served by suppressing the evidence of the injury. Testimony showing, or tending to show an attempt on the part of a party to a suit to cover up, conceal, or otherwise prevent pertinent facts from being presented to the court or jury is competent and proper. Such efforts may be shown, not as part of the *res gestæ*, but in the nature of an admission, the effect of which is a matter for the consideration of the jury. *Silva v. Northern Cal. Powder Co.*, 32 Cal. App. 139, 146, 162 Pac. 412; *Clark v. Tulare Dredging Co.*, 14 Cal. App. 414, 437, 112 Pac. 564.

The judgment is reversed.

We concur: RICHARDS, J.; GOSBEY, Judge pro tem.

(48 Cal. App. 116)

**LAMPTON v. DAVIS STANDARD BREAD CO. et al.**

**SAME v. DAVIS STANDARD BREAD CO.**  
(Civ. 3298.)

(District Court of Appeal, First District, Division 1, California. June 9, 1920.)

**1. Municipal corporations §705(1)—Driver of vehicle must be on alert.**

The driver of a vehicle must proceed carefully, and be on the alert lest he collide with others.

**2. Municipal corporations §705(3)—Driver near schoolhouse required to exercise greater care than usual.**

The proximity of the place where defendant was driving to adjacent school grounds, and the hour at which children might with certainty be expected to be on the street, imposed on him a greater degree of caution than ordinary circumstances would require; what would be but ordinary negligence in reference to a grown person would be gross negligence as respects a child.

**3. Evidence §123(1), 244(1)—Conversations with defendant employé admissible, not as *res gestæ*, but as admissions.**

In an action against a company and its employé for injuries to a schoolboy when a horse driven by the employé ran him down, testimony as to conversations with defendant employé shortly after the accident *held* not admissible as part of the *res gestæ*, nor as against the employer, but admissible as evidence against the employé under Code Civ. Proc. § 1870, subd. 2, being admissions concerning the occurrence.

**4. Evidence §146, 222(10)—Admissible evidence not excluded because of collateral effect; admissions of one defendant not excluded because not binding on other.**

Statements made by defendant employé in conversations after the accident sued for, not binding upon defendant employer, though binding upon the employé, could not properly be excluded, as admissible evidence cannot be excluded because having an ulterior or collateral effect detrimental to a party.

**5. Evidence §215(1)—Photograph of statement made at police station by defendant admissible as admission.**

In action against a company and its employé for injuries to a child run down by a horse driven by the employé, photographic copy of detailed statement, made by the employé at the police station after the accident, *held* admissible against him as his admission.

**6. Appeal and error §883—Defendants, not taking advantage of offer to dismiss as to one, cannot complain of refusal to rule on motion.**

Where plaintiffs' counsel offered to dismiss the case as against one of the two defendants, but defendants did not take the opportunity and file written consent, as required by Code Civ. Proc. § 581, subd. 2, but remained silent until after adverse verdict and judgment, they can-

not complain of prejudicial error in the trial court's action in refusing to pass on plaintiffs' alleged motion to dismiss, not being given an exception by section 647.

**7. Guardian and ward § 130—Averment of official capacity of guardian suing for child held sufficient.**

In a child's action for injuries by his father as guardian, allegations of complaint that the father was the duly appointed and qualified guardian of the person and estate of the minor held a sufficient averment of the official capacity of the guardian, in the absence of special demurrer, which, being admitted by answer, had effect of stipulation of fact rendering allegation of more specific facts unnecessary.

**8. Guardian and ward § 130—Denial of appointment and qualification of guardian held insufficient to raise issue.**

Where defendants denied the appointment and qualification of plaintiff guardian "for lack of information and belief," thereby placing their denial on such ground as required by Code Civ. Proc. § 437, the denial was insufficient, and the appointment of the guardian, being a matter of public record, was not put in issue, but stood admitted.

**Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.**

Actions by Bill Lampton, a minor, by his guardian, W. W. Lampton, against the Davis Standard Bread Company and Harry Graham, and by W. W. Lampton against the Davis Standard Bread Company. From judgments for plaintiff, defendants appeal. **Affirmed.**

Hickcox & Crenshaw and E. R. Young, all of Los Angeles, for appellants.

Allen W. Ashburn and Newlin & Ashburn, all of Los Angeles (J. W. McKinley, of Los Angeles, of counsel), for respondent.

**WASTE, P. J.** The above-entitled cases were tried together before a jury. One is a suit against both defendants, for damages for personal injuries received by the plaintiff Bill Lampton, who sues by his general guardian, W. W. Lampton. The other is a suit by the father against the bread company alone, to recover money for doctor's bills, hospital expenses, and other expenditures, due to the injury.

The accident occurred while the plaintiff, aged seven years, was on his way to the public school located at the corner of Tenth and Valencia streets, in Los Angeles, a portion of the grounds running through to Grattan street, upon which the accident happened. Plaintiff was proceeding northerly on the west side of that street, and in crossing the roadway was struck by a wagon, belonging to the defendant Davis Standard Bread Company, driven by the defendant Harry Graham. At the time the accident occurred Graham was driving at a trot, at about eight miles

an hour, but was not looking ahead. The plaintiff was knocked down and seriously injured. One of the horses stepped on his head, breaking the skull, from which pieces of the bone had to be removed. The jury returned a verdict for plaintiff for \$8,000, in the suit by the minor, and for \$597.75 in the suit by the father. The defendants moved for new trials, which were denied, and then appealed, it being stipulated that both cases may be heard and determined by this court on the same record.

Appellants contend that the evidence does not establish negligence on the part of either of the defendants. The defendant Harry Graham, an employe of the other defendant, the bread company, was engaged in his usual vocation of delivering bread at the time of the accident. He had passed over this particular route twice daily for seven months, and was familiar with the fact that there was an obstruction at this particular place which would render it impossible for him to see a person who was about to step from the sidewalk into the street. He was also aware of the fact that, at that particular time of the day, the children from the nearby school were at their noon recess, and were apt to be in and about the spot where the accident occurred. At the time, so he testified in his deposition, which will be referred to later, he was not looking ahead, but was looking to the right of the wagon, intending to stop and inquire as to the wants of a customer who had called to him. He did not see the boy until one of his horses had knocked him down and stepped on his head. When asked why he did not see the boy he testified:

"It was not my habit to notice people on the sidewalk, and immediately before the accident three poles at the side may have obstructed any view that I might have had of him."

[1] The driver of a vehicle must proceed carefully, and be on the alert lest he collide with others. *Bauhofer v. Crawford*, 16 Cal. App. 676, 678, 117 Pac. 931; *Scott v. San Bernardino Valley, etc., Co.*, 152 Cal. 604, 610, 93 Pac. 677; *Wistrom v. Redlick Bros., Inc.*, 6 Cal. App. 671, 673, 92 Pac. 1048.

[2] The proximity of the place where Graham was driving to the adjacent school grounds, and the hour, at which children might, with certainty, be expected to be using the street, imposed upon him a greater degree of caution than he might be required to use under ordinary circumstances. That which would be but ordinary negligence in reference to a grown person may be gross negligence as respects a child. *Schlerhold v. N. B. & M. R. Co.*, 40 Cal. 447, 454. The jury was instructed with particularity on the law applying to the facts surrounding the accident. The court used rather more than usual care in the matter, and we are satisfied

that the verdict accords with the law and the evidence.

When the case came on for trial the defendant Graham was a soldier with the overseas forces in France. In anticipation of this fact the defendants, on stipulation of the parties, procured his deposition as to the accident, and the manner in which it occurred. With the consent of the defendants, the plaintiff offered, and read in evidence, Graham's testimony taken in that manner. A part of his statement of the occurrence has already been quoted in substance, or in the exact language used. Appellants now complain of the action of the trial court in admitting the testimony of two witnesses, who related certain conversations had with defendant Graham, shortly after the accident, to the effect that—

"Mrs. Bergman (a customer) had called to him, and he looked around to answer her question, and while he was looking around he ran over the child, and that was how it happened. He did not see the boy."

[3] The conversations were not part of the res gestæ, and were not admissible on that theory. They were relevant and admissible as evidence against the defendant Graham, being declarations and admissions concerning the happening for which he was responsible. Code Civ. Proc. § 1870, subd. 2; *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 574, 74 Pac. 147. Furthermore, the statements made by Graham, in the conversations with the two witnesses, were almost word for word the same statements he made when giving his deposition, in explanation of how the accident occurred.

[4] While these statements made by Graham in these conversations were not in the least binding upon the defendant bread company, the court could not properly exclude them for that reason. It is a well-established rule that if evidence is properly admissible upon the issue presented it cannot be excluded because it may have ulterior or collateral effects detrimental to one of the parties. *Vallejo, etc., R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 562, 147 Pac. 238; *Keyes v. Geary St., etc., R. R. Co.*, 152 Cal. 437, 441, 93 Pac. 88. In the last case noted certain statements of the gripman, following the accident, were admitted for the purpose of impeaching his testimony given at the trial. The court held that as the statements were properly admitted for that purpose, they could not be excluded because they also tended to show negligence on the part of the defendant, his employer. The exact question now raised in this case was well considered in that decision. See, also, *Voorman v. Voight*, 46 Cal. 392, 397, to the effect that evidence inadmissible against one defendant may be received in the action against another party. The appellant does not appear to have made any effort to have the trial court limit the effect of the declarations made by Graham, as it

would no doubt have done, by proper instructions, if so requested. No error resulted in these admissions.

[5] There was attached to the deposition of defendant Graham a photographic copy of the detailed statement made by him at the police station after the accident. Over the objection of the defendant bread company it was admitted in evidence. Graham identified this statement, in his deposition, and testified to its veracity, and to the genuineness of the writing and his signature thereto. For the same reasons that the conversations, already alluded to, are admissible, this statement was properly submitted to the jury.

During the course of the argument of plaintiff's counsel, he remarked:

"Just to show that we are willing to do the right thing, we will dismiss the case, with your honor's permission, against the defendant Harry Graham at this time."

[6] The court refused to rule on the suggestion at that time, and, after the jury had retired, again declined to do so, giving no reason for not so doing. Appellants did not join in, and took absolutely no part in this proceeding. The record contains no evidence that any dismissal of the action was ever entered. Appellants now ask a reversal of both judgments, claiming prejudicial error in the court's action in refusing to pass on the alleged motion to dismiss the damage case against defendant Graham, but cite neither law nor authority in support of their proposition. We see no ground for appellants' contention. The dismissal, if there was one, was not had "upon the written consent" of the defendant, as required by section 581, subdivision 2, of the Code of Civil Procedure. Under that provision it was ineffectual. If it be contended that the dismissal was attempted under subdivision 4 of said section 581, which provides that an action may be dismissed by the court, when upon the trial and before the final submission of the case the plaintiff abandons it, the dismissal was ineffective for any purpose until made by order of the court and entered upon the minutes. The proposal may have come from the respondent's counsel in such manner, and under circumstances, as not to amount to an abandonment of the case as to Graham. It is possible, and quite probable, as suggested by appellants in their brief, that the purported dismissal was staged "for the purpose of influencing the jury." Had the defendants been vigilant in seizing the opportunity then presented to take advantage of the tentative advantage offered by the incident, they should have promptly filed their written consent to the dismissal, in the one instance, or have insisted upon an order of court and entry in the minutes, in the other. Not having pursued their ostensible advantage, and having remained silent until the opportunity offered was swept away by an adverse verdict and

judgment, appellants are not in position to complain. They were not given an exception to the court's refusal to pass upon the motion, by section 647 of the Code of Civil Procedure, as claimed by them, and to which action, so far as the record discloses, they gave their consent.

[7] Appellants make the final objection that the plaintiff totally failed to prove the appointment and qualification of the guardian of the minor. There is no testimony as to the fact. The allegation of the complaint is "that W. W. Lampton is the duly appointed, qualified, and acting guardian of the person and estate of said minor." This was a sufficient averment of the official capacity of the guardian in the absence of a special demurrer, and, if admitted in the answer, had the effect of a stipulation of the fact, which rendered the allegation of more specific facts unnecessary. *Collins v. O'Lavery*, 136 Cal. 31, 83, 68 Pac. 327; *S. F., etc., Land Co. v. Hartung*, 138 Cal. 223, 230, 71 Pac. 337. The defendants denied the appointment and qualification of the guardian for lack of information and belief.

[8] Assuming that they thereby placed their denial "upon that ground," as required by section 437 of the Code of Civil Procedure, such a denial was insufficient, and the appointment of the guardian, being a matter of public record, was not put in issue, but stands admitted. *Mulcahy v. Buckley*, 100 Cal. 484, 487, 35 Pac. 144; *Mullally v. Townsend*, 119 Cal. 47, 54, 50 Pac. 1066; *Mendocino County v. Peters*, 2 Cal. App. 24, 28, 82 Pac. 1122.

Each of the judgments appealed from is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

(48 Cal. App. 147)

HENNING v. WUEST. (Civ. 3307.)

(District Court of Appeal, First District, Division 1, California. June 10, 1920.)

1. Evidence ⇨419(15)—Parol evidence admissible to show note was for indemnity against loss on accommodation note.

In an action on a note, evidence was admissible to show an agreement between plaintiff and defendant by which the former signed with others a note to a bank in consideration of the defendant guaranteeing him against loss thereby by giving the note in suit and other facts tending to show that accommodation maker had not suffered loss.

2. Stipulations ⇨17(3)—That renewal note was for balance due held binding, and to preclude contrary findings.

Where parties in an action on a note stipulated that a new note "was given as a renewal on the amount remaining due" on the original note, the stipulation was binding, and

precluded a finding that the old note had been paid by the renewal note.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by E. J. Henning against A. Wuest. Judgment for defendant, and plaintiff appeals. Reversed.

Wm. H. Wylie, C. A. A. McGee, of Oakland, for appellant.

Wright & McKee, of San Diego, for respondent.

WASTE, P. J. The plaintiff brought this action to recover the sum of \$5,750, alleged to be due on a promissory note executed and delivered to him by the defendant and E. A. Edmonds. Judgment was entered for the defendant. Motions were made for a new trial, and for the entering of a different judgment, on the ground that the facts found were not sufficient to support the conclusions of law. Both motions were denied, and the appeal is from the judgment.

The defendant interposed as a defense, and the court found, that on April 28, 1914, H. B. Tanner and John A. Watson, with the plaintiff as an accommodation maker, made and delivered a promissory note to the Marine National Bank of San Diego, payable 60 days after date, for the sum of \$5,750; that thereupon, and on the same day, defendant and Edmonds executed and delivered to plaintiff the note sued upon, also payable 60 days after date, to guarantee plaintiff against all liability by reason of his having joined, as accommodation maker, in the note of Tanner and Watson to the bank; that the promissory note executed by Tanner and Watson to the Marine National Bank was paid in full and discharged by another note for the sum of \$4,600, executed October 13, 1914, signed by Tanner and wife, Watson and wife, and plaintiff, payable 90 days after date, and certain payments of cash on account of principal and interest; that the defendant had no knowledge of the making of this last note; that he did not consent to the execution and delivery of the latter note as a renewal of the note of April 28, 1914; that the execution of the said renewal note altered the obligation of the defendant upon the guaranty to plaintiff, and suspended and impaired his rights in respect thereto. It was further pleaded and found that no liability on the part of plaintiff to pay the note to the bank ever attached, and that plaintiff never paid anything by reason thereof, and suffered no loss or detriment by reason of being an accommodation maker thereon.

[1] The appellant concedes in his brief that—

"If appellant paid no money and suffered no loss on account of his accommodation making

of the note to the bank, and respondent's contention as to the alleged agreement be true, then appellant should not recover."

He complains, however, of the action of the lower court in admitting parol evidence to show the nature of the real agreement between plaintiff and defendant, and of the alleged alteration of the defendant's liability by the giving of the new note to the bank. He also contends that the findings are contradictory, and not fortified by the evidence, and do not support the conclusions of law.

The court did not err in admitting the parol evidence tending to prove that there was an agreement between the plaintiff and the defendant, by which the former agreed to, and did, sign the note to the bank with Tanner and Watson, in consideration of the defendant guaranteeing him against loss by reason of his so doing. The admission of such evidence did not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract. If the note, executed by the defendant, was given to secure plaintiff against loss, by reason of his so acting as an accommodation maker on the note to the bank, and the note was paid, and he suffered no loss or detriment, or if the liability of the defendant was in any way affected by some act of the plaintiff, the note of the defendant was discharged, and parol evidence was admissible to prove the facts. *Howard v. Stratton*, 64 Cal. 487, 488, 2 Pac. 263. It was proper to show the circumstances under which the note was made, and if the facts were as claimed by the defendant, and found by the court, then defendant's parol contract was executed, and the note paid and satisfied. *Schultz v. Noble*, 77 Cal. 79, 81, 19 Pac. 182.

[2] There is ample evidence to support the lower court's finding that the note executed by Edmonds and defendant was given to guarantee plaintiff against liability by reason of the note executed to the bank on April 28, 1914. We are at a loss, however, to account for the finding that that note was paid in full by the note of October 13, 1914, and certain payments of cash on account of principal and interest. This finding accords with the allegation of the answer, but there is no evidence to that effect. On the contrary, the stipulated fact, elicited by counsel for the respondent, is that the note of October 13, 1914, "was given as a renewal on the amount remaining due on the note exe-

cuted \* \* \* the 28th day of April, 1914, for \$5,750," or, as again stated, "a renewal note of this prior obligation." This stipulation was binding upon the parties, and precluded any finding in opposition to the stipulated facts. If this finding was upon such a material issue as to be determinative of the action, inasmuch as it was contrary to the admission of the parties, the court below should have granted the motion for the new trial. *Haese v. Heitzeg*, 159 Cal. 569, 574, 575, 114 Pac. 816; *Carpentier v. Small*, 35 Cal. 346, 354-359.

We think this finding was most material to the case. The respondent seeks to avoid liability on either of two grounds: First, that the appellant suffered no detriment because the obligation which rendered him liable was fully paid and discharged; and, second, that if it was not so discharged the obligation was so altered and changed, without his consent, upon a renewal being had, as to release him from liability as a guarantor. The lower court has found, contrary to the stipulated fact, that the original obligation was paid, which is not so. It has made no finding that the note was ever renewed. It has found that the defendant had no knowledge of the making of the note of October 13, 1914, which fact was entirely immaterial if the old note was thereby paid, as found by the court. In view of the probability of a retrial of the action, we may remark, in passing, that this finding is contrary to the evidence addressed to the fact. It has further found that the defendant did not consent to any renewal of the note of April 28, 1914, to the Marine National Bank, nor to the making of the note of October 13, 1914, as a renewal of the former instrument. This finding is likewise utterly immaterial, in the absence of any finding that there was a renewal, either with or without the knowledge and consent of the defendant, and in the face of the contrary finding that the new note and the cash payments paid and discharged the old obligation.

The only support in the findings for the conclusions and judgment of the lower court rests upon the finding that the note of April 28, 1914, was paid and discharged, which is contrary to the stipulated facts. The motion for a new trial should have been granted.

The judgment is reversed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

(48 Cal. App. 122)

(191 P.)

**CALIFORNIA NAT. SUPPLY CO. v. BLACK  
et al. (Civ. 3207.)**

(District Court of Appeal, Second District, Division 2, California. June 9, 1920.)

**1. Corporations** ⇨430—Agent may not represent both parties without their full knowledge and consent.

Where the agent of plaintiff corporation was at the same time agent and stockholder of a defunct corporation, whose stockholders are defendants, and his own interests were adverse to plaintiffs, his actions as to any dealings had with plaintiff are not binding on it, unless it had full knowledge of and consented to the agent representing both parties.

**2. Corporations** ⇨422(1)—Representation of agent construed not to mean shares were fully paid up.

An agent's representation to plaintiff, his principal, that he also represented a corporation whose stockholders are defendants and incidentally himself, and that they had sold 300,000 \$1 shares for \$40,000, construed not to mean that the shares of stock had been fully paid up, or that creditors in good faith could not resort to the unpaid balance in an action against stockholders.

**3. Corporations** ⇨428(1) — Knowledge of agent of two corporations held not chargeable to one of them.

Where a stockholder and officer of a defunct corporation, whose stockholders are being sued, was agent therefor as well as for plaintiff corporation, conditions held such that the fact that he knew all about a transaction on both sides was not sufficient, under the law, to charge the plaintiff with such knowledge.

**4. Corporations** ⇨228—Stockholders liable to corporate creditors where stock not paid for in full.

The fact that defendants owned stock not paid for in full, as set forth in plaintiff's complaint, fixed their liability in an action by the corporation's creditor, so that the trust fund theory is applicable.

**5. Corporations** ⇨228—Persons holding stock not fully paid up may not avoid liability to creditors.

Where stock of a corporation is issued without being fully paid up, the unpaid amount, so far as the corporation's creditors are concerned, is money due from the stockholders, and no subterfuge or device making it appear as fully paid up, when it is not, will enable the stockholders to avoid liability.

**6. Mines and minerals** ⇨104—Stockholders of mining corporation liable on stock not fully paid.

The rule of law that stockholders are liable to a corporation's creditors for the amount not paid on stock issued applies to mining corporations as well as others.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the California National Supply Company against George Black and others. Judgment for defendants, and plaintiff appeals. Reversed.

Flint & Jutten and H. S. MacKay, Jr., all of Los Angeles, and Wm. G. Griffith, of Santa Barbara, for appellant.

Charles U. Armstrong, of Santa Maria, and Canfield & Starbuck, of Santa Barbara, for respondents.

**THOMAS, J.** According to the complaint in this action, plaintiff secured a judgment in the sum of \$4,777.88 for goods, wares, and merchandise sold and delivered by it to the Cat Canyon Oil Company, against that company, previous to the commencement of this action; that an execution was thereafter duly issued and returned by the sheriff satisfied to the extent of \$1,937.65, and no more, leaving a balance of \$2,869.93 thereon unpaid and unsatisfied at the time of the commencement of this action; and that on two occasions subsequently executions were issued, and the sheriff of Santa Barbara county attempted to levy on property of the Cat Canyon Oil Company for such latter amount, but that upon each occasion the execution was returned wholly unsatisfied.

It is alleged that the Cat Canyon Oil Company was incorporated and organized with a capital stock of \$500,000 divided into 500,000 shares of the par value of \$1 each. It also is alleged, "on information and belief," that prior to July 25, 1910, a certain lease of certain described land had been given by one M. J. McCroskey, as lessor, to L. M. McCroskey, as lessee, giving the latter the right to drill and to exploit the same for oils and minerals; that thereafter, and prior to July 25, 1910, this lease was assigned to one George Black, one of the defendants here; that on this latter date the value of the interest of the lessee in the lease was not to exceed the sum of \$10,000; and that the directors of the Cat Canyon Oil Company knew this to be a fact at that time. It further is alleged, "on information and belief," that on July 25, 1910, the directors of the Cat Canyon Oil Company agreed with said Black that his interest in said lease should be transferred to that corporation, and in consideration therefor the latter would issue to N. B. Barker the remaining 499,975 shares of its said capital stock; 25 shares having previously been issued, 5 shares to each of the five directors of said corporation. This agreement was carried out. But it is alleged "that the value of all the consideration received by said corporation for the issuance of said 499,975 shares of its capital stock was not, at any time, in excess of the sum of \$10,000; that as incidental to said issuance of said 499,975 shares of said capital stock by said corporation and the directors thereof said corporation and said directors

did assert, as a fact, that said 499,975 shares and all thereof were fully paid upon the issuance thereof as aforesaid;" that said directors knew said shares were not fully paid, inasmuch as the total consideration for the issuance thereof was property of a value not to exceed the total sum of \$10,000; and that all of this was done fraudulently and with intent to defraud the public, and particularly the then and future creditors of the corporation.

The complaint further sets forth, on information and belief, that the defendants herein "have continuously been and now are the owners and holders in fact and according to the books and records of said Cat Canyon Oil Company, of the respective number of shares \* \* \* set opposite their respective names, to wit, George Black, 9,500, L. B. Coblenz, 9,000, W. O. Oakley, 9,000, H. H. Jessee, 3,000, Frank Jessee, 3,000, Perry Jessee, 3,000, O. U. Armstrong, 9,000, and O. F. Black, 7,000"; and that the Cat Canyon Oil Company has at no time received, on account of said shares, any "thing of value or consideration other than \$2500/499,975 of the sum of \$10,000," which latter sum was the value of said lease.

Plaintiff asks the court to determine "the amount paid to the Cat Canyon Oil Company for the issuance from its treasury of each of the shares of its capital stock owned and held by the defendants herein, and that plaintiff have judgment against each of the defendants for the sum of \$2,869.93, \* \* \* but not to exceed the amount due from each defendant upon his subscription to the capital stock of said corporation."

A demurrer, general and special in terms, was interposed to the complaint, and by the court overruled. Defendants, except for the formal parts thereof, deny each and every material allegation of the complaint, and by way of separate and further defense allege: (1) That the cause of action set up in the complaint is barred by the provisions of subdivision 2 of section 337, subdivisions 1 and 4 of section 338, subdivision 1 of section 339, section 343, and section 359 of the Code of Civil Procedure of this state; (2) that of the sum prayed for there has been paid by Joseph P. McDonnell the sum of \$664.02, and by Theodore R. Finley the sum of \$562.23; (3) that there was, when this action was commenced, and now is, another action pending between this plaintiff and certain of these defendants for the same cause of action as herein set forth; (4) that for value received the said L. M. McCroskey assigned, etc., all his right, title, and interest in and to said lease and option to George Black, one of the defendants herein, which lease, together with the assignment thereof, was thereafter duly recorded, and, on July 25, 1910, was in full force and effect and of great value, to wit, "\$100,000 or more"; (5) that the Cat Canyon Oil Company was an oil mining corporation,

and organized for that purpose, that it had no land to operate or drill upon for oil, that with full knowledge of all the stockholders and directors thereof the said corporation duly and legally purchased said oil lease and option from said Black at the reasonable, actual, and agreed value of \$100,000, and agreed to give and did issue and deliver to him and his associates in payment therefor 100,000 shares of the capital stock of said company, as fully paid, and no more, and that at the time said lease was sold to the Cat Canyon Oil Company the said corporation did not owe the plaintiff anything; and (6) that one Joseph McDonnell was a stockholder, director, and secretary of the Cat Canyon Oil Company at all times set forth in plaintiff's complaint, and at all times during its corporate existence, and at the time of the sale of the McCroskey oil lease to the Cat Canyon Oil Company the said McDonnell was also a sales agent and officer of the plaintiff herein, and knew of all the facts and details of said sale or exchange, as already set forth, that plaintiff well knew said facts to be as aforesaid at the time it extended credit to the Cat Canyon Oil Company, viz., that said stock was so issued to defendants and sold at par value and issued as fully paid up stock, and that plaintiff did not look to the said stock or the holders thereof, but to the corporation, the Cat Canyon Oil Company, and its property assets, in extending said credit.

Upon the issues thus presented, the cause went to trial to the court without a jury. After due deliberation thereon the court found in favor of defendants, and judgment, from which this appeal is taken, was entered accordingly.

The evidence shows, among other things, that the defendant George Black, on or about July 10, 1910, made an offer in writing by the terms of which, if accepted, he agreed to exchange, "in full payment for the entire capital stock" of the Cat Canyon Oil Company, "excepting the shares subscribed by the incorporators," a certain lease, with option to purchase, which he held, of certain lands described therein. If accepted, according to the offer so made by him, "the entire capital stock, except the shares subscribed, is to be issued as follows: 499,975 shares par value of \$1 each to be issued to N. B. Barker, assistant secretary, N. B. Barker to issue said capital stock as follows: Geo. Black, 100,000 shares; T. R. Finley, 25,000 shares; Jos. McDonnell, 25,000 shares; N. B. Barker, 349,975 shares. N. B. Barker then to issue to treasury account 200,000 shares; Hopkins, Moltman & Robbins, 50,000 shares; J. H. Robbins, trustee, 99,975 shares, which is to be reissued in connection with the sale of the treasury stock. \* \* \* This offer was duly and legally accepted by the Cat Canyon Oil Company "in full payment for all the unsubscribed shares of the capital stock of this corporation," the 499,975 shares of said stock were



issued in accordance with the directions of the offer, being evidenced by certificate of stock No. 6, and the reissue of the stock, as set forth in the offer, was made by the assistant secretary accordingly.

Appellant urges that originally the stock held by each of these defendants was a part and parcel of said certificate No. 6, and that "the issuance to N. B. Barker of the 499,975 shares, in consideration of the transfer of the lease, was a subterfuge or device to make it appear as though the entire capital stock of the corporation was fully paid, or, in other words, that the corporation had received money or money's worth to the full par value of the stock." In the absence of evidence showing that the plaintiff knew of these facts before the credit was extended, we think this argument is sound. Did the plaintiff, therefore, have such notice?

[1] The rule is that an agent may, with their full knowledge and consent, represent both parties to a contract, and his contract under such circumstances bind each within the scope of his employment. "But where an agent, without the full knowledge and consent of his principal, represents the adverse party in a transaction, his contracts relating thereto are voidable at the option of his principal." 2 C. J. 838. And for the same reason the agent cannot, except with his principal's full knowledge and consent, assume any duties or enter upon any transaction concerning the subject-matter of the agency in which he has individual interests, or represents interests, adverse to those of his principal. *Brown v. Spencer*, 163 Cal. 589, 126 Pac. 493; *Smith v. Goethe*, 147 Cal. 725, 82 Pac. 384. "He cannot, without the knowledge and consent of his principal, represent himself and the principal, where third interests conflict; he must not put himself into such a position that his interests become antagonistic to those of his principal." 2 C. J. 694. Public policy demands that this be so, that all temptation to neglect his principal's interests may be removed from the agent.

In the case at bar, the witness McDonnell was the agent of the plaintiff. He was at the same time the agent of the defunct corporation, having been its secretary during the life of that corporation. He was also a stockholder thereof. McDonnell was therefore attempting to represent the plaintiff here, the defunct corporation, and his own interests as a stockholder. The interests of the defunct corporation and his own were adverse to those of the plaintiff; and unless the record here brings him within the rule above enunciated, his actions in reference to any dealings had with this plaintiff may not be binding upon it.

[2] On August 5, 1910, without the authority of his principal, the plaintiff corporation, McDonnell sold and delivered to said defunct corporation, Cat Canyon Oil Company, supplies, etc., to the extent of \$2,046.60. On the

13th of the same month the treasurer of the plaintiff corporation wrote to McDonnell, among other things, as follows:

"I have asked you twice for a report on this account now, and of course unless I get satisfactory information and know that the company is all right, financially, we will not take their business. So if you want their business, the quicker it is made satisfactory to the treasury department the better."

On the 17th of the same month McDonnell answered this letter, purporting to give the treasury department of the plaintiff corporation the information sought. So far as material here, we quote from such answer as follows:

"I own one-tenth interest in this company for getting them the property, and as I do not have to put up a dollar and as I am secretary, it is of double interest to me to see that I am protected. We sold 300,000 shares of stock for \$40,000, to be paid for not less than \$5,000 per month. Hopkins, Maltman & Robbins are very well thought of as brokers in San Francisco and throughout the country, and I am sure that with the payments started they will be kept up. At any rate they have got to be kept up, for as soon as they stop work stops."

[3] This is the only testimony, so far as we have been able to learn from the record, and we have read the whole of it, disclosing any information about the Cat Canyon Oil Company to the plaintiff. This letter reveals to the plaintiff corporation that its agent, McDonnell, was representing both parties, and incidentally himself, so far as his interests were concerned; but it shows nothing else. We do not think the reference to the sale of "300,000 shares of stock for \$40,000" can be legitimately construed to mean "fully paid up," or that creditors in good faith could not resort to any unpaid balance on the stock issued for any unpaid balance thereon. The evidence, on the other hand, discloses without question that this same McDonnell knew all about the whole transaction before, at the time of, and ever since the incorporation of the Cat Canyon Oil Company, as well as the issuance of the 499,975 shares of stock in exchange for the lease. The par value of the shares so issued was \$1 each, or a total of \$499,975. There is evidence that the defendants, and each of them, believed that the property was worth "at least \$100,000." Assuming that among themselves it was binding as "fully paid up," this is not the case as to creditors. "The question concerns creditors only. As to them the corporation is presumed to have sought credit based upon its supposed capital \* \* \* actually paid in or due from its stockholders. Public policy requires that the fact whether a particular creditor did trust the corporation on that basis should not be inquired into." *Vermont, etc., Co. v. Declez, etc.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143.

The evidence discloses the duplicity of McDonnell, not only in his dealings with plaintiff, but with his associates and fellow stockholders in the defunct corporation. There is no doubt but that he deliberately kept the facts above recited from the plaintiff. As to his associates, we cite but one instance to show his attitude to them. In a letter written by him to the plaintiff he says, among other things:

"I would suggest that upon receipt of this letter you immediately write Mr. Finley, Santa Maria, telling him that you had heard from me regarding this account, and that it is absolutely certain that the account be paid by January 1st. Make the letter good and strong; that will make him get in the harness and get in the money. \* \* \* Make the letter strong enough so there will be no doubt left as to your intentions."

Under these conditions we do not think the fact that McDonnell knew all about the transaction on both sides is sufficient, under the law, to charge plaintiff with such knowledge.

[4] There is no merit to the point urged by respondents that the trust fund theory does not apply to a person who has not subscribed to or purchased stock. The fact that defendants owned the stock set forth in plaintiff's complaint fixed their liability. *Vermont, etc., Co. v. Declez, etc., Co.*, supra.

[5, 6] The evidence here, giving it such construction as will be the most favorable to respondents, shows that the stock was actually sold at much below its par value. And this, in reality, is the question upon which the case turns. The fact is, as disclosed by the record, that the stock owned by defendants is a part of the 499,975 shares transferred in accordance to Black's offer, by direction of T. R. Finley, to N. B. Barker. Where the stock of a corporation is issued without being fully paid up, "the amount remaining unpaid is, so far as its creditors are concerned, deemed to be money due from the stockholders. Such a creditor, if the corporation becomes insolvent, may apply, in equity, to have the fund so deemed to be due to the corporation collected and applied upon his debt. The fact that the stock is issued as fully paid up does not estop or bind the creditor, and in such a case, if it is not fully paid up, the creditor may prove the fact and recover enough of the portion that is unpaid to satisfy his debt. No subterfuge or device by which it is made to appear as fully paid up when it is not will enable the stockholder to avoid this liability." *Herron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265. This is conceded by respondents to be a correct statement of the law; but in their opinion it does not apply to a mining corporation, nor to one who has not subscribed to or purchased stock. This is only another

way of arguing that incorporators of mining companies should be permitted to violate the law, while conceding that all others should be held to strict accountability. We know of no law, and none is called to our attention, supporting the application of such double standard. As we have seen, the contention is untenable. In our opinion the reasoning of the Supreme Court in the case just cited is applicable on every phase of the case at bar. We think that case determinative of the points raised on this appeal.

No other point raised, under these considerations, needs discussion.

Judgment reversed.

We concur: FINLAYSON, P. J.; WELLER, J.

(48 Cal. App. 151)

**GIFFEN et al. v. CHRIST'S CHURCH.**  
(Civ. 3299.)

(District Court of Appeal, First District, Division 1, California. June 11, 1920.)

**1. Specific performance §36—Action lies against religious society failing to perform contract.**

When a religious corporation neglects or refuses to carry out its contractual obligations by failing or refusing to do or perform certain acts which lie within its power, an action against it for specific performance may be successfully invoked.

**2. Religious societies §20—Cannot contract for sale of land without first obtaining court order.**

A valid sale of real property by religious corporation may not be made until an order of court authorizing such sale is first had and obtained, under Civ. Code, § 598, although the provisions of the statute are not mandatory upon the court, but allow it sound discretion to deny the order.

**3. Courts §481—Specific performance cannot be decreed where inconsistent with a former order in force.**

While an order of the superior court granted under Civ. Code, § 598, permitting a religious corporation to sell property to one other than plaintiff, exists, the order prayed for, compelling such society to specifically perform a contract to transfer the property to plaintiff, cannot be made.

**4. Judgment §512.—False testimony not ground for collateral attack.**

A court order, under Civ. Code, § 598, permitting a religious corporation to transfer property to a certain party, cannot be annulled for fraud by a decree of specific performance of a contract to convey to another, since if the former was granted on false testimony that would not justify a collateral attack, in the absence of a showing of lack of jurisdiction.

5. Appeal and error  $\Rightarrow$  843(2)—Unnecessary questions need not be determined.

Where the court, under Civ. Code, § 598, granted an order directing a conveyance from a religious society to one other than plaintiff, the order was, in effect, a denial of the petition, so far as plaintiffs appellants are concerned, so that it is unnecessary on their appeal to determine the validity of the order.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Charles A. Giffen and another against Christ's Church, a religious corporation. Judgment for defendant, and plaintiffs appeal. Affirmed.

Milton K. Young, W. G. Van Pelt, and Bertin A. Weyl, all of Los Angeles, for appellants.

R. T. Quinn, T. A. Williams, Overton, Lyman & Plumb, and Wm. B. Himrod, all of Los Angeles, for respondent.

**KNIGHT, Judge pro tem.** This is an action to compel the specific performance of an agreement to convey real estate. At the commencement of the trial defendant objected to the introduction of any evidence upon the ground that the second amended complaint failed to state a cause of action. The objection was sustained, and, plaintiffs having declined to amend, judgment was rendered in favor of the defendant, from which plaintiffs appeal. The sufficiency of said complaint is therefore the only matter to be considered.

The following are substantially the facts upon which plaintiff's cause of action is based: On July 1, 1918, pursuant to a resolution of its board of directors, respondent, a religious corporation, entered into a written agreement with appellants, whereby it agreed to sell appellants certain real property for the sum of \$5,000, subject to incumbrances amounting to \$65,000. Thereafter, on July 1, 1918, respondent petitioned the superior court of Los Angeles county, in accordance with section 598 of the Civil Code, for leave to sell and convey said property. On July 12, 1918, after due notice, said petition came on regularly for hearing, and an order was granted by the court directing the sale to be made, but to a person other than appellants and for a consideration other than that stated in the petition. It is alleged in said complaint that at all times subsequent to the 1st day of July up to and including July 12, 1918, respondent, by and through its officers and agents, represented to appellants that said agreement would be carried out, but that said representations were false, and that between said 1st day of July, 1918, and the 12th day of July, 1918, with the intention of avoiding said agreement the officers of said respondent negotiated with

another purchaser for the sale of said real property and fraudulently concealed from the court the existence of said written agreement between appellants and respondent, and fraudulently represented to said court that respondent was free to accept a bid from a proposed purchaser other than appellants. It is further alleged that the negotiations between the officers and agents of respondent and said other purchaser were concealed by them from the directors of respondent, and that said directors never authorized or directed the sale of said property to any purchaser other than appellants. It is further alleged that, unless otherwise decreed, said officers and agents will execute and deliver to said other purchaser a deed to said property. Said complaint also embodies the usual allegations necessary to be made in the statement of a cause of action for specific performance of an agreement to sell land, by alleging adequacy of consideration, the performance by appellants of all matters and things required of them to be performed, and their willingness and ability to complete the agreement.

The prayer of said complaint is:

"That a judgment and decree be made and entered in this case requiring defendant to apply to the court in which said petition to sell and convey said property is filed, for an order setting aside the order heretofore made, and the making and entry in said proceedings of an order granting leave to sell and convey said property in accordance with said petition and in pursuance of said contract between plaintiffs and defendant, and that said defendant be further required to fully carry out its said contract with the plaintiffs and to make and execute a grant deed conveying said property unto said plaintiffs," and for general relief and costs.

[1, 2] It is the contention of appellants, first, that the action is one for specific performance, and that under the facts alleged in said second amended complaint specific performance may be decreed; secondly, that the order to sell to another was obtained by fraud; and, thirdly, that the provisions of section 598 of the Civil Code limit the power of the court to either grant or deny the petition as filed, and do not authorize the court to direct a sale to a purchaser other than the one named in the petition, or for a different consideration.

It is doubtless the law, that when a religious corporation neglects or refuses to carry out its contractual obligations by failing or refusing to do or perform certain acts which lie within its power to perform, an action for specific performance against it may be successfully invoked. *Bowen et al. v. Trustees of Irish Presbyterian Church, etc.*, 6 Bosw. (N. Y.) 245; *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. Prac. (N. S. N. Y.) 485; 34 Cyc. 1162; in

the Matter of the Reformed Dutch Church, 16 Barb. (N. Y.) 237. But we cannot agree with appellants' contention that under the facts stated in their complaint such a case is here presented, for the reason that under all of the authorities cited a valid sale may not be made by such religious corporation until an order of court authorizing such sale is first had and obtained. *Dudley v. Congregation of Third Order of St. Francis*, 138 N. Y. 451, 34 N. E. 281. Such are the plain provisions of section 598 of the Civil Code of this state, and such is the effect of the decisions of the other jurisdictions above cited, construing statutes of similar character. The provisions of the statutes upon which those cases are founded, as well as those of our own statute, are not mandatory upon the court, requiring that the court shall in all cases grant an order to sell. The court may, in the exercise of sound discretion, deny such order. *Bowen et al. v. Trustees of Irish Presbyterian Church*, supra; 34 Cyc. 1162, 1163.

[3] Appellants are, then, in the beginning, confronted with the order of the superior court of Los Angeles county, duly made upon proper petition and notice, directing that the property in question be conveyed by respondent to another purchaser. If the lower court thereafter, in the face of that order, decreed specific performance to appellants, it would have brought about the anomalous situation of having the superior court of Los Angeles county in one proceeding direct that respondent execute and deliver a deed to the property in question to one purchaser, and at the same time having the same court, although a different department thereof, direct that respondent execute and deliver a deed to said property to another purchaser. This, of course, the law will not permit, and it is quite obvious that while the order granted by the superior court in the proceeding instituted under section 598 of the Civil Code remains in force specific performance in this action cannot be decreed.

[4] Appellants seek to have such order annulled for fraud, but the manner in which said order is being attacked, that is, through the medium of a judgment sought to be obtained in this action for specific performance, is clearly collateral, and therefore unavailing. *Baldwin v. Foster*, 157 Cal. 643, 108 Pac. 714; *Estate of Ryan*, 177 Cal. 598, 171 Pac. 297. Neither does the fact that the order may have been granted on false testimony justify a collateral attack upon said order, in the absence of a showing of lack of jurisdiction. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; *Roundtree v. Montague*, 80 Cal. App. 170, 157 Pac. 623; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317.

[5] It is not necessary to consider and de-

termine the remaining contention urged by appellants, namely, that the provisions of section 598 of the Civil Code do not authorize the court to direct a sale of the property of a religious corporation to any other purchaser than the one named in the petition and in the resolution adopted by said religious corporation. We are here concerned only with the issues between appellants and respondent, and since the court in the special proceeding under said section 598 granted the order directing the conveyance to be made to a person other than these appellants, it was, in effect, a denial of the petition in so far as appellants are concerned (*Estate of Bradley*, 168 Cal. 655, 144 Pac. 136), and whether or not the order is valid in so far as it directs a conveyance to such other purchaser is not material here.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(48 Cal. App. 103)

**GIANELLI et al. v. GLOBE GRAIN & MILLING CO. (Civ. 2167.)**

(District Court of Appeal, Third District, California. June 8, 1920.)

**1. Sales ⇨199—Title held to have passed to buyer.**

A contract for the sale of hay, containing the words "hereby sell," but providing that seller should deliver whenever buyer should arrange time therefor, and for payment of three-quarters of the purchase price almost immediately, held an executed contract, so that the title passed to the buyer.

**2. Evidence ⇨457—Parol evidence of circumstances admissible to show meaning of "f. o. b."**

In an action for buyer's refusal to take a part of hay sold because of subsequent damage, parol evidence held proper to bring before the court all facts and circumstances characterizing the transaction culminating in the written agreement, not to alter or modify its terms, but to show what the characters "f. o. b." as used in the writing were intended by the parties to mean, and whether they were to control in determining whether the agreement was an executed or an executory sale.

**3. Sales ⇨199—Purchaser's agreement to deliver not controlling as to passing of title.**

The fact that the seller of goods or commodities agrees to deliver the same to the purchaser at some point is not necessarily controlling in determining whether the parties intended that an immediate transfer of title should be effected.

**4. Sales ⇨218½—Evidence held to show sale of hay was executed, not executory.**

Evidence held to show an absolute sale of hay so that the title passed to the buyer, the

contract being executed and not executory, in view of Civ. Code, § 1140.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by A. E. Gianelli and another against the Globe Grain & Milling Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton (Clarence E. Fleming, of Stockton, of counsel), for appellant.

Nutter, Hancock & Rutherford, of Stockton, for respondents.

HART, J. From a judgment in favor of plaintiffs for the sum of \$1,590 defendant prosecutes this appeal.

Plaintiffs were the owners of a tract of land, situated near Stockton, upon which, in the season of 1918, they had grown and harvested a crop of hay amounting to 330 tons. The hay was baled, and was in one stack on the premises, each bale, with the exception of 80 tons, being tagged with the weight. On August 8, 1918, J. E. Morgan, of Stockton, and G. A. Morgan, of Los Angeles, representing the defendant, called upon the plaintiff, Barmann, and had a conversation with him regarding the securing of an option on the hay or the purchase thereof. Barmann informed the Morgans that he preferred to sell the hay rather than to give an option upon it and, after some conversation, the following contract was written and signed by the parties:

"Stockton, Aug. 8, '18. I hereby sell to the Globe Grain & Milling Co. three hundred and fifty ton (350) more or less No. 1 barley hay for twenty-three dollars (\$23.00) f. o. b. cars or warehouse; same to be decided upon. The amount of seventy-five per cent. to be paid on or before the 12th of Aug.; the balance of twenty-five per cent. to be paid on completion of hauling and delivering, together with weight, on or before sixty days. Globe Grain & Milling Co., J. E. Morgan. Barmann & Gianelli, by H. W. Barmann. J. E. Morgan."

Six thousand dollars, approximately 75 per cent. of the purchase price, was paid to plaintiffs on August 14, 1918, and, at the same time plaintiffs assigned to defendant an insurance policy for \$7,000 covering the hay. It appears that, on the night of the 11th of September, before the hay had been delivered, half an inch of rain fell, and in the next few days there were four inches of rain. The hay was badly damaged, and defendant refused to accept any damaged hay, but expressed its willingness to take the undamaged hay. Plaintiffs agreed to haul the undamaged hay if defendant would segregate what it considered damaged from the undamaged hay. This defendant refused to do, and plaintiffs commenced the action for the balance of the purchase price.

[1] The controversy herein arises over the question whether the transaction evidenced by the above instrument involved a sale of the hay or an executory contract for the sale of said property, the appellant's position being that, under the terms of said writing, the title to the hay was not to pass to the purchaser until the completion of delivery on board of cars or at a warehouse, to be later designated by defendant; and that, no such delivery having been made, although, as is the claim, notice of and demand for such delivery was duly given and made, the title to the hay remained in the vendors, and that therefore they must stand any loss or damage which occurred by reason of the rain-storm referred to. On the other hand, the plaintiffs contend that the transaction constituted an absolute sale of the hay, and that title to the property immediately passed to the defendant upon the execution of the writing above quoted herein.

We think the words of the writing evidencing the transaction involved herein clearly import an absolute sale of the hay, and that the legal effect of said writing, although signed by the defendant as well as the plaintiffs, is that of a bill of sale. The instrument sets forth definitely the property sold—that is, the kind and the number of tons of hay sold—and expressly states that the vendors "hereby sell," not "hereby agree to sell" the hay to the purchaser at a specified price. Moreover, the language of the writing, it will be noted, clearly implies that the hay, although thus purchased outright by the defendant, was to remain on the premises of the plaintiffs until such time as the defendant might itself determine whether the hay should be placed or stored in some warehouse designated by it or put on board of cars for shipment. This matter was solely to be determined by the defendant, and it is obvious that the hay could not be delivered until the defendant had made a decision as to which of the two different places provided for in the writing at which it should be delivered for it by the plaintiffs. Indeed, the plaintiffs were without any right or authority to deliver the hay except at one or the other of the places to be finally designated by the defendant, although the former could have compelled the latter to remove the hay from their premises if it had been permitted to remain there for a longer period than was consistent with the convenient use by the plaintiffs for their own purposes of the particular portion of the premises where the hay was allowed by them to remain after the transaction and pending its delivery to the place designated by the defendant.

There is still another consideration of potent significance in establishing that the transaction was intended by the parties to constitute an absolute sale, and that title to the hay should immediately vest in the de-

defendant, and that is in the fact that the writing above reproduced herein provided that a very large proportion of the purchase price—in fact, the larger proportion thereof—should be paid within four or five days after the execution of the instrument. It is not at all likely that, had the contract been intended or understood to be merely executory and its consummation dependent upon delivery of the hay by the sellers to the purchaser, the defendant would have bound itself to pay three-quarters of the purchase price within so short a time after the transaction and before (as we shall later see was true) the place of delivery was designated by the defendant. Referring to the circumstance of the payment down of a large amount of the purchase price of personal property as one shedding some light on the nature of the contract involving a transfer of such property—that is, upon the question whether the contract involves an absolute sale or is only executory, Williston, in his work on Sales (1909 Ed.) p. 368, says:

"If the buyer pays the price, or a large portion of it, it is evidence not so strong as delivery, but still entitled to great weight, that immediate transfer of the property is intended. The weight to be given such evidence will be diminished if the portion of the price paid is not large. It is to be observed that though payment of the price is important evidence of an intention to transfer the property immediately, nonpayment of the price is little, or no evidence, of an intent to retain the ownership."

[2] But if there be doubt as to the scope and effect of the writing or as to whether it was intended as an executed or only an executory contract, or one merely for the sale in the future of the hay, such doubt will be readily dissipated upon a consideration of the parol evidence allowed by the court, disclosing the facts and circumstances leading to, surrounding, and attending the execution of the writing. But in this connection, we may first well consider the contention of counsel for the defendant that evidence extrinsic to the writing itself is incompetent, and therefore inadmissible for the purpose of showing what the parties meant or intended by their agreement. This position is based upon the well-established rule that, where parties have reduced the terms of an agreement into which they have entered to writing, all their prior and contemporaneous oral negotiations appertaining to the agreement are to be ordinarily presumed to have been merged in the writing, and that the terms of the agreement cannot be varied or changed or modified or even explained by parol testimony.

The specific contention is that the characters "f. o. b.," as used in contracts for the sale of personal property, are in commercial circles always understood to mean that title to the thing which is the subject of such a

contract does not pass until the thing or property is delivered by the seller to or on board the cars, or, as in this case, until so delivered either at a warehouse or on board the cars. In other words, it is the contention that those letters or characters as used in commercial contracts for the sale of goods or commodities have a definite, fixed, and well-understood meaning, that their signification as so used is as above given, and that therefore there cannot properly be admitted to prove the meaning of those characters or to show that, as used in a particular contract, they do not mean what they are in the law merchant commonly understood to mean when so employed, any testimony other than the agreement itself, but that the courts may and must take notice of their meaning or signification when so used. Some cases from other jurisdictions are cited as in support of this view. Without entering into an examination herein of the cases named by counsel, we affirm only an obvious proposition when we observe that words or characters having a definite and well-understood meaning when used in certain contracts may nevertheless be used in a contract in such manner or in such connection with other words or language therein employed as expressing the terms of the agreement of the parties thereto as to make such contract itself ambiguous or uncertain as to its meaning, scope, and effect, or, in other words, render the intent of the parties to such contract vague and uncertain; and, where the intention of the parties to a written contract is not made clear by the written instrument itself, or is so obscured by the language of the writing, even though phrased in words which themselves, or taken alone, bear a fixed, definite, certain, and a common and well-understood meaning, it is proper to receive evidence for the purpose of explaining what the parties meant by the language employed in such contract to express their agreement. In this case, the parties appear from the face of the writing itself to have "struck a bargain" by agreeing upon a sale of the hay and the terms of the payment therefor, but they, notwithstanding, inserted in their written agreement the characters "f. o. b.," in a connection which might possibly have the effect of throwing a little—we think very little, if any—doubt upon what they really intended to effect by their agreement. It was proper, therefore, to allow parol evidence for the purpose of bringing before the court all of the facts and circumstances characterizing the transaction culminating in the agreement and the writing evidencing its terms, not for the purpose of altering or modifying the terms thereof, but only to show what the characters "f. o. b.," as therein used, were intended by the parties to mean, or whether they were to control in determining whether the agreement was an executed agreement of

sale or only an executory agreement for the sale of the hay.

[3] It has repeatedly been held in this state that the fact that the seller of goods or commodities of any character agrees to deliver the same to the purchaser at some point is not necessarily controlling in determining upon a construction of the contract for their sale, whether the parties intended by their agreement that an immediate transfer of title should or should not then be effected. In *Bill v. Fuller*, 146 Cal. 50, 79 Pac. 592, the agreement provided for payment for the oranges, which were the subject of the contract, "as soon and at the time of delivery." In that case the trial court allowed parol proof to show what the parties understood and intended that the nature of the contract should be; that is, whether it involved a present sale and transfer of title, or merely an agreement to sell, with the intention that title in the vendee should vest only upon delivery by the vendor. It was held that the trial court made no error in admitting the evidence thus referred to; and, furthermore, the court held, in the language following this, that the contract upon its face clearly indicated that an absolute sale was thereby effected:

"Nor do we wish to be understood as holding that the title to the crop did not pass as soon as the contract was executed. The agreement, in form, imports a present sale; the thing sold was in existence, and was identified and separated from other things. Under section 1141 [1140?] Civ. Code, it would seem that title passed at once, and that the oranges remained on the trees at the risk of the buyer."

In *Fiddymont v. Johnson*, 18 Cal. App. 339, 123 Pac. 342, the agreement involved the sale of hay, and the facts of the transaction therein are so near identical with those of the present case that it would be difficult to differentiate the two upon any logical line of demarcation. It was there held that the fact that the seller was required by the contract to deliver the hay was not controlling, citing *Dyer v. Libby*, 61 Me. 45, where the seller was to haul and deliver at a specified point, which was held not a controlling factor determinative of the question whether the contract involved an executed or present sale and transfer of title to the vendee or merely executory in its nature. See, also, *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12.

It is held in all of the above cases that whatever may be the general trade meaning of the phrase "payable f. o. b." or other trade phrases peculiar to commercial contracts or the characters "f. o. b.," the fact remains that such trade or commercial signification or meaning is always controlled by the express contract of the parties, and that parol evidence may be received to show what effect such phrases or characters have on such contracts as in fixing the nature, scope, or effect

thereof, or as in disclosing the intention of the parties as to such scope and effect.

It follows from the foregoing considerations that the action of the trial court in allowing parol evidence of the circumstances attending the making of the agreement involved herein was free from error; and, as before declared, a consideration of the evidence so admitted will readily demonstrate that the said agreement or contract involved an absolute sale of the hay, and that, therefore, the title to said property passed to the defendant eo instante upon the execution of said agreement. The testimony so referred to was (for the plaintiff) mainly that of H. W. Barmann, one of the plaintiffs, and is as follows, given synoptically, though somewhat extendedly:

"A. E. Gianelli, the other plaintiff, and myself own a tract of land situated about four miles west of Stockton on the lower division of Roberts Island. In the season of 1918 we grew and harvested a crop of hay on this land. This hay was harvested, baled, and stacked in one large stack on the premises adjoining the Jacobs or Holt road. Every bale was weighed as it came from the hay press on the field, and every bale, with the exception of 80 tons was tagged. On the 8th day of August, 1918, there were 330 tons of hay in the stack, less one-fifth of a ton. It was separated from everything else. On that day Mr. J. E. Morgan, of Stockton, and Mr. G. A. Morgan, of Los Angeles, called upon me in regard to selling my hay. We talked for about half an hour. No one else was present. Mr. Morgan's wife was in his automobile, but she did not enter into our conversation. Both of the Mr. Morgans and I looked at the hay; they examined it very carefully, asked me as to its quality and uniformity in the stack and so forth. They both seemed to be very much pleased with the quality of the hay. They told me that the United States government was opening bids for the purchase of a large quantity of hay, on the following Monday, I believe, and asked me if we would be willing to give them an option for the purchase of this hay. I told them that I didn't think so, that an option would not be satisfactory to me. I felt that the hay was to be sold outright to avoid any damage—any possible damage from rain or otherwise. We spoke of what the hay would bring. As we were speaking of the price, the point came up as to whether I could deliver the hay for them. I told them I didn't want to deliver the hay, because it was a lot of bother, and I wanted to sell it as it was, and not be bothered with it. They told me that they had no organization to look after such things as hauling hay, and so forth, and could not be bothered with the same. I consented, and said that in that event I could probably deliver the hay to them. It was agreed that the price to be paid for the hay was \$23 a ton, which would net me practically \$22 a ton, inasmuch as the hauling would cost \$1 a ton. We then spoke of payments. We spoke as to how much money we would want, or I would demand at that time. I told them I would need most of the money at that time. They asked me if 75 per cent. would be suffi-

cient and meet our needs at that time, that being about the sum of \$6,000. I said yes, I thought that would be satisfactory for the initial payment, and as to the other payment they asked me if 60 days from date would be all right for the second payment, in case they did not haul the hay before that time. Mr. Morgan asked me if they could leave the hay on the ranch for a period longer than 60 days in case they wished. I told them it made no difference to us, they could leave the hay there until next winter, and we would not charge them storage for the same, provided we didn't need the land or the space. That being agreed upon, Mr. Morgan from Los Angeles, instructed his brother to draw up a bill of sale for the hay."

[4] Thereupon the writing evidencing the agreement of the parties and above quoted herein was prepared by one of the Morgans, and signed by both the parties to the transaction. The witness (Barmann), continuing further, testified:

"The next time I saw Mr. Morgan was on the 14th of August. Inasmuch as the payment of 75 per cent. on the purchase price was due on the 12th of August by the terms of the bill of sale, I went to the office of Morgan & Miller on the 14th of August to get the 75 per cent. payment for the hay. Mr. Morgan at that time wrote out a check payable to our order for \$6,000, and gave me the same. He also asked me to have the insurance assigned to them, inasmuch as they had bought the hay, which I told him I would do. The hay was insured for about \$7,000. I then went to the Bank of Italy, and deposited our check for \$6,000. I went to Mr. Wurster, and asked him for the policy. Mr. Wurster gave me this insurance policy, which we had had at the Bank of Italy. I took the insurance policy, and started over to Giannelli's office. I met Mr. Morgan on the sidewalk in front of the Bank of Italy, and told him it had been made out for about \$7,000, and asked him if he wanted more insurance on the hay. He said no, that sum would be all right. I delivered the policy to Mr. Truett, and he in turn assigned the policy to the Globe Grain & Milling Company, and the policy was delivered to the Globe Grain & Milling Company. I saw Morgan & Miller once or twice before the 31st of August, and asked them if they had been successful in selling this hay to the government, and as to when they would want the hay hauled."

Barmann stated that on the 31st day of August he called on and saw Morgan, and said to him that, they (the plaintiffs) having finished hoeing their beans, they then had nothing to do, and would like very much to remove the hay from the ranch. Morgan replied that he was writing to Los Angeles, and hoped that "they could move it very soon." The next time the witness saw Morgan was on the 11th day of September, at about 5 o'clock in the afternoon at his (Morgan's) office, and at that time Morgan instructed the witness to deliver the hay to the Dickinson-Nelson Warehouse in Stockton, "and that we could start hauling." Mor-

gan said to Barmann that one Hickey desired to secure the work of moving the hay, and both Morgan and the witness thereupon went together to the office of Hickey. The witness continued:

"I asked Mr. Hickey what he would charge to haul this hay to the warehouse in Stockton, and he told me it would cost \$1 a ton to deliver the same. I wanted to see several other parties regarding the hauling, and went to Russell Bros. to see them. They had gone home, so I went to the office of Russells the next morning at 8 o'clock, and saw Mr. Russell. It was then raining. It had rained half an inch on that night of the 11th of September. Russell told me he was very busy, and he would rather I would have Hickey haul it. I went to Hickey's office, and as he was not in I wrote a note, telling him to haul the hay as soon as possible. It then rained about four inches in the next few days. I saw Mr. Morgan on the morning of September 12th, and told him I had seen Mr. Hickey, and had told Hickey to haul the hay, and I told Morgan, in case he saw Hickey before I did, to tell Hickey to commence hauling the hay.

"I saw Mr. Morgan again on September 13th, and we talked over about the rain and so forth, and Mr. Morgan said it was not advisable to haul the hay until things dried off. On the following Monday, September 16th, I was out on the ranch and got on top of this stack of hay and examined it by taking a couple of bales from the top to see how far the moisture had penetrated the stack of hay. At that time the moisture had gone through at least two bales—the top two bales—two layers of hay were saturated with water. I telephoned Mr. Morgan, and told him that the hay was very wet, and told him that in case I owned the hay I would remove the two bales which were saturated with water to prevent the same from percolating through the whole stack. Mr. Morgan came out and looked at the hay, and told me to remove the top two bales of hay from the stack and pile the same to one side. That same evening, about 5 o'clock I went to Mr. Morgan's office in Stockton again, and told him that, inasmuch as he had instructed me to move the top bales off, and so forth, I told him I wanted him to give me a statement of that part, in writing. Mr. Morgan told me he could not give me anything in writing without taking the matter up with the Los Angeles office. I therefore went to the office of Mr. Morgan on the morning of September 17th, and asked him for the order. He told me he could not give me this in writing. Mr. Morgan instructed me to haul the good hay which had not been damaged. I therefore arranged with Mr. Hickey to have trucks down there at once to haul the hay which had not been damaged, and notified Mr. Morgan of the same. \* \* \*

"On the 17th—I have this on September 17th—I have this memorandum in my handbook; 'Morgan instructs me to start hauling hay which is undamaged, but will not give order to remove wet hay from stack to find further damage!' \* \* \*

The testimony of Barmann was corroborated in all material particulars by that of J. E. Morgan, who, testifying for the defendant,



declared that the former first said they would let the defendant have an option on the hay at \$23 per ton, to which proposition the brother of J. E. Morgan replied that it was not advisable to take an option, but that it would be better "to take the hay as long as we could get the time for storing or loading the hay out. We told Mr. Barmann," Morgan continued, "we would let him have what money he needed as an advancement on the hay. He spoke about getting about three-quarters of the approximate weight, which was about 350 tons, or, in other words, about \$6,000 which was satisfactory."

That the foregoing testimony unmistakably shows that an absolute sale of the hay was effected by the transaction between the parties, and that the title to the hay then and there passed to and vested in the defendant, there is no reasonable ground for doubting. The parties agreed to a present transfer, and the property which was the subject of the agreement was itself identified, being separated from all other hay or "things." When those conditions arise and exist, a sale and the transfer of title to the thing sold are effected. Civ. Code, § 1140; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Lassing v. James, 107 Cal. 348, 40 Pac. 534; Scribner v. Schenkel, 128 Cal. 255, 60 Pac. 860. "When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery, and the property and risk of accident to the goods vest in the buyer." 2 Kent's Commentaries, p. 492; Browning v. McNear, 158 Cal. 525, 527, 528, 111 Pac. 541. Here, as we have seen, everything that the plaintiffs had to do with the hay after the transaction or before its execution was complete, except that, when called on to do so by the defendant, they were to deliver the hay to some place designated by the latter. The proportion of the purchase price as agreed upon and specified in the written contract was paid by the defendant to the plaintiff at the time designated in said contract, and before any of the hay was delivered. Furthermore, the plaintiffs, at the request of the defendant, assigned to the latter the policy of insurance previously issued to and taken out by plaintiffs to indemnify them against loss in case of the destruction of the hay.

The fact, manifestly, is that the contract here involved was, in a technical or strictly legal sense, a bargain and sale, as known to the common law; for, as we have pointed out, the evidence unquestionably shows that everything was done that the plaintiffs were required to do with the hay, except the delivery thereof, which act rested entirely with defendant. In other words, upon reaching an agreement as to the terms of the conven-

tion by the parties, a bargain having thus been struck, title to the hay necessarily and immediately passed to the defendants. It was, in brief, under the evidence and under the law (section 1140, Civ. Code) clearly an executed and not an executory agreement or contract. See Benjamin on Sales (4th Ed.) pp. 309, 310; Johnson v. Dixon Farms Co., 29 Cal. App. 52, 57, 155 Pac. 134, 136.

The conclusion from the foregoing views is necessarily that "the title and the risk of accident" to the hay vested in the defendant upon the completion of the transaction evidenced by the writing to which the parties subscribed, and which is above reproduced herein, and that the findings of the court are well supported, and that they likewise support the judgment.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

(48 Cal. App. 98)

**POTTER HUFFMAN LAND & LIVE STOCK CO. v. WITCHER. (Civ. 2121.)**

(District Court of Appeal, Third District, California. June 7, 1920.)

1. Judgment  $\S$  251(1)—Court may adjudge matter in issue, though not prayed for in complaint.

Under Code Civ. Proc. § 580, in default cases the demand limits plaintiff's recovery, but where the prayer of the complaint did not specifically ask judgment as to ownership of a water right, but there was an answer and contest raising such issue, it was proper for the court to adjudge the water right between the parties.

2. Waters and water courses  $\S$  152(8)—Evidence held sufficient to show irrigation right to water from user.

In an action involving water rights, evidence held to show that plaintiff's predecessors in interest had acquired the right by using the natural flow of water from a canyon for irrigating a certain ranch during the irrigation season for over 40 years, during which time no one else had any claim thereto, or interfered with their use thereof.

3. Waters and water courses  $\S$  152(8)—Evidence held to show that appropriator of water was acting as agent for another.

In an action involving water rights, evidence held to show that the party appropriating water for use on a particular ranch located the same in his own name as agent of the plaintiff company's predecessor in interest.

4. Waters and water courses  $\S$  152(8)—Evidence held to show that purchaser had notice of water rights of another.

In an action involving water rights, evidence held sufficient to sustain the court's find-

ing that the defendant had full notice and knowledge of the rights of plaintiff's predecessor in and to a certain reservoir at the time he received the instrument of title from the party who had located the same as agent for plaintiff's predecessor.

**5. Waters and water courses**  $\Leftrightarrow$  156(5)—Purchaser of water rights held to have had notice of adverse claim.

Where defendant was given sufficient information to place him on inquiry as to plaintiff's rights long before transfer of water rights to him, he was not an innocent purchaser without notice, in view of Civ. Code, § 19, since he had readily accessible means of acquiring knowledge which is equivalent to notice or knowledge of such rights.

Appeal from Superior Court, Modoc County; C. A. Raker, Judge.

Action by the Potter Huffman Land & Live Stock Company against W. V. Witcher. Judgment for plaintiff, and defendant appeals. Affirmed.

Jamison & Wylie and Daly B. Robnett, all of Alturas, for appellant.

Chas. W. Kitts, of San Francisco, for respondent.

NICOL, Presiding Judge pro tem. This is an appeal from a judgment of the superior court of Modoc county adjudging plaintiff to be the owner of a certain water right, reservoir site, and right of way described in the complaint, and also adjudging that a certain instrument in writing, executed by one Ed Ivory, Jr., to defendant and set out in the complaint, conveyed no right, title, or interest in said water right, reservoir site, and right of way.

The complaint alleges that the plaintiff is the owner and in possession of a certain tract of land described in the complaint as the "E" or Ivory ranch, in Clover Swale, Modoc county, together with the right to construct and maintain a reservoir on sections 2 and 11, township 43 north, range 10 east, M. D. M., and a right of way therefrom down what is known as Weller canyon to the said "E" ranch; that this reservoir site and right of way was located, appropriated, and secured for the purpose of impounding winter water draining from Antelope plains and delivering the same to and upon said "E" ranch, during the irrigating season to be there used for irrigating the crops thereon; and that at all times since the selection thereof they have been appurtenant to the said "E" ranch.

The said ranch for many years prior to October 8, 1915, was owned by the Ed Ivory Land & Live Stock Company (a corporation) and its predecessors in interest, and the plaintiff through certain mesne conveyances has succeeded to its title thereto, together

with all water and reservoir rights, etc., connected therewith.

The complaint further alleges that for more than 20 years continuously, next preceding the year 1912, the said corporation had claimed, appropriated, taken, and used all the natural flow of water from sections 2 and 11 and surrounding lands known as Antelope plains, draining off through Weller canyon during the irrigating season of each year, to wit, from June 1st to October 15th for irrigating said "E" ranch.

This allegation of the complaint was specifically denied by the defendant, and in addition thereto the defendant avers the facts to be that the defendant is the owner of 160 acres of land that is riparian to the waters flowing from said Antelope plains, through said Weller canyon, and that for a period of 50 years prior to the commencement of this action the defendant and his grantors have irrigated the tillable portions of said lands from the waters flowing through said Weller canyon during the irrigating season of each and every year.

Upon the issue thus formed the court found: That for more than 20 years continuously next preceding 1912 the Ed Ivory Land & Live Stock Company and its predecessors in interest had claimed, appropriated, taken and used all the natural flow of water from sections 2 and 11, township 43 north, range 10 east, M. D. M., and surrounding lands known as Antelope plains draining through said canyon during the irrigating season for irrigating said ranch and ever since and including the year 1912 plaintiff and its predecessors have so taken and used all of the natural flow of said water, and for a period of more than 28 years preceding the commencement of this action the said waters and the whole thereof were and are necessary and indispensable to the proper irrigation of said lands.

The court further found:

"That the defendant is the owner of 160 acres of land known as the Redding Field which adjoins the said 'E' ranch on the south, through which the water course flowing through the said 'E' ranch continues and through which water course and over said land, the drainage from said 'E' ranch passes. That for a long period namely 40 years prior to the commencement of this action the water which drained upon said premises from said 'E' ranch had been used from time to time as desired in irrigating said lands. That at no time were the possessors and occupants of the 'E' ranch ever asked to or compelled or did they, during the irrigating season, allow any portion of the water of said Weller canyon which could be used in irrigating on said 'E' ranch, pass the boundaries thereof to said defendant's land. That the only water from said Weller canyon ever used on said Redding Field was such as was voluntarily permitted by the owners and

occupants of said "E" ranch to flow onto said defendant's premises."

The appellant claims that the court erred in finding and decreeing that the plaintiff is the owner of all the natural flow of the water of Weller canyon. That this is an action to quiet the title of plaintiff as against defendant to the reservoir and the right of way described in the complaint. That there was no prayer in the complaint that the court should decree anything else to the plaintiff than the said reservoir and right of way, and that the said findings are not supported by the evidence.

[1] It is true that the prayer of the complaint in this action does not specifically ask for judgment as to the ownership of the water right, but it was not necessary that it should, in order to warrant the court in granting the relief that it did in that respect. Section 580 of the Code of Civil Procedure provides:

"The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

In default cases the demand limits plaintiff's recovery (*Staaacke v. Bell*, 125 Cal. 309, 57 Pac. 1012; *Brooks v. Forington*, 117 Cal. 219, 48 Pac. 1073), but in contested cases the demand does not so limit the recovery, and the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue, although not specifically prayed for (*Dennison v. Chapman*, 105 Cal. 447, 39 Pac. 61; *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 28 Pac. 795; *Cassinella v. Allen*, 168 Cal. 677, 144 Pac. 746; *Murphy v. Stelling*, 8 Cal. App. 702, 97 Pac. 672; *Fox v. Hall*, 164 Cal. 287, 128 Pac. 749; *Title Ins. & Trust Co. v. Ingersoll*, 158 Cal. 474, 111 Pac. 360; *Faulkner v. First National Bank*, 130 Cal. 258, 62 Pac. 463; *Poledori v. Newman*, 116 Cal. 375, 48 Pac. 325). It was said by this court in *Haight v. Stewart*, 36 Cal. App. 514, 172 Pac. 769, that:

"It is \* \* \* well settled in procedural law that a party is not only entitled to any and all relief which is appropriately within the scope of his pleading, but may be awarded such relief upon any substantial legal or equitable ground coming within the fair and reasonable import of the averments of his pleading."

The allegations of the complaint and the denials and averments of the answer, as above stated, clearly raised an issue as to the ownership of the water rights in Weller canyon, and it became necessary for the court to find the facts in reference to such rights and to adjudicate as to the ownership of the same.

[2] We are of the opinion that the evidence

is ample and sufficient to sustain these findings of the trial court as to the ownership of the said water rights. It appears that the Ivory family settled on the "E" ranch in 1872, being 46 years before the trial of this action. In 1904 they organized the Ed Ivory Land & Live Stock Company. All the officers and shareholders of the company were members of the said family. Ed Ivory, Jr., became the general manager of the company at the time of its organization, and continued as such until it was dissolved, and during this time he generally attended to its business. From the date of the articles of incorporation to October 8, 1915, the said company occupied and claimed said ranch. As to the use of the water on the "E" ranch, Ed Ivory, Jr., testified as follows:

"Q. During this period was part of it irrigated? A. Yes, sir. Q. How long prior to 1904 had the lands there been irrigated? A. They had been irrigated as long as we owned it. Q. How long had your folks owned it? A. I do not know. Q. Were you born there? A. Yes, sir. Q. They were irrigated as long as you can remember? A. Yes, sir. Q. And always have been irrigated since you can remember? A. Yes, sir. Q. Where did they get the water to irrigate those lands with? A. There were springs in the canyon and in the spring of the year we got the overflow of Antelope plains. Q. Did you use the water that came down out of the canyon? A. Yes, sir. Q. Did you use it all? A. Yes, sir; we used it all, it ran over the ground. Q. How did you use that water; was it by permission of anybody or did you rent it from somebody? A. No, sir; we just used it. Q. Did you claim it as your own? A. I do not know as we claimed it could not get away from there. Q. You just took it and used it? A. Yes, sir. Q. For 40 years or more the Ivory family has used that water? A. Yes, sir. Q. And nobody else claimed it or used it, did they? A. No, sir. Q. You took it all, except in the winter season, did you not? A. Yes, sir. Q. Where did this water that came from the canyon come from? A. It comes off of the Antelope plains and the country surrounding that. Q. That canyon is Weller canyon, is it not? A. Yes, sir. Q. Weller canyon is the outlet of Antelope plains, where it runs out to the river, is that right? A. Yes, sir."

He further stated that the water of Weller canyon was a good stream in the early part of the season, but goes down later, and ceases to run in July or August. Mrs. Mary E. Ivory testified that she had resided on the "E" ranch for 46 years; that during that time the waters of Weller canyon were used for irrigating said ranch, and that no one ever interfered with them in the use of said water, nor made any claim thereto, until the defendant started trouble; that they claimed the water during all that time for the irrigation of the "E" ranch; that they used the water for the irrigation of crops raised there, which crops consisted of hay, grain, and a garden. Thomas H. Ivory testified

that the waters of Weller canyon that drain from Antelope plains were necessary for the lands of the "E" ranch; that he had irrigated the property a good many years, and found that the water would dry up too early to even make a thorough crop.

It appears from the foregoing evidence that the natural flow of the waters of Weller canyon were used by the Ivory family in irrigating the "E" ranch, during the irrigating season, for a period of over 40 years, and that during this time nobody else made any claim to the said waters, or interfered with them in their use of the same. This evidence as above stated, in our opinion, fully sustains the said findings of the trial court.

[3] As to the reservoir site and right of way described in the complaint, it appears from the record that in the year 1913 Ed Ivory, Jr., made application to the United States Land Department for the location of said reservoir site and right of way therefrom down Weller canyon to the "E" ranch which application was approved by the United States Commissioner on May 25, 1914. Prior to this, on October 15, 1912, the said Ed Ivory Jr., had appropriated for this reservoir 1,000 miners' inches of water, measured under a 4 inch pressure, flowing in Weller canyon during the period of melting snow; said water to be restrained by means of a dam, at the point at which this notice of appropriation was posted. On December 27, 1915, the said Ed Ivory, Jr., by an instrument in writing, set out in the complaint, conveyed all his title and interest in said reservoir and reservoir site to the defendant, for the stated consideration of \$250, and on August 7, 1916, he filed with the United States Land Office his relinquishment of said reservoir. On the same day Mary E. Ivory, his mother, filed with the department an application "for a reservoir and canal identical with that theretofore granted to Ed Ivory, Jr." The Land Department refused to approve either of the applications, for the reason that prior to August 7, 1916, said Ed Ivory, Jr., had conveyed said reservoir to the defendant.

On this feature of the case two questions are presented: (1) Did Ed Ivory, Jr., act as trustee or agent for the Ed Ivory Land & Live Stock Company, in locating and securing the right to the reservoir site and right of way therefrom, described in the complaint; and (2) Did the defendant take the agreement of December 27, 1915, from Ed Ivory, Jr., with notice that the said reservoir and right of way had been located for the use and benefit of the Ed Ivory Land & Live Stock Company?

1. The court found that the plaintiff was the owner of the "E" ranch, together with the right to construct and maintain a reservoir and the right of way therefrom down Weller canyon to the said ranch; that the reservoir site, water right, and right of way described in the complaint were located, appropriated,

selected, and secured for the purpose of impounding the winter water draining from Antelope plains and delivering the same upon the said "E" ranch during the irrigating season, to be used thereon for irrigating the crops thereof, and at all times since the selection thereof have been appurtenant to the said ranch; that Ed Ivory, Jr., located the said reservoir site, water right, and right of way as the manager of the said Ed Ivory Land & Live Stock Company, and that the costs, charges, and expenses of making said location, survey, and application were paid out of the funds of the said company; that he continued as a director and general manager of the said company until October 8, 1915, though he performed no duties as manager after April, 1913.

The foregoing finding is fully supported by the evidence. Ed Ivory, Jr., testified that he made the said water appropriation on October 15, 1912, to secure the water for irrigating the "E" ranch; that he located in his own name for the Ed Ivory Land & Live Stock Company and in the performance of all acts he was acting for the said company as its general manager; that he made the application for the reservoir site, and had a survey made for the benefit of the company, and all the costs and expenses of the same were paid out of the funds of the said company; that when he filed on the same he intended it for the said ranch. It is true that he did testify that the expenses were charged up against his salary. How they were so charged he does not state. The court, however, upon sufficient evidence, found that he did not pay any portion of said costs and expenses.

[4] 2. As to the defendant having notice at the time he took the agreement of December 27, 1915, the court found:

"That at the time of making and delivery of the instrument of December 27, 1915, and at the time of the payment of the consideration specified therein, the defendant knew that the said Ed Ivory, Jr., had made such location, survey, and application, and had secured the right from the United States to said water, water right, dam, reservoir site, and right of way, and then held the same as the general manager of, to, and for the use and benefit of the Ed Ivory Land & Live Stock Company, and that the company had paid all the expenses incurred in securing the same; and that Ed Ivory, Jr., had no right, title, or interest of his own therein."

The defendant was a neighbor and for over 30 years had an intimate acquaintance with the Ivory family and the "E" ranch. He was a witness at the trial of this action, and while on the witness stand he made the following admission:

"Q. Did you have any knowledge or notice at the time you contracted for this reservoir from Ed Ivory, Jr., that the Ed Ivory Land & Live

Stock Company had any rights in this reservoir? A. Well I was told by Mr. Ivory that he had filed on it first for the Land & Live Stock Company, but his father objected to his taking it for the company, and he then took it for himself individually."

Ed Ivory, Jr., stated as a witness that two years before the making of said agreement he told the defendant about this reservoir, and what a good thing it would be; that they went down to the reservoir site together, and he told the defendant that there was more water than the Ed Ivory Land & Live Stock Company needed for their ranches, and he told him that he had located for the "E" ranch. The said witness further stated that he knew of some work being done there by the defendant during 1915, and prior to the conveyance of December 27, 1915. "I talked to Mr. Wither about it, and we were going to construct the dam; he was going to furnish the money, and I was to be superintendent of the work, and the water was to be divided between him and the Ed Ivory Land & Live Stock Company." Work was commenced, but was suspended by the defendant upon Mrs. Mary E. Ivory threatening to commence an injunction suit. The defendant admitted that in 1915, before he purchased, that he had two interviews with Ed Ivory, Sr., and Mrs. Mary E. Ivory about this reservoir; that in one of these interviews he offered to construct the reservoir, and they could take their own time to pay for their proportion of the cost at 6 per cent. interest, and they were to have a half interest in the reservoir.

There is other and additional evidence in the record bearing upon this question, but it is unnecessary to review the same, as we are of the opinion that the foregoing is ample and sufficient to sustain the finding of the court as to the defendant having full notice and knowledge as to the rights of the Ed Ivory Land & Live Stock Company in and to said reservoir at the time he received the instrument of December 27, 1915.

[5] The defendant was not an innocent purchaser without notice; he was given sufficient information to place him on inquiry long before the transfer of December 27, 1915, and was therefore chargeable with notice of all facts which he might have ascertained by inquiry. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Section 19, Civ. Code. A party having readily accessible means of acquiring knowledge of a fact, which he might have ascertained by inquiry, is equivalent to notice and knowledge of it. *Montgomery v. Keppel*, 75 Cal. 128, 19 Pac. 178, 7 Am. St. Rep. 125. The law imputes knowledge of

facts to one who has sufficient means of knowledge to put him upon inquiry. *San Diego, etc., Co. v. La Presa School District*, 122 Cal. 98, 54 Pac. 528.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(79 Okl. 124)

STATE ex rel. DALE et al., Commissioners, v. VERNOR et al. (No. 9979.)

(Supreme Court of Oklahoma. March 23, 1920. Rehearing Denied Aug. 10, 1920.)

(Syllabus by the Court.)

1. Attorney and client  $\S$ 54—Court may set aside, confirm, or modify report of referee in disbarment proceeding.

A referee in a disbarment proceeding is an officer of the court, and the court has full authority to supervise and control his report by setting it aside, or confirming or modifying it as the facts and the law require.

2. Attorney and client  $\S$ 54 — Findings and conclusions in referee's report in disbarment proceeding not conclusive.

The report of a referee appointed to take evidence and report his findings of fact and conclusions of law in a disbarment proceeding is not conclusive as to either the findings of fact or conclusions of law, but is accorded every reasonable presumption of being correct. The burden is on the party attacking it, but it is to be freely set aside by the court if found to be incorrect.

3. Attorney and client  $\S$ 53(1, 2)—Innocence presumed; truth of charges must be proved to a reasonable certainty.

In a proceeding to disbar an attorney at law, such attorney is presumed to be innocent of the charges preferred, and to have performed his duty as an officer of the court in accordance with his oath, and the evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true, and warrant a judgment of disbarment.

4. Attorney and client  $\S$ 53(2)—Evidence held to support findings of referee, and to require a suspension.

Transcript of the evidence examined, and held, that the same supports the findings of the referee, as the same are modified by this court, and, as so modified, are confirmed and judgment of suspension of the respondents rendered accordingly.

Original action by the State of Oklahoma, on relation of Frank Dale and others, commissioners appointed by the Supreme Court, to investigate charges preferred against Vilas K. Vernor and Ed. K. Brook, by petition praying that they be permanently disbarred. Findings and conclusions of the referee con-

firmed, and respondents ordered suspended from practicing as attorneys or counselors at law in the courts of Oklahoma for six months.

E. L. Fulton, of Oklahoma City, for plaintiffs in error.

S. M. Rutherford and Neff & Neff, all of Muskogee, for defendants in error.

JOHNSON, J. This is an original action commenced in this court by the state of Oklahoma, on relation of Frank Dale, W. J. Horton, and D. W. Maddon, commissioners appointed by this court to investigate charges preferred against the defendants and others, by petition praying that the said defendants, and each of them be permanently disbarred from the practice of law in the state of Oklahoma, which petition alleges, in substance, as follows:

"That during all the times hereinafter mentioned said Vilas K. Vernor and Ed. K. Brooks were duly licensed and practicing attorneys in the state of Oklahoma; that each of said defendants reside at Muskogee in said state; that on and prior to the 31st day of May, 1917, one Stella Mason, formerly Stella Manuel, was a minor residing in the city of Washington, D. C., and had theretofore been married to one Isaac Mason, and as a result of said marriage there had been born one child, at that time aged about one year old; that said Stella Mason from inheritance became possessed of valuable real estate situated in the county of Okmulgee, state of Oklahoma, and which was highly valuable by reason of oil and gas deposits, and said properties were under the care of a guardian who resided in Muskogee county, Okla., that the title to said properties had long theretofore been established in said Stella Mason, and on May 21, 1917, at midnight of said date, she would reach the age of 18 years, at which time she would be entitled to receive from the hands of the guardian all of the properties hereinbefore mentioned; that said defendants, Vilas K. Vernor and Ed. K. Brooks, well knowing that said Stella Mason would, upon the 21st day of May, 1917, reach the age of her majority, and upon said date become possessed of properties hereinbefore referred to, conceived the idea of getting control of the properties belonging to said Stella Mason and using their offices as attorneys to exploit and rob said estate, and for the purpose of carrying out said plan, so formed as aforesaid, induced one A. G. W. Sango, a colored lawyer of doubtful reputation, residing in the city of Muskogee, to undertake to bring from the city of Washington, D. C., to the city of Muskogee said Stella Mason, in order that they might by devious and sundry methods, more particularly hereinafter described, procure contracts with said Stella Mason which would given them an opportunity to further their purpose of exploiting said estate for their benefit; that in pursuance to said arrangement with said Sango, said Sango went to the city of Washington, D. C., accompanied by other parties, and by false and misleading statements, to the effect that Isaac Mason, the husband of Stella Mason, would rob said Stella

Mason of all of her property unless she left him, and the further statement to the effect that it was necessary for Stella Mason to go to the city of Muskogee, state of Oklahoma, in order to receive her property and interest in her estate, and that it would be necessary for her to employ some strong and influential lawyers to protect her interest in order for her to come into possession of her estate, said Sango carrying out the purpose of said Vilas K. Vernor and Ed. K. Brook to induce Stella Mason to leave Washington, D. C., and to go to the city of Muskogee, Okla.; that said Sango in the furtherance of said design, and with the knowledge of Vilas K. Vernor and Ed. K. Brook, defendants herein, upon the arrival of the said parties at Muskogee, placed the said Stella Mason in a hotel in said city of Muskogee, where she, together with her husband, who had insisted on coming with her to Muskogee, took up their abode; that they arrived at Muskogee about May 8, 1917; that immediately upon the arrival at Muskogee, and for the purpose of carrying out more fully their design and purpose, said defendants, together with one J. Coody Johnson, a disreputable colored attorney, began a systematic course of effort to induce Stella Mason to separate from her husband, Isaac Mason, and procure from him a divorce; that said Sango, under an agreement hereinbefore mentioned, under which he went to the city of Washington, D. C., for the purpose aforementioned, was to become a party to a contract, to be entered into upon the part of Stella Mason on one side and Vilas K. Vernor and Ed. K. Brook, defendants herein, and A. G. W. Sango on the other side, by which and under which, an employment of said attorneys was to be made, giving to said attorneys control over the property belonging to the said Stella Mason, the control of which would come to her upon reaching her majority; that said Vilas K. Vernor and Ed. K. Brook, defendants herein, together with said Sango and said Johnson, in the prosecution of their designs induced said Stella Mason to leave her husband and go to another place in the city of Muskogee, where she was kept and held in order to prevent her husband, Isaac Mason, from in any manner seeing her, and in carrying out said purpose guards were employed by Vilas K. Vernor and Ed. K. Brook and said Sango, and said Stella Mason was told that it was necessary to have her guarded, in order that the husband, Isaac Mason, would not undertake to steal their child; that Isaac Mason being desirous of continuing the marriage relationship between himself and wife, and having done nothing whatever to induce his wife to leave him, undertook to visit and confer with his wife while she was so held under guard as aforesaid, and upon his going to said premises in the afternoon and in a proper manner undertaking to confer and consult with his wife, he was, by a sham and groundless complaint made by said Sango, caused to be arrested by the city authorities of Muskogee, and thereby, and in the manner aforesaid, being prevented from conferring and consulting with his wife.

"Your relators further state that shortly prior to midnight May 21, 1917, at the time when said Stella Mason would arrive at her majority, said defendants, Vilas K. Vernor and Ed.

K. Brooks and said Sango had prepared a written contract to be signed by said Stella Mason as the party of the first part, and Vilas K. Vernor and Ed. K. Brook as parties of the second part, and arranged with said Sango and other parties to have said Stella Mason at the office of Vilas K. Vernor to meet said Vernor and said Brook, and execute the contract and in pursuance to said plan, and as a result of said plan said Stella Mason was taken to the office of said Vilas K. Vernor, where she met said Vernor and Brook and other parties acting in the interest of said defendants Vernor and Brook, and was there induced to sign a contract of employment, whereby she undertook to turn over to said Vernor and Brook her property interests, a true copy of which said contract is attached hereto, made a part hereof, and marked 'Exhibit A'; that under the terms of said contract among other things it was stipulated and agreed that said contract should run for a period of five years, and said Vernor and Brook for their legal services should receive as compensation the sum of \$5,000 per annum, payable yearly and in advance, and that they should become and remain during said period of time the sole attorneys of said Stella Mason, and should have sole charge of any litigation which might arise in matters growing out of her property interests, and your relators state that at the time said contract was entered into said Stella Mason had no litigations pending, and had no reason to believe or expect litigation growing out of her right of possession to the estate she was about to take over; that there were no unsettled matters involved in the procurement by her of all of the estate to which she was entitled; that the control of said estate was at that time pending in the county court of Muskogee county, and theretofore had been handled and conserved by a guardian who was under bond, and who was bound to account for and turn over to her the entire interest in said estate to which she was entitled; that at the time, to wit, just after midnight May 21, 1917, when this contract was entered into at the office of said Vilas K. Vernor, said Stella Mason was not represented by her guardian, or any other person who was competent and qualified to act as a friend or advise her in her behalf, and the purpose of inducing her to go to the office at midnight and enter into said contract was, as your relators allege and aver, to take an undue and unconscionable advantage of her ignorance of her lack of skill and experience in the handling of her business affairs, and your relators further allege that said contract was unconscionable in its terms in this, to wit: That it exacted a compensation beyond any probable needs; that said defendant attorneys in procuring said contract were guilty of grossly unprofessional conduct, highly prejudicial to the standing and reputation of the bar, and were guilty of practicing fraud and deceit upon said Stella Mason, and did procure said contract for the purpose of permitting them to unlawfully and corruptly exploit the estate and property of said Stella Mason.

"And, further, your relators say that in the carrying out of the design to exploit said estate as hereinbefore mentioned said defendants applied and appropriated to their individual use

\$5,000 of the money of said Stella Mason, and, to secure the balance of said sum of \$25,000, immediately after procuring said contract caused the same to be filed of record at Okmulgee, in Okmulgee county, Okl., the county in which all of the estate of said Stella Mason was located, thereby incumbering said estate with an instrument in the nature of a mortgage, and placing a cloud upon the title of said Stella Mason in and to all her said estate, all of which was done in furtherance of the unlawful and unprofessional purpose of said defendants, as hereinbefore mentioned, in the procurement of said contract, and your relators say that said conduct was unethical, grossly unprofessional, and highly prejudicial to the profession of law and standing of the legal fraternity, and done and performed by said defendants with the view to unlawfully and corruptly procure from said estate moneys to which they were in no manner entitled, and for their conduct your relators ask that said defendants and each of them be permanently disbarred from the further practice of law in the state of Oklahoma.

#### "Second Cause of Action.

"For a further and second cause of action against the said defendants, Vilas K. Vernor and Ed. K. Brook, your relators state that they make all of the allegations of the first cause of action which are pertinent to this, the second cause of action, a part of said second cause of action to the same extent as if fully set forth and repleaded herein, and further allege that on or about the 29th day of May, 1917, one Isaac Mason, the husband of Stella Mason, commenced an action in the county court of Muskogee county, Okl., wherein he sought to have Stella Mason adjudged to be an incompetent and to have a guardian appointed to conserve her estate, and employed as his attorneys for the prosecution of said action a firm of lawyers, to wit, Stuart & Brown, and one S. V. O'Hare, all attorneys at law, regularly licensed and practicing in Muskogee and residing in said city; that thereafter, and on or about the 31st day of May 1917, said Vilas K. Vernor, in conjunction with said defendant Ed. K. Brook, pretending to represent said Stella Mason as her attorneys, and knowing that said action above referred to had been commenced by said Isaac Mason, and knowing also that said Stuart & Brown and S. V. O'Hare were his attorneys, induced the said Isaac Mason to go to the office of said Vilas K. Vernor and in the absence of his attorneys, Stuart & Brown, and S. V. O'Hare, and in disregard of their duties towards said last-named attorneys, and without their knowledge or consent, and in their absence, represented to said Isaac Mason that the cause of action which he had instituted was one which could not be maintained, and stated to said Isaac Mason that he must dismiss said action, and that it was dangerous for him to attempt to stay in the city of Muskogee or state of Oklahoma, and that he could be arrested if he remained in said city and state, and by said threats and intimidations, and, by holding out to him the promise of the payment of the sum of \$3,000 by way of compromise between himself and wife, did induce the said Isaac Mason to prepare for filing a written dismissal of

said action, so brought as aforesaid against his wife, to declare her an incompetent and to have a guardian appointed to conserve her estate, and procured from the county judge of Muskogee county a large sum of money, the exact amount being unknown, of the funds of said Stella Mason, and paid to said Isaac Mason the sum of about \$2,000 of said sum so procured, and induced said Isaac Mason to undertake to immediately leave the city of Muskogee, and secrete himself so that his attorneys, Stuart & Brown and S. V. O'Hare, would have no knowledge of his whereabouts, and would be unable to procure said Isaac Mason to have him rescind his action in the dismissal of said cause. Wherefore your relators pray that said defendants, and each of them, be permanently disbarred from the practice of law in the state of Oklahoma.

#### "Third Cause of Action.

"For a third and further cause of action against said defendants, and each of them, your relators state that they make all of the allegations in the first and second causes of action a part of this the third cause of action as fully and complete as if set forth herein and repleaded, and further allege that on or about the 28th day of May, 1917, in the city of Muskogee, state of Oklahoma, said defendants, for the purpose of obtaining an unlawful and unprofessional advantage over one Isaac Mason, induced one C. Benjamin Jefferson to undertake to act as attorney of said Isaac Mason in the procurement of a dismissal of an action theretofore brought by said Isaac Mason against Stella Mason to have her declared an incompetent, and to have a guardian appointed to conserve her estate, and, at the time of the procuring of said C. Benjamin Jefferson to act as aforesaid, said defendants well knew that said Isaac Mason was represented in said litigation by competent and reputable attorneys, to wit, Stuart & Brown and S. V. O'Hare, and also well knowing that said Stuart & Brown and S. V. O'Hare, if called upon, would not consent or consider the question of a dismissal of said action so brought by said Isaac Mason as aforesaid; that in order to procure the services of said C. Benjamin Jefferson, said defendants agreed with said C. Benjamin Jefferson that they would not resist the application of said Jefferson for a large allowance to him of a guardian's fee in the handling of the estate of Stella Mason, said Jefferson being the guardian of the estate, and further agreeing with said Jefferson that they would assist him in procuring from said Isaac Mason a large fee under the pretense that he was acting as Isaac Mason's attorney; that said Jefferson, in pursuance to said purpose of inducing said Isaac Mason to come to the office of Vilas K. Vernor, there met said Isaac Mason, and together with said Jefferson, and in the absence of Isaac Mason's attorneys, and after being advised by said Isaac Mason that he wanted to send for his attorneys, by threats and intimidation and promises of payment of money, to wit, the sum of \$3,000, induced the said Isaac Mason to sign a dismissal of the action pending in the county court against his wife to declare her an incompetent, and to have some person appointed as guardian of her estate, and procured from the

county court, ostensibly for the purpose of compromising the action between Isaac Mason and Stella Mason and settling their property rights and differences, the sum of \$3,000, claiming that said sum was to be paid to Isaac Mason, that the money was taken to the office of Vilas K. Vernor and turned over to said Jefferson, he retaining for his alleged professional services in procuring said compromise the sum of \$1,000, and your relators state that said defendants Vernor and Brook well knew at that time that said Jefferson was not the attorney who brought said action for said Isaac Mason, and well knew that said Stuart & Brown and S. V. O'Hare were representing said Isaac Mason in said litigation, and that they were reputable attorneys, and that they would resist any action upon the part of said defendants in bringing the dismissal of said action, and well knew that said Jefferson was not in fact properly representing said Isaac Mason in said settlement, and well knew that they were taking unconscionable advantage of said Isaac Mason in inducing him to dismiss said action, and well knew that they were acting in an unprofessional way towards reputable and competent attorneys. Wherefore, your relators ask that said defendants, and each of them, be permanently disbarred from further practicing law in the state of Oklahoma.

#### "Fourth Cause of Action.

"For a further and fourth cause of action against said defendants, and each of them, your relators state that they make all of the allegations of the preceding and foregoing causes of action in so far as they are pertinent a part of this the fourth cause of action as if fully set forth and repleaded herein, and further allege: That on and prior to May 21, 1917, one Stella Mason, formerly Stella Manuel, a minor, was possessed of a large and valuable estate, consisting of oil and gas lands and the products thereof, located in Okmulgee county, state of Oklahoma; that her property interests in the estate were under the charge of a guardian, one O. Benjamin Jefferson, and said guardianship proceedings were pending in the county court of Muskogee county, Okl.; that she became of age at midnight May 21, 1917; that all of her property interests were under the charge of said guardian and the county court of Muskogee county, Okl.; that there were no suits pending against said guardian or minor, and the estate was in no manner involved in litigation; that there were no reasonable grounds to apprehend litigation growing out of the affairs of said estate or the interest of said minor in said estate; that notwithstanding such fact, said defendants, as hereinbefore set forth, undertook by fraudulent and deceitful methods to have themselves appointed, under the contract hereinbefore referred to and made a part hereof, and marked 'Exhibit A,' attorneys of the property interests and affairs of said Stella Mason, and as hereinbefore set forth did procure a contract from her, giving to said defendants for a period of five years the sum of \$5,000 per annum, payable annually in advance, as a fee and consideration running to them to look after her property interests and any litigation which might arise in the future; that in carrying out said contract, and with the design



of exploiting said estate, said defendants wrongfully appropriated to themselves \$5,000 of the moneys of said estate, and wrongfully and fraudulently entered into the agreements and arrangements with other parties hereinbefore mentioned to pay said parties unlawfully from the funds of said estate large sums of money, and in carrying out said design fraudulently and purposely exploited said estate, and used of the funds of said estate, in various ways which were unnecessary to properly conserve said estate, the sum of approximately \$15,000, which expenditures from the funds of said estate were unnecessary and wasteful, and known, or should have been known, to have been unnecessary and wasteful by said defendants; that said sums of money so paid out as aforesaid were done in furtherance of their own scheme and plan, and to aid therein said scheme and plan of exploiting for their own advantage the funds of said estate."

Defendants filed their answer, denying the material allegations contained in the petition, except they admit the making of the contract, a copy of which was attached to the petition, and alleging that the services proposed to be rendered were fairly and reasonably worth the amount agreed to be paid therefor.

The cause was referred to Hon. P. D. Brewer, of Oklahoma City, with directions to make a report of findings of fact and conclusions of law, who, in pursuance of the order of reference, heard the testimony, and thereafter made and filed his report in which it is found as follows:

#### "Findings of Fact.

"1. The charges resulting in this petition for disbarment against respondents Vilas K. Vernor and Ed. K. Brook, grew out of certain relations and contracts they had with one Stella Mason; and your referee finds that the said Stella Mason's maiden name was Stella Manuel; that she was a negro orphan girl during the year 1915, owning some land in the Creek Nation under oil and gas lease to the Prairie Oil & Gas Company, who developed the same and discovered large quantities of oil therein; that one C. Benjamin Jefferson, a colored lawyer, was the duly appointed, qualified, and acting guardian of said Stella Mason and of her estate; that about June, 1915, the said Stella Mason was taken to the city of Washington, D. C., where she met and shortly thereafter married one Isaac Mason; that the said Isaac Mason was a colored man of fair intelligence, who had attended school at Howard College, and was at the time of his marriage and thereafter, when mentioned herein, employed in some clerical capacity in the United States Treasury Department at Washington, D. C.; that in 1916, a child was born to the said Isaac Mason and Stella Mason; that the said Stella Mason, née Manuel, became of age at midnight on May 20, 1917; that prior to May 1, 1917, Lula Hendricks, a half-sister of Stella Mason, and other colored people and relatives from Oklahoma, together with a colored lawyer, one Coody Johnson, visited the Masons at their home in

Washington, D. C., the said Lula Hendricks probably making more than the one trip before the said May 1, 1917. On her last trip before said date, the presence of Lula Hendricks there and her association with Stella Mason seems to have become objectionable to Isaac Mason and possibly others, and she was notified to leave there. The evidence as to just how this came about is obscure, but she returned to Oklahoma. Thereafter, and about May 1, 1917, she saw one A. G. W. Sango, a colored lawyer of Muskogee, Okl., or he saw her; at any rate it was arranged between Lula Hendricks and her husband, Will Hendricks, and the said A. G. W. Sango that they would all three go to Washington City. The said Sango borrowed the money to pay the expenses of the three on the trip. They went to Washington, D. C., and prevailed upon Stella Mason to return to Oklahoma, claiming to her that she should be in Oklahoma at the time of arriving at her majority, so as to have an accounting with her guardian and be there to receive her estate from him. Her husband, Isaac Mason, determined to accompany them, and did so. The party arrived in Muskogee, Okl., about May 10, 1917, and on the day after their arrival, Mason and his wife obtained board and lodging with a colored woman named Eliza Bailey, Lula Hendricks and her husband being with Stella practically all of the time. After a few days at Eliza Bailey's, Stella became estranged from her husband, Isaac Mason, and he was practically compelled to leave said boarding house; at least, he did so, and went elsewhere to stay in Muskogee. Two or three days before Stella was to become of age on May 20, 1917, she was sent or went to the house of a colored doctor named Smith in Muskogee to stay, and the colored lawyer, Sango, put a man at the Smith home to guard the house for the purpose, as Sango claims, of protecting Stella from her husband, Isaac Mason.

"The respondents, after their contract with Stella, hired a guard to stay where she was staying. That while Stella was at the Smith home, Isaac Mason went there in an attempt to see his wife; he was refused admittance, but heard Sango talking in the room with other colored people. In the meantime, Isaac Mason heard Sango call the police. Mason then waited in the vicinity until the policemen arrived, when he was taken to jail, where a colored friend made a small cash deposit and obtained his release. Isaac Mason was never prosecuted on this charge. A few days before May 20, 1917, Lula Hendricks and her husband, Will Hendricks and Stella Mason, visited the office of the respondents herein, and began negotiating with them regarding employing them to represent Stella and her estate.

"The proof shows that: Stella went to the office of respondent Vernor on Saturday before May 20, 1917. That on Sunday, Stella went away from Muskogee, Okl., to Taft, Okl., and returned to Muskogee on Sunday night, May 20, 1917, but before going to Taft, it was arranged between Stella, her sister, her brother-in-law, and other colored friends and associates, and also with Mr. Vernor and Mr. Brook, the respondents, that Stella would go to the office of respondent Brook immediately after midnight on May 20, 1917, for the purpose of negotiating and entering into a contract from

the employment of these respondents. That upon returning from Taft that night to Muskogee, these colored people, including Stella, went to respondent Brook's office where they were shown a typewritten contract already prepared, employing respondents as Stella's attorneys. This contract was discussed to some extent and read, and shortly after midnight, and within an hour after she became of age, executed between Stella and the respondents. The colored lawyer, Sango, was not at this meeting; neither was Isaac Mason, Stella's husband, there. This contract may be found, commencing at page 23 of the transcript, and, in substance, is a contract of employment, whereby Stella Mason employed the respondents herein jointly and severally as her sole and only attorneys at law for a term and period of five years from its date for the sum of \$5,000 for each and every year thereof, payable annually in advance. That said contract by its terms was in such form as to constitute a mortgage on the oil-producing lands of Stella Mason to secure the full and faithful payment of the \$25,000 provided therein, the same to be a first lien on the land, and to be capable of enforcement as a mortgage, and this document, at about 9 o'clock in the morning of May 21, 1917, after her signing it, after midnight on the same morning at Muskogee, was filed for record in Okmulgee, Okmulgee county, Okla., wherein said lands were situated.

"(2) At the time of the contract between Stella Mason and the respondents herein, her guardian C. Benjamin Jefferson had in his possession of liquid assets belonging to her estate approximately \$67,000, the same consisting of mortgages, notes, time deposits in banks and other securities, in addition to the lands which were producing oil. That Stella's estate at that time was of the value approximately of \$115,000 to \$135,000, but under the evidence the respondents at the time of making the contract believed the estate to be of much greater value. That within a very short time after said contract of employment of respondents, Stella's guardian, C. Benjamin Jefferson, went with the respondents to the judge of the county court of Muskogee county, Okla., he being a brother of respondent Vernor, and turned over into the judge's keeping such assets of the estate as were subject to delivery, such as notes, mortgages, and time certificates of deposit, and filed his final report as guardian, and on or about May 25, 1917, certificates of deposit aggregating \$20,000 were turned over to Stella Mason or her attorneys, the respondents herein. These certificates were converted into cash, and between the dates of her becoming of age on May 21, 1917, and June 1, 1917, Stella Mason had disposed of these funds in substantially the following manner; \$5,000 to the respondents for their first yearly payment; \$4,000 to O. Benjamin Jefferson, her guardian; \$1,500 to other attorneys who had attended to some matters for the estate; \$3,000 in settlement with Isaac Mason; nearly \$2,000 for an automobile and repairs; nearly \$1,000 for furniture. So that, within a very short time, approximately within two weeks after becoming of age, she had received and disposed of all of this \$20,000 turned over to her, except a few hundred dollars, and had placed a lien on her

oil-producing lands, as above stated. The \$4,000 paid to Jefferson, her guardian, was upon the advice of respondents, and was by way of compromise of a claim of \$5,000 he had put in against the estate under the contention that he was entitled to extra compensation for services rendered therein, although he had been allowed payment for his services up to and including February 17, 1917, immediately prior to his receiving this sum about the 26th of May, 1917.

"(3) I find from the evidence that shortly after May 21, 1917, Isaac Mason filed a petition in the county court of Muskogee county, Okla., asking that a guardian be appointed for his wife, Stella, on the ground of her incompetency and inability to handle her estate; that in this proceeding a firm of lawyers, Brown & Stuart, and S. V. O'Hare, represented Isaac Mason; that upon learning of this proceeding the respondent Vernor placed what funds Stella Mason had remaining in his individual name in the bank, as he explained, for the purpose of preventing them being tied up; that about May 31, 1917, and after this petition for guardianship was filed, Isaac Mason was called on the telephone by O. Benjamin Jefferson; he went to Jefferson's office and employed Jefferson to represent him, and went with him to respondent Vernor's office, where some kind of a settlement was effected with Isaac Mason, whereby Vernor paid Mason \$3,000 in money out of Stella Mason's estate, and had Stella Mason convey to Isaac Mason a half interest in a house in Washington, D. C., and in an automobile, and in the terms of which settlement Isaac Mason entered into a stipulation for the dismissal of the guardianship proceedings. To effectuate this settlement, the respondent Vernor had agreed to pay O. Benjamin Jefferson a fee of \$500. After the respondent Vernor had paid Isaac Mason the \$3,000 in an inner room, Jefferson was in another part of the office, where he met Mason with the money and claimed one half of it as his fee in representing him as against Stella, his wife. Some argument and controversy arose in the matter, but Isaac Mason paid O. Benjamin Jefferson \$1,050 of the money, in \$50 bills, and Isaac Mason was advised by both respondent Vernor and O. Benjamin Jefferson that the best thing he could do, now that he had settled, was to take the train and leave the state. In the meantime, and before Isaac Mason received the money, he had gone with the respondent Vernor to the office of the county judge of Muskogee county, Okla.; they had filed a stipulation dismissing the guardianship proceedings in open court, the judge taking the bench for the purpose of hearing the application, and upon hearing it dismissed the petition for guardianship. After Isaac Mason received the money upon returning from the court, he took the advice that had been given him, and entered a train to depart from Muskogee, but was found thereon by some other person, a Mr. Swanson, who also claimed some contract for fees from Isaac Mason, and Mason was induced to leave the train, and did so shortly thereafter, went to or was found by Messrs. Brown & Stuart, two of the attorneys who had filed the petition for guardianship, and in the following morning Isaac Mason filed an application to have the order of dis-

missal set aside and the petition to have a guardian appointed for Stella Mason reinstated. After this complication had arisen, the respondents declined to pay Jefferson the \$500 it had been agreed upon he should receive regarding the settlement with Isaac Mason and the said sum has never been paid. In making the settlement with Isaac Mason and in obtaining the stipulation for dismissal and in having the petition for guardianship dismissed, the respondents knew that Messrs. Brown & Stuart and S. V. O'Hare were Isaac Mason's attorneys, but did not consult with them or advise them of the proceedings, or have them present in court when the dismissal occurred. The petition to reinstate the petition for guardianship was heard in the county court of Muskogee county, Okl., by a special judge agreed upon by the parties, and a guardian was appointed for Stella; an appeal was taken to the district court of Muskogee county, Okl., a judge was brought in from another district, and the action of the county court in appointing a guardian was sustained in the district court. The case then found its way into the Supreme Court of the state, wherein the same was pending at the time of this hearing, but was later dismissed.

"(4) Your referee is of the opinion from the evidence and all the surrounding circumstances and facts disclosed in this case that at the time of making the contract of employment with the respondents herein the said Stella Mason, née Manuel, was an ignorant, inexperienced negro girl, who, although she had had some schooling, was wholly incompetent and incapable of handling her affairs or of making the contract that she made and entered into with the respondents, and that she was incompetent and incapable of protecting herself or of making a wise and just contract, or one that would protect her interests, and that this finding is amply supported by reference to the very contract she made and the way she handled her estate during the brief time a part of it was subject to her control.

"(5) Your referee finds that at the time of the making of the contract between Stella Mason and the respondents her estate was not in litigation, and was in no wise incumbered, and was free and clear; was producing an income, and she was receiving rents and interest on her invested capital, and was so situated as to have about as little use for attorneys as it is possible to conceive of. It is true that a suit for divorce was pending between her and her husband, but this fact would furnish little, if any, necessity for the contract made.

"(6) Your referee is of the opinion and finds that, in view of all the circumstances surrounding the making of this contract, terms, the inexperience and incompetency of Stella Mason upon the one hand, the experience and legal knowledge of the respondents upon the other, together with the situation and surroundings under which the parties acted with regard to this contract, the way it was obtained was unethical and unconscionable. I am not unmindful of the expert testimony as to reasonable fees found in the record, but in my judgment such estimates were hypothetical questions, in which many of the important elements involved here were not taken into account.

"(7) Your referee finds that at the time of the making of this contract the respondents herein were each of them duly and legally licensed attorneys at law, practicing in the Supreme Court and other courts of this state, that they were each engaged in the practice of law in the city of Muskogee, Okl., but that they were not partners nor occupying the same offices nor officing in the same building; that the respondent Vernor is a brother of the then county judge of Muskogee county, Okl., but your referee finds that there is not sufficient evidence to sustain the charge that his relationship to the county judge was used to influence this employment. The fact itself was, of course, known to all these parties, and it may have been, and probably was, a factor in inducing them to go to respondent Vernor, but there is no evidence, or, at least, not enough, to justify a finding that either of the respondents herein used the fact for the purpose of obtaining the employment.

"(8) Your referee finds that respondent Vernor knew nothing about these people, and never talked to any one about being employed in the matter until after Stella Mason came back to Oklahoma from Washington, D. C., and within two or three days at the farthest from the time she entered into the contract of employment with him. But as to respondent Brook it appears in Sango's testimony that he told Mr. Brook before he went to Washington, D. C., after Stella, in an effort to get her to employ him (Sango), that if he got the employment, he might want respondent Brook to assist him, but there is no evidence to justify a finding that Brook had anything to do with Sango's going or encouraging him in the matter, or, in fact, made any reply to him.

"(9) Your referee finds that after Stella Mason made the contract of employment with respondents herein that A. G. W. Sango, the colored attorney who had brought her back with him from Washington, D. C., made the claim to respondents that he was entitled to a portion of the proceeds derived from the contract, and that this contention was settled by respondents paying to Sango \$1,000 in full settlement of his claim. The evidence does not disclose whether there was any working agreement between Sango and the respondents. That Sango was actively engaged in trying to get himself employed, however, seems certain.

"(10) Your referee finds that both of the respondents herein are comparatively young in age and in the practice; that they are intelligent and educated; and that up to the time of the investigation, out of which this petition for disbarment grew, their reputation as men and as attorneys at law in the community at Muskogee, Okl., and where they were known, was good."

#### Conclusions of Law.

"Your referee concludes that the conduct of the respondents herein, in making the contract they did with Stella Mason, under the circumstances, surroundings, and in the manner in which it was made, and considering its subject-matter and the unequal situation between the parties making the same, was unethical and unprofessional, and that in so doing said respondents, and both of them, were unmindful

of their duties as attorneys at law, and did not observe the same, and that in so doing their conduct was calculated to bring the profession of law into disrepute. Your referee also concludes that the respondents herein were unethical and unprofessional toward the attorneys for Isaac Mason in obtaining the dismissal of the guardianship he had filed, and with full knowledge of who his attorneys were, and that they lived in the same town and without advising them of the situation and in taking the orders of dismissal in their absence and without their knowledge, and also in their dealings with and payments to A. G. W. Sango, who confessedly rendered no services as an attorney to their (respondents') client."

[1] To this report of the referee exceptions were filed by the respondents. As was said by this court, in *Re Relly*, 75 Okl. 192, 183 Pac. 728:

"The referee in a disbarment proceeding is an officer of the court, and the court has full authority to supervise and control his report by setting it aside, or confirming or modifying it as the facts and the law require." 23 R. C. L. 300; *Krapp v. Aderholt*, 42 Kan. 247, 21 Pac. 1063.

[2, 3] The rule to be applied in considering the report was stated in *Town of Grove v. Haskell*, 31 Okl. 77, 116 Pac. 805, as follows:

"The report of the referee appointed to take the evidence and report the same to this court with his findings of fact and conclusions of law would not be conclusive on either. It should and would be accorded every reasonable presumption of being correct, with the burden on the party attacking it, but to be freely set aside by the court if found to be incorrect."

As was further said in *Re Relly*:

"The serious consequences of disbarment should follow only where there is a clear preponderance of evidence against the respondent. In such proceeding the attorney sought to be disbarred is presumed to be innocent of the charges preferred, and to have performed his duty as an officer of the court in accordance with his oath, and the evidence in support of the charges must satisfy the court to a reasonable certainty that the charges are true and warrant a judgment of disbarment." In *re Sitton*, 177 Pac. 555; In *re L. C. McNabb*, 76 Okl. 253, 185 Pac. 431.

Following the findings of the honorable referee, he recommends as follows:

"Taking into account all of the surrounding circumstances, your referee is of the opinion that the respondents herein should be punished, but is inclined to believe that a definite suspension of the right to practice their profession for a definite period of time, to be fixed by the court, would be sufficient, and so recommends."

[4] From an examination of the evidence we find that the findings of fact of the referee are amply supported by the evidence, and, not only so, but in modification thereof, we find that the conduct of the respondents

in the management of the business of their client, after obtaining the contract of employment, was a direct violation of both the letter and spirit of subdivision 3 of section 252 of R. L. 1910, which provides that one of the sufficient causes for revoking or suspending the license of an attorney or counselor at law is: "For the willful violation of any of the duties of an attorney or counselor."

The acts and motives which should move an attorney in his relation with his client, and the conduct which should control in that regard, is laid down in 2 R. C. L. 187, as follows:

"For an attorney to act toward a client otherwise than with the utmost good faith is unprofessional, and therefore any advice given by the attorney which he does not believe to be correct, and any action whatever taken by him with a view of injuriously affecting his client, or of obtaining some advantage for the attorney to the prejudice of his client, justifies a disbarment. The relation of attorney and client is of a confidential nature, and therefore any contract between them during the continuance of that relation is closely scrutinized, to the end that the attorney may not gain any advantage either from his superior knowledge, or from the confidence reposed in him, and there have been instances in which, because of his entering into contracts with his client of a highly advantageous character to himself, he has been deemed to have acted from unconscionable motives and to be unfit to be continued in the profession."

This is a rule that is laid down by all the authorities and upheld by all the text-writers. One of the decisions, which is probably more often quoted on this question than any other, is the case of *Fairfield County Bar Association v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767, wherein the court says:

"It is not enough for an attorney that he be honest. He must be that, and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices. If he so conducts himself in his profession that he does not deserve that confidence, he is no longer an aid to the court nor a safe guide to his clients. A lawyer needs to be learned. It would be well if he could be learned in all the learnings of the schools. There is nothing to which the wit of man has been turned that may not become the subject of his inquiries. Then, of course, he must be especially skilled in the books and rules of his profession. And he must have prudence, and tact to use his learning, and foresight, and industry, and courage. But all these may exist in a moderate degree, and yet he may be a creditable and useful member of the profession, so long as the practice is to him a clean and honest function. But possessing all these great faculties, if once the practice becomes to him a mere 'brawl for hire' or a system of legalized plunder, where craft and not conscience is the rule, and where falsehood and not truth is the means by which to

gain his ends, then he has forfeited all right to be an officer of any court of justice, or to be numbered among the members of an honorable profession."

The exceptions to the findings and conclusions of the referee are overruled.

The findings and conclusions of the referee are accordingly confirmed, and it is ordered that the respondents, and each of them, be suspended from practicing as attorney or counselor at law in any of the courts of this state for a period of six months.

RAINEY, V. C. J., and KANE, McNEILL, and BAILEY, JJ., concur.

(79 Okl. 115)

LOWE et al. v. CONSOLIDATED SCHOOL DIST. NO. 97, BLAINE COUNTY, et al.  
(No. 11149.)

(Supreme Court of Oklahoma. Aug. 10, 1920.)

*(Syllabus by the Court.)*

1. Elections  $\S$ 44—Not to be held void for want of notice in absence of pleading or proof relating thereto.

Where a special election is assailed on the ground of lack of compliance with all the statutory requirements with reference to notice, but there is no averment or showing that the electors did not have actual notice or knowledge of the election, and failed to participate therein by reason thereof, the same will not be held void on this account.

2. Schools and school districts  $\S$ 39—No provision for appeal from superintendent's action as to consolidation.

There is no constitutional provision, or legislative enactment, which provides for an appeal from the action of the county superintendent in attaching to and making a part of a consolidated school district a part of an adjacent school district, upon a petition signed by a majority of the legal voters of such territory desiring to be attached, and the board of directors of such consolidated school district, under section 1, art. 7, c. 219, Laws 1913, and such detached territory becomes a part of the consolidated district from the day the order is made.

3. Schools and school districts  $\S$ 97(4)—Qualified residents of territory attached to consolidated school district may vote on bond issue.

All persons, including females, residing in a consolidated school district, and possessing the qualification of electors, as defined by the Constitution and laws of this state, are entitled to vote on the question of issuance of bonds for said school district, although the territory in which they reside has been a part of the school district for less than 30 days.

4. Schools and school districts  $\S$ 91—Provision as to bonds held not repealed by later statute.

Section 7835, Rev. Laws 1910, was not repealed by chapter 219, Laws 1913.

Error from District Court, Blaine County; Thos. A. Edwards, Judge.

Action for injunction by H. T. Lowe and another against Consolidated School District No. 97, Blaine County, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Seymour Foose and R. C. Brown, both of Watonga, for plaintiffs in error.

Geo. P. Glaze, of Oklahoma City, for defendants in error.

RAINEY, C. J. This action was commenced in the district court of Blaine county by the plaintiffs, who were residents of consolidated school district No. 97, against said consolidated school district as defendant, for the purpose of restraining the issuance of bonds in the sum of \$20,000, voted by the electors of said consolidated school district for schoolhouse purposes. Trial was to the court, resulting in a judgment for the defendant, from which the plaintiffs have appealed.

[1] The first error assigned is that the election was void for the want of legal notice of the time of holding it, and under this assignment it is contended that one of the five notices of said election required to be posted by section 7837, Rev. Laws 1910, fixed the date of the election as the 25th day of May, 1919, when in fact the election was held on the 29th day of said month. This discrepancy is explained by Mr. Thomas, one of the witnesses for the plaintiffs, who testified that it was at first intended to hold the election on the 24th day of May, and that notices were prepared for that date, but that it was later decided to hold the election on the 29th, and that the notices, which were afterwards posted, were made to read the 29th, instead of the 24th. He further testified that the figures were changed from "24" to "29" on each of said notices, but that after about 12 days the figure "9" had disappeared from one of the notices, and "4" appeared in lieu thereof. It was contended that this was probably caused by climatic conditions. But, conceding that one of the notices, by inadvertence, did read the 24th, instead of the 29th, this irregularity would not defeat the election, in the absence of an averment or showing that the electors did not have actual notice or knowledge of the election and failed to participate therein by reason thereof. The rule prevailing in this jurisdiction has been recently reannounced in cause No. 11254, J. A. Ratliff et al. v. State of Oklahoma ex rel. W. H. Woods,

County Attorney of McClain County, 191 Pac. 1088, in an opinion rendered August 10, 1920 (not yet officially reported), wherein, in the second paragraph of the syllabus, we held:

"Where a special election is assailed on the ground of lack of compliance with all of the statutory requirements in reference to notice, but there is no averment or showing that the electors did not have actual notice or knowledge of the election and failed to participate therein by reason thereof, the same will not be held void on this account."

To the same effect are *Grove v. Haskell*, 24 Okl. 707, 104 Pac. 56; *McCarty v. Cain*, 27 Okl. 82, 110 Pac. 653; *Hughes v. City of Sapulpa*, 75 Okl. 149, 182 Pac. 511. See *Lamb v. Palmer et al.*, 191 Pac. 184, decided July 13, 1920, but not yet officially reported.

In the instant case there is nothing in the record to show that any elector was misled or prevented from casting his ballot on account of insufficiency of notice of the time of the election. On the contrary, it is clearly shown that great diligence was exercised in notifying the voters. Printed handbills were distributed, urging people to vote at the election on the question of issuing the bonds, and a newspaper published within the district contained notice of the time and place of holding the election in two weekly issues.

The same principle of law governs the next contention made by plaintiffs, which is that the notices, as posted and published, stated that the election would be held "at the schoolhouse in said district," and that such notices were ineffective, on account of the fact that there were two schoolhouses in said district, and the notices failed to designate at which of said schoolhouses the election would be held. The evidence in the record shows that, in fact, there was a building belonging to said school district which had at one time been used as a schoolhouse by district No. 77, which had, prior to the election, become a part of consolidated school district No. 97, but it had never been used for school purposes since it became the property of defendant school district. It was neither alleged nor proven that any voter was misled or prevented from casting his ballot on account of the alleged insufficiency of the notice in this respect, and we must confess that we do not perceive any merit in this objection.

[2] It is next asserted that 9 illegal votes were cast, by 9 persons who were not qualified voters of the district, and that since there were 263 votes cast in the election—160 for, and 103 against the issuance of the bonds—that with the 9 alleged illegal votes eliminated the proposition of issuing the bonds failed to receive the votes of three-fifths of the qualified electors of the district voting at such election, as required by law. It is claimed, in support of this assertion, that the territory in which said voters resided was not a part of consolidated school

district No. 97 at the time of the election. Section 1, art. 7, c. 219, Sess. Laws 1913, provides for the establishment of consolidated school districts, and the proviso to said section is:

"That all or a part of any district adjacent to a consolidated district shall be attached to and become a part of such consolidated district upon petition to the county superintendent signed by a majority of the legal voters of such territory desiring to be attached and by the board of directors of such consolidated district."

The procedure thus authorized was followed in attaching the territory in which the contested voters resided to the consolidated school district; the order of attachment being made by the county superintendent on May 28, 1919, which was one day before the election. But plaintiffs say that the right of appeal existed for 10 days thereafter, and that under the authority of *Fowler v. Green*, 176 Pac. 222, such order did not become final until the expiration of 10 days from the time it was made. The opinion cited relates to an appeal from an order made by a county superintendent attaching territory from an independent school district, and construes the proviso to section 2, art. 6, c. 219, Sess. Laws 1913, which reads:

"Provided, that if any party or parties should object to the changing of the school district boundaries, they shall have the right to appeal as provided for appealing from the decision of such county superintendent in changing the boundaries of other school districts."

It is unnecessary for us to pass upon the construction of the case of *Fowler v. Green*, supra, for that case dealt with a statute not applicable to the case at bar. In the case of *Cleal et al. v. Higginbotham et al.*, 49 Okl. 362, 153 Pac. 64, relative to the right of appeal in creating a consolidated school district pursuant to section 1, art. 7, c. 219, Sess. Laws 1913, this court said:

"There is no constitutional provision or legislative enactment which provides for an appeal, either from the action of the county superintendent of public instruction to the board of county commissioners, or from the board of county commissioners to the district court, for the purpose of reviewing the action of the people themselves and the county superintendent in creating a consolidated school district, pursuant to section 1, art. 7, c. 219, Session Laws of 1913. The right of appeal exists only where especially given by constitutional or legislative enactment, and cannot be extended to cases which do not come within the statute.

The identical question before the court in the *Cleal Case* was the question of whether the right of appeal existed from the action of the people themselves and the county superintendent in creating a consolidated school district; but the law, as announced in

said decision, is applicable to the instant case, for the reason that the act likewise does not give the right of appeal from the order of the county superintendent attaching a part of an adjacent district to a consolidated school district. We are of the opinion that the order was effective from the date it was made, and that on the date of the election the territory of which the alleged illegal voters were residents was a part of the consolidated school district No. 97.

[3] It is further insisted that, even though the territory was a part of the consolidated school district, the 9 contested voters were not legal voters of the district on said date, for the reason that they had not resided "in the election precinct thirty days next preceding the election," as provided by section 1, art. 8, of the Constitution. Section 7, art. 8, c. 219, Sess. Laws of 1913, provides:

"All persons, including females, residing in the district and possessing the qualifications of electors, as defined by the Constitution and the laws of the state, shall be entitled to vote at any district meeting."

Section 1, art. 8, *supra*, of the Constitution, provides that:

"The qualified electors of the state shall be male citizens of the United States, male citizens of the state, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote."

From the evidence in the record it conclusively appears that each of the contested voters had continuously resided in the same place for several years prior to May 29, 1919, the date of the election, and had resided within the election precinct for the time required by law. Counsel for plaintiffs seem to confuse the school district boundaries with the election precinct boundaries in considering the qualifications of these electors.

[4] Another proposition urged is that there was no law authorizing an election for the purpose of determining the will of the voters on the question of issuing the bonds for the purpose of erecting a schoolhouse in the consolidated school district. Section 7835, Rev. Laws 1910, authorizes the holding of elections for the purpose of voting bonds for purchasing sites and erecting school buildings, but counsel for plaintiffs insist that chapter 219, Sess. Laws of 1913, operated to repeal section 7835, Rev. Laws 1910, and since said chapter 219 does not contain any specific provision for purchasing or erecting school houses in consolidated school districts none exists. Chapter 219, Sess. Laws 1913, does not specifically repeal section 7835, Rev. Laws 1910, and inasmuch as the school laws of

1913 do not cover all the school questions contained in the Revised Laws of 1910, we cannot say that said section 7835, Rev. Laws 1910, was repealed by implication. State *ex rel. Oklahoma City v. Superior Court of Oklahoma County*, 40 Okl. 120, 136 Pac. 424. To so hold would mean that there was no way of acquiring or erecting school buildings in consolidated districts. This is clearly against the obvious intention of the Legislature.

The remaining assignments of error are premised on the proposition that the 9 persons residing in the territory attached by order of the county superintendent to the consolidated school district were disqualified voters, and since we have taken a contrary view we need not further consider these assignments.

Finding no error in the record, the judgment of the trial court is affirmed.

KANE, HARRISON, PITCHFORD, JOHNSON, McNEILL, and RAMSEY, JJ., concur.

(79 Okl. 63)

McINTOSH v. HOLTGRAVE et al.

(No. 9810.)

(Supreme Court of Oklahoma. July 18, 1920.)

(Syllabus by the Court.)

1. Judgment  $\S$ 443(1)—Motions  $\S$ 59(1)—District courts have jurisdiction to vacate judgments of other courts for extraneous fraud.

The district courts of this state, in exercising their equitable jurisdiction, have power to vacate and annul orders or judgments of other courts in a proceeding brought for that purpose, for fraud in inducing or entering into such order or judgment, where such fraud is extraneous to the issues in the proceeding attacked, and especially where the court has been imposed upon by such fraud.

2. Judgment  $\S$ 420—Process  $\S$ 141—False return of officer not conclusive on direct attack.

When an officer makes a false return of personal service on which judgment is rendered, when in fact there has been no service at all, such return is not conclusive, in a direct attack against said judgment, nor in a proceeding in equity to set aside said judgment for fraud, practiced by the opposing party, in procuring said service or return.

3. Judgment  $\S$ 461(2), 497(2)—Recital of personal appearance of defendant conclusive in collateral, but not direct, attack; effect of fraud stated.

In a domestic judgment, when the judgment recites that the defendant appeared personally in court, such finding is conclusive in a collateral attack on said judgment, but is not conclusive

in a direct attack on said judgment, nor in an equitable proceeding, to set aside said judgment for fraud when in fact the party did not appear, and said recital in said judgment was procured by the fraud of the successful party, said fraud being extrinsic to the issues.

**4. Judgment**  $\S$ 336, 403, 518—Modes of attacking domestic judgment, enumerated; "direct attack"; "collateral attack."

A domestic judgment may be attacked in three ways:

(a) By a direct attack, which is an attempt to avoid or correct it in some manner provided by law.

(b) A collateral attack, which is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.

(c) By an equitable proceeding to set aside said judgment for fraud practiced by the successful party, said fraud inducing or entering into such order or judgment, where such fraud is extrinsic to the issues in the proceeding attacked, and especially where the court has been imposed upon by such fraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Collateral Attack; Direct Attack.]

**5. Vendor and purchaser**  $\S$ 242—Purchaser must establish good faith by proof.

Purchasers of land which has been fraudulently transferred to their grantor must establish the good faith of their purchase, and it cannot be presumed.

Pitchford, J., dissenting.

Appeal from District Court, Creek County; Ernest B. Hughes, Judge.

Action by Ananias McIntosh by Arthur W. S. Wright, his guardian, against W. H. Holtgrave and others. Judgment for defendants on demurrer, and plaintiff appeals. Reversed and remanded, with instructions.

H. B. Martin, R. A. Reynolds, and H. A. Guess, all of Tulsa, for plaintiff in error.

John G. Ellinghausen and Edwin A. Ellinghausen, both of Sapulpa, for defendants in error.

McNEILL, J. This action was commenced in the district court of Creek county by the plaintiff in error through his guardian, W. S. Wright, to set aside a certain guardianship proceeding and guardian deed and for judgment decreeing the plaintiff in error to be the owner of certain real estate. The petition alleged that the plaintiff was a Creek freedman, and received certain lands as his allotments. The material allegations of the petition are that on September 1, 1908, plaintiff was a minor under the exclusive care of his mother, Stella McIntosh, alias Stella Drew, living at Shawnee, Okl., and his father, Pompey McIntosh, alias Drew, was residing at Wagoner; that said Pompey Mc-

Intosh presented a petition to the county court of Wagoner county, asking to be appointed guardian of the estate of said minor, and the county court refused to appoint the petitioner, but did appoint James H. Kennedy, who thereafter sold the lands of this minor through the probate court. Copies of all the guardianship proceedings were attached to the petition. It is alleged that the guardianship proceedings disclosed that Stella McIntosh had been served with a notice of the application for the appointment of guardian, and that the order of the court recites that she appeared personally in court and consented to the appointment of James H. Kennedy as guardian.

It then alleges that Stella McIntosh, alias Stella Drew, the mother of the minor, was not present in Wagoner county at the time of the hearing, but resided in Shawnee, Okl., and had no knowledge of the proceedings, and that the proceedings were fraudulent, and were a fraud upon the rights of the minor, in that the person who represented in court that she was Stella McIntosh, alias Drew, was not in fact Stella McIntosh, but was some person unknown to plaintiff, who presented herself to the court, and made said representations for the purpose of deceiving the court, and defrauding said minor out of his property. It is alleged, by reason of the fraudulent representations made by said Pompey McIntosh, alias Drew, and the person who represented herself as Stella McIntosh, alias Drew, the court was induced to appoint James Kennedy as guardian. The petition then asks to have the proceedings declared void, for the reason the court acquired no jurisdiction, and the appointment of the guardian set aside, and the guardian's deed, all of which was obtained by fraud. To this petition, the defendants filed a general demurrer, which was sustained by the court, and, plaintiff having elected to stand on his petition, the court dismissed the petition at plaintiff's cost. From said judgment the plaintiff has appealed.

The question presented is, Did the petition state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant? Or the question may be stated, Can a minor in an equity proceeding set aside guardianship proceedings, and the sale of his land had thereunder, where the proceedings appear regular on their face, and the minor attacks the orders and judgment for want of jurisdiction of the court by reason of fraud practiced upon the court by the prevailing party, where such fraud is based upon facts extrinsic to the issues, and especially where the court has been imposed upon by such fraud and the minor has been deprived of his property by reason thereof? The statute which regulates the appointment of guardians (Rev. Laws 1910, § 6522) provides as follows:



"Before making the appointment the judge must cause such notice as he deems reasonable to be given to the relatives of the minor residing in the county, and to any person having care of such minor."

[1] The petition in the instant case alleged that at the time of filing the petition for appointment of guardian the minor was two years of age and was under the exclusive care and custody of his mother. Under the statute and the allegations of the petition it was essential that the mother have notice for the court to acquire jurisdiction. For the purpose of the demurrer, the allegations of the petition must be considered as true. The question then presented is, Does the district court have power and jurisdiction in an equity proceeding to set aside and annul the orders and judgment of the county court on account of fraud in inducing or entering into such order or judgment, where the fraud practiced was extrinsic to the issues, and where the court has been imposed upon by such fraud? Such is the holding of this court in the case of *Brown v. Trent*, 36 Okl. 239, 128 Pac. 895; *Elrod v. Adair*, 54 Okl. 207, 153 Pac. 660; *Bridges v. Rea*, 166 Pac. 416; *Brewer v. Dodson*, 60 Okl. 81, 159 Pac. 329; *Griffin v. Culp*, 174 Pac. 495; *Baldrige v. Smith*, 76 Okl. 36, 184 Pac. 153.

There can be no question but what the petition states a cause of action, unless it can be said to be fatally defective by reason of the allegations in the petition that the records disclosed that the mother of the minor was personally served, and the further allegation that the court found the defendant was present in court and had consented to the appointment of the guardian. Are these recitals in the judgment conclusive, and is the judgment conclusive and not subject to an attack in an equitable proceeding upon the ground that said recitals were false and untrue and the court was imposed upon by the fraud of the successful party, said fraud being extrinsic to the issues, and prevented the adverse party from appearing, or from having notice of the pending of said proceedings?

[2, 3] This court in the case of *Ray v. Harrison*, 32 Okl. 17, 121 Pac. 633, Ann. Cas. 1914A, 413, stated as follows:

"When an officer makes a false return of personal service on which judgment is rendered, when in fact there has been no service at all, such return is not conclusive evidence against the fact."

This same principle has been followed in the case of *Caulk v. Lowe*, 74 Okl. —, 178 Pac. 101. See *Griffin v. Culp*, 174 Pac. 495, where Justice Rainey, speaking for the court stated as follows:

"When want of jurisdiction appears on the face of the proceedings of a court of general jurisdiction, whether expressly or by necessary implication, and whether as to the subject-matter or as to the parties the judgment is void,

and will be so treated even in a collateral attack, but in the case of a domestic judgment of a court of general jurisdiction want of jurisdiction cannot ordinarily be shown by extrinsic evidence, in a collateral attack, but may be shown on a direct attack; but where parties by sufficient pleadings assail a judgment for want of jurisdiction because of fraud, extrinsic to the record, practiced by the prevailing party on the court or on the party against whom the judgment was rendered, parol evidence is admissible in support of such pleadings, and it is immaterial whether such an attack be denominated 'direct' or 'collateral.'"

Decisions of this court which may be considered holding to the contrary are the cases of *Continental Gin Co. v. De Bord*, 34 Okl. 66, 123 Pac. 159, wherein the court stated:

"When, in a judicial proceeding, the court expressly finds that the defendant is present, such finding is not subject to attack in a collateral proceeding"

—and the cases following that rule to wit: *Rice v. Woolery*, 38 Okl. 199, 132 Pac. 817; *Blackwell v. McCall*, 54 Okl. 96, 153 Pac. 815; *Daugherty v. Feland*, 59 Okl. 124, 157 Pac. 1144. The rule announced in both lines of cases is correct. The rule announced in the case of *Ray v. Harrison* is correct where the judgment is attacked by direct attack, or by a proceeding in equity to set aside the judgment upon grounds of fraud extrinsic to the issues. The rule announced in the case of *Continental Gin Co. v. De Bord* is a correct statement of the law in so far as it pertains to a collateral attack, but is not a correct statement of the law when applying to direct attacks, or to a proceeding in equity based upon fraud extrinsic to the issue. This court expressed its opinion upon this same question in the case of *Griffin v. Culp*, when the court, speaking through Justice Rainey, stated as follows:

"The distinction in the two divergent theories is in name only. In any case, if the matters alleged in the pleadings are permissible under the provisions of the Code hereinafter mentioned, and a party to the action assails, by such pleadings, a judgment for want of jurisdiction because of fraud extraneous to the issues, practiced upon the court or on the party against whom the judgment was rendered, that prevented him from having a fair opportunity to present his case, the same evidence is admissible in support of such pleadings whether the attack is denominated direct or collateral."

[4] In my opinion Justice Rainey blazed the way to clarify the opinions, not only of this court, but of the courts of the different states. The courts in announcing the kinds of attack that may be made upon a domestic judgment always classify them as either direct attacks or collateral attacks, and define direct attack as follows:

"A 'direct attack' on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law"

—and collateral attack as follows:

"A 'collateral attack' on a judicial proceeding is an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it."

The confusion in the opinions has arisen by the courts attempting to determine whether an equity proceeding is a direct attack or a collateral attack, and upon this they disagree, and this is the basis for the confusion in the opinions in many cases, and upon which the courts disagree. One court under a state of facts will hold that an equity proceeding for fraud extrinsic to the issues is a direct attack, and set aside the judgment; another court will hold it is a collateral attack, under the same pleading and evidence, and hold the recitals in the judgment conclusive. In my judgment it is, strictly, neither, but it is more in the nature of a direct attack. In my judgment, if the court would classify the different proceedings by which a judgment might be attacked under three classifications, to wit: First, direct attack; second, collateral attack; and, third, proceedings in equity, because of fraud extrinsic to the issues which prevented the complaining party from having a fair hearing—this would avoid much of the confusion. If such a classification was made, the opinions hereafter would not be as conflicting nor confusing either to the members of the bar or the trial court in attempting to apply the correct rule. There is no case which does not come within one of these classes. Commissioner Rosser in the case of *Brown v. Trent* stated:

"But an attack upon a judgment for fraud in its procurement is a direct attack over which courts of equity take jurisdiction, and no well-considered case can be found in which such jurisdiction is denied."

An examination of the cases which announce the rule that was followed in the case of *Continental Gin Co. v. De Bord* and the cases of this court following that case discloses that the cases were considered on no other theory than was the proceeding attacking the service of jurisdiction of the court a collateral attack. The cases were not considered by the court upon the theory that any of the attacks were an equitable proceeding to set aside a judgment on the grounds of fraud extrinsic to the issues, although a reading of the cases will disclose that in some of the cases they were in fact such proceedings, but in deciding the case the court did not consider them upon that theory, but only upon the theory that the proceeding was a collateral attack. As to whether the judgment which is regular on its face, and disclosed that the court had jurisdiction of the parties,

may be attacked in an equity proceeding to show the jurisdiction was not obtained, but the jurisdiction was based upon fraudulent pleadings, is discussed in a well-considered opinion by the Supreme Court of Massachusetts in the case of *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393, the syllabus of which read:

"This court has power, upon petition of the party aggrieved, to vacate a decree of divorce obtained at a former term against the petitioner by false testimony, on a libel of which she had no actual notice, knowledge of which was fraudulently kept from her by the other party, and of which the court had only an apparent jurisdiction, founded on his false allegations of domicile."

The court in the opinion, after setting forth that the case was in the nature of an equitable proceeding, stated as follows:

"These set forth a case in which it is clear that a party has procured a judgment of this court in his favor by the perpetration of a gross fraud, by means of which he induced this court to take cognizance of a case at a term of the court in a county in which it could not legally exercise jurisdiction over the parties, and to hear and determine it without giving to the adverse party any due or legal notice of the proceedings, or any opportunity to appear and be heard in the suit. The question to be determined is whether a judgment so obtained can be re-examined and set aside by the party aggrieved by the fraud, or whether it is to be taken as forever binding and conclusive on the rights and obligations of the parties."

"The statement of the question is of itself sufficient to make it apparent that, if there is no remedy by which judgments so procured to be rendered can be impeached and annulled, courts of justice may be made instruments by which the grossest frauds may be successfully accomplished, to the great wrong and injury of innocent persons. Such a conclusion cannot be supported, unless it is founded on adjudicated cases which this court is bound to regard as obligatory declarations of the law, or upon reasons of the most decisive and satisfactory nature."

"Upon careful examination of the authorities, we are entirely satisfied that they do not sustain the doctrine that courts have no power to grant relief to parties to a suit, against whom a judgment has been obtained by fraud. It is no doubt true that a decree or judgment which stands unreversed and in force cannot be called in question or impeached in collateral proceedings by one of the parties to the original suit; it is a very different proposition to maintain that an innocent party cannot invoke the power of the court by which the original judgment or decree was rendered, to vacate and annul it on the ground that it was procured by a fraud practiced on the court to his gross injury. We believe it to be an established principle of jurisprudence that courts of justice have power, on due proceedings had, to set aside or vacate their judgments and decrees, whenever it appears that an innocent party without notice has

been aggrieved by a judgment or decree obtained against him without his knowledge, by the fraud of the other party."

In the case of *Hilton v. Guyott* (C. C.) 42 Fed. 249, the court stated as follows:

"The term is indefinite, and when it is said that a judgment is vitiated and may be nullified by fraud it is not to be understood that the fraud which consists in false testimony, or the suppression of truth, in respect to the matters litigated on the trial of the action which resulted in the judgment is sufficient to have this effect."

Fraud such as will vitiate a judgment consists in preventing the complaining party from presenting the merits of his case, or imposing on the jurisdiction of the court, or corrupting the court, or collusion between counsel.

The Supreme Court of Illinois in the case of *Pratt v. Griffin*, 223 Ill. 349, 79 N. E. 102, citing *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342, stated as follows:

"'Fraud' is of two kinds with reference to judicial proceedings: Fraud in obtaining a decree by false evidence, and fraud which gives the court colorable jurisdiction over the defendant's person."

We are not interested in the fraud that comes within the first class, although it is universally held that such fraud cannot be the basis of an equity proceeding to set aside a judgment. The fraud that comes within the second class of cases includes the case where equity has intervened and set aside the judgment because it was obtained by such fraud. The Supreme Court of the United States, in the case of *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, enumerated the character of fraud that a court of equity would recognize, which is stated as follows: First. Fraud which prevents the unsuccessful party from fully exhibiting his case. Second. Fraud practiced upon the unsuccessful party by his opponent: (a) By keeping him away from court; (b) a false promise of compromise. Third. Where the defendant never had knowledge of the suit, being kept in ignorance of the case by fraudulent acts of the plaintiff. Fourth. Where an attorney fraudulently or without authority assumes to represent a party, and connives with the successful party. Fifth. Where an attorney, regularly employed, corruptly sells out his client's interest. The opinion then says, these and similar cases, which disclose there has never been a real contest

on account of fraud of the successful party in the trial or hearing of the case, are grounds upon which a court of equity will, in an independent suit, set aside or annul the former judgment or decree. This classification in the case of *U. S. v. Throckmorton* was approved by Justice Rainey in the case of *Griffin v. Culp* and by Commissioner Rosser in the case of *Brown v. Trent*.

Now, do the facts pleaded in the case at bar bring the case within the rule above announced? The fraud pleaded had the following result:

First. It prevented the minor from having his case presented in the court by reason of the fraud practiced upon the court and the minor by having fraudulent return made of the notice.

Second. The practice of fraud upon the court by having a third party fraudulently represent herself to be the mother of the minor and appear in court, and fraudulently attempt to give consent.

Third. The participation of the father in the fraud prevented the mother of the infant from having notice of the suit.

Fourth. There was never any real contest or trial or hearing of the case for the reason that the fraud was such that the hearing amounted to a farce and a mockery.

These acts of fraud as pleaded bring the case squarely within the rule advanced in the case of *U. S. v. Throckmorton*, supra.

[5] The defendant in error contends, however, the petition does not state a cause of action, for the reason that the parties are innocent purchasers, but that claim is not available at this time, nor can it be considered by the court at this time. If the defendants are innocent purchasers, it will be necessary for the defendants to plead and prove such fact. Such was the holding of this court in the case of *Adams Oil & Gas Co. v. Hudson*, 55 Okl. 386, 155 Pac. 220; *Tucker v. Leonard*, 76 Okl. 16, 183 Pac. 907. As to the right of innocent purchasers, it is unnecessary for us to determine their rights, or if they have any, until that question is presented.

For the reason stated the judgment of the court is reversed and remanded, with instructions to overrule the demurrer.

RAINEY, O. J., and HARRISON, KANE, and JOHNSON, JJ., concur.

PITCHFORD, J., dissents, for the reason the petition fails to allege that the purchaser at the guardian's sale purchased with notice of said fraud.

(17 Okl. Cr. 639)

**WILLIAMS v. STATE. (No. A-3327.)**

(Criminal Court of Appeals of Oklahoma.  
June 9, 1920. Rehearing Denied Sept.  
11, 1920.)

*(Syllabus by the Court.)*

1. Criminal law  $\S$  1159(2)—Conviction sustained by any competent evidence will not be reversed.

The trial jury is the exclusive judge of the weight of the evidence and of the credibility of the witnesses, and this court will not reverse a judgment of conviction where there is any competent evidence tending to support the same.

2. Homicide  $\S$  342—One cannot complain because convicted of a lesser crime than the evidence showed.

Where the defendant is placed on trial for murder and convicted of manslaughter in the second degree, he cannot legally complain because convicted of a less crime than the evidence shows him to have been guilty of.

3. Criminal law  $\S$  1186(4)—Unless error violated defendant's constitutional or statutory rights, judgment will not be reversed.

A judgment of conviction will not be reversed because of the improper admission of evidence, unless, after an examination of the entire record, it clearly appears that such error has probably resulted in a miscarriage of justice, or constitutes a violation of some constitutional or statutory right of the defendant.

4. Criminal law  $\S$  1038(1), 1063(6) — Instructions not objected to or questioned in motion for new trial will not be considered on appeal unless fundamentally erroneous.

Instructions not objected to in the trial court, nor called to the attention of the trial court in the motion for a new trial, will not be considered on appeal unless fundamentally erroneous.

Appeal from District Court, Payne County;  
John P. Hickam, Judge.

Harry Williams was convicted of the crime of manslaughter in the second degree, and he appeals. Affirmed.

J. M. Springer, of Stillwater, and E. G. Wilson, of Tulsa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. O. Hall, Asst. Atty. Gen., for the State.

**MATSON, J.** Harry Williams was convicted in the district court of Payne county, at the October term, 1917, of the crime of manslaughter in the second degree, and sentenced to serve a term of two years' imprisonment in the state penitentiary. The information charged the defendant with having murdered William Williams on the 12th day of June, 1917.

William Williams and the defendant were brothers. The killing occurred in a public highway in front of the home of the deces-

ed about the hour of 8 o'clock p. m. The only eyewitness to the tragedy, beside the defendant, was Annie Williams, the widow of the deceased. The testimony of Annie Williams, if believed by the jury, was sufficient to support a conviction of murder. The testimony of the defendant, if believed by the jury, would entitle him to be acquitted on the ground of self-defense.

It is first contended that the evidence is not sufficient to support the conviction. It is not necessary to enter into a lengthy discussion of this evidence. Counsel for defendant admit that on appeal a conviction will not be reversed where there is any evidence reasonably tending to support the guilt of the accused, but it is strenuously contended that Annie Williams, the only eyewitness to the tragedy who testified for the state, is not a credible witness, because she was impeached in the trial court.

[1] It is only necessary to reiterate that the trial jury is the exclusive judge of the weight of the evidence and of the credibility of the witnesses, and that this court will not reverse a judgment of conviction where there is any competent evidence tending to support the same. We find such evidence in this record.

[2] In this connection, it is also contended that there is no evidence which would tend in any way whatever to support a conviction for manslaughter in the second degree; that the defendant is either guilty of murder or nothing, and the jury should have found him either guilty of murder, or should have acquitted him on the ground of self-defense.

In the case of Robinson v. State, 15 Okl. Cr. 456, 177 Pac. 925, this court held:

"Where a defendant is placed on trial for murder and convicted of manslaughter in the second degree, he cannot legally complain because convicted of a less crime than the evidence shows him to have been guilty of."

[3] It is also contended that the court erred in admitting certain incompetent and irrelevant testimony in rebuttal to the effect that the defendant was intoxicated some two or three hours after the killing took place.

In view of the fact that the defendant admitted his intoxicated condition at that time, and was permitted to explain his intoxication, and that he drank a considerable quantity of intoxicating liquor immediately after the killing, and in view of the further fact that there was no controversy upon the question of whether or not he was intoxicated at the time of the killing, it cannot be said that the action of the trial court in the light of the entire record was prejudicial to the defendant in permitting certain witnesses to testify that the defendant was intoxicated some two or three hours after the homicide took place.

The Legislature has specifically provided,

by section 6005, Revised Laws 1910, that no judgment of conviction shall be reversed because of the improper admission of evidence, unless, after an examination of the entire record, it clearly appears that such error has probably resulted in a miscarriage of justice, or constitutes a violation of some constitutional or statutory right of the defendant.

[4] It is also contended that the court erred in giving instruction No. 14½ of the general charge to the jury, which said instruction related to the law applicable to self-defense.

This instruction was not excepted to in the court below. In fact, the record indicates that the instruction was probably given at the request of the defendant.

The specific objection urged against the instruction is that it is not applicable to the issues in the case. The instruction is not fundamentally erroneous, and in the absence of a specific objection taken to the same in the trial court, and in view of the further fact that this alleged error was not called to the attention of the trial court in the motion for a new trial, no question is presented properly to be considered on appeal.

Other instructions are complained of, but they are such as have heretofore been approved by this court in homicide cases, and are based upon statutory provisions relative to homicide. We find no reversible error in the action of the trial court in giving such instructions.

While the evidence in this case on the part of the state and that of the defendant is in direct conflict as to what occurred at the time of this killing, the jury having decided such conflict against the defendant, and the record before us disclosing no prejudicial error, it is the opinion of this court that the judgment of the district court of Payne county sentencing the defendant to serve a term of two years' imprisonment in the state penitentiary should be affirmed.

It is so ordered.

DOYLE, P. J., and ARMSTRONG, J., concur.

(17 Okl. Cr. 787)

IVEY v. STATE. (No. A-3500.)

(Criminal Court of Appeals of Oklahoma.  
Sept. 1, 1920.)

(Syllabus by Editorial Staff.)

Intoxicating liquors — 236 (6½)—Evidence held to show unlawful possession.

Evidence in a prosecution for the unlawful possession of intoxicating liquor held to sustain a conviction.

Appeal from County Court, Oklahoma County; W. R. Taylor, Judge.

A. L. Ivey was convicted of the crime of unlawful possession of intoxicating liquor, and he appeals. Affirmed.

D. S. Levy and S. A. Byers, both of Oklahoma City, for plaintiff in error.

S. P. Freelling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from the county court of Oklahoma county, in which court the said defendant, A. L. Ivey, was convicted of the crime of unlawful possession of intoxicating liquor, and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 90 days. To reverse this judgment of conviction, defendant has appealed to this court.

The evidence on the part of the state is to the effect that on the 10th day of May, 1918, the defendant was operating a rooming house at No. 718½ North Broadway, Oklahoma City; that about 9:30 o'clock p. m. on said day several officers of the Oklahoma City police force raided said premises, and in a plant under the floor of room No. 5 in said rooming house 12 or 14 quart bottles of whisky were found stored; that the defendant and his wife and some other parties were present in said room; that some of the officers had a conversation with the defendant, in which it was virtually admitted by the defendant that he was the owner of the whisky, and had disposed of a considerable quantity of the same that day before the officers got there. The proof is also conclusive that the defendant was in possession and control of the premises, every room of which contained a similar storage plant.

The defendant denied that he was in possession of the whisky, and claimed that it must have been stored in said plant before he took possession of the premises. The plant was located under a gas stove and under a zinc mat, and was so concealed that the same was not found by the officers until a second search of the room was made.

This court has examined the evidence, the instructions of the court, the judgment, and sentence, and has carefully considered all the assignments of error set forth in the petition, and the conclusion is reached that the defendant had a fair and impartial trial, that the instructions are as favorable to the defendant as the evidence would warrant, and that no alleged error is presented, such as should result in a reversal of this conviction.

The judgment of conviction is therefore affirmed. Mandate forthwith.

(111 Wash. 550)

**OSNER & MEHLHORN, Inc., v. LOEWE et ux.** (No. 15824.)

(Supreme Court of Washington. July 14, 1920.)

1. Bills and notes  $\S$ 452(3)—Payee's breach of oral promise, made contemporaneously with note, no defense.

In action on note, payee's breach of oral promise to employ maker, made contemporaneously with the note, the payee at the same time delivering to defendant the exact amount of money expressed in the note, is no defense.

2. Mortgages  $\S$ 454(1)—Answer in mortgage foreclosure action held insufficient pleading of fraud.

In mortgage foreclosure action, allegations in answer that mortgagee breached oral promise, made contemporaneously with execution of mortgage, to employ mortgagor, without allegations that the note should or might be paid by services to be rendered, or that at the date of the note the mortgagors had no other means by which to pay, or that mortgagee understood that they had no other way of paying, held not sufficient pleading of the defense that such breach was committed with intent to defraud mortgagors and to take their home from them after it had increased in value.

3. Contracts  $\S$ 10(2)—Agreement to employ attorney, without promise on part of attorney to do the work, held void.

Promise to employ an attorney to do all promisor's law work, without an agreement on the part of lawyer to do such work, held void for lack of mutuality.

4. Mortgages  $\S$ 581(6)—Evidence held not to prove that mortgagee's attorney had agreed to foreclose for less than fee fixed by court.

In action to foreclose mortgage, testimony that officers of mortgagee told witness that they never paid their attorney the amount fixed by the court as attorney fee held not to prove that the particular mortgage was being foreclosed under such an agreement between mortgagee and its attorney.

5. Pleading  $\S$ 236(4)—Amendment of answer, after plaintiff had put in its proof, discretionary with court.

Defendant's application for leave to amend answer, made after plaintiff had put in its proof, was addressed to the sound discretion of the court.

6. Pleading  $\S$ 236(4) — Refusal to permit amendment to answer, after plaintiff had put in its proof, held not abuse of discretion.

Where the issues had been completed some eight months before the trial, and where defendants had been granted several continuances, court's refusal to permit amendment to answer, after plaintiff had put in its proof, held not an abuse of discretion.

7. Mortgages  $\S$ 526(2) — Mortgage sale for less than amount of judgment harmless to mortgagors.

Court's confirmation of foreclosure sale to highest bidder for less than amount of judgment

was harmless to mortgagors, since the lower the bid the smaller the amount of money they would be required to pay to redeem.

8. Mortgages  $\S$ 512—Sale of lots en masse, instead of separately, held not error.

Where four lots had been considered as a single tract by mortgagors in their declaration of homestead, and where sheriff's return stated that the lots were sold in one parcel, "deeming that the most advantageous," the sale of the four lots at mortgage foreclosure sale en masse, instead of separately, held not error, under Rem. Code 1915,  $\S$  583.

9. Appeal and error  $\S$ 477—Court will not grant stay, where statute provides a bond.

Denial of mortgagors' application for order staying execution of deficiency judgment during pendency of their appeal to Supreme Court held not error; the proper procedure in such case being the execution of a bond to stay proceedings, under Rem. Code 1915,  $\S$  1722.

## Department 1.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Osner & Mehlhorn, Incorporated, against Adolf Loewe and wife. From a judgment for plaintiff, and from an order confirming the sheriff's sale of real estate, and from an order denying defendant's application to stay the execution of deficiency judgment, defendants appeal. Affirmed.

Edgar C. Snyder, of Seattle, for appellants.  
Edward Von Tobel, of Seattle, for respondent.

MITCHELL, J. This action was commenced in August, 1918, to recover judgment on a promissory note in the sum of \$1,200, and to foreclose a mortgage given to secure the same on July 7, 1910, payable three years after the date thereof. The only payments that had been made were for interest to July 7, 1918.

The answer, after a general denial of the allegations of the complaint, contained a first affirmative defense, alleging the existence of an agreement whereby the attorney for plaintiff was to receive for his services in the present case an amount less than that specified in the note and mortgage sued on, and less than that to be fixed by the court in the decree. The answer also set up an alleged second affirmative defense, to the effect that the note and mortgage were given for money used in the improvement of the real estate mortgaged, and that the defendants were induced to make the improvements thereon through the false representations of the plaintiff that it would sever its connections with its then attorney and employ exclusively the defendant Adolf Loewe as its attorney; that at the date of the note and mortgage, and ever since, plaintiff had and

still has an amount of litigation yielding in any one year attorney's fees far in excess of the amount of the note, and that plaintiff gave only a part of its litigation to defendant, and decreased the same year by year, though repeatedly asked by defendant to keep its promise; that defendants have made diligent efforts to meet their note, but defaulted, because of the foregoing conduct of the plaintiff in its breach of agreement to employ defendant, which breach was committed with intent to defraud defendants, and take from them their home, after the same had increased in value many times; and that because of the practices of fraud of plaintiff as alleged the consideration for said note and mortgage has wholly failed. A demurrer was sustained to the second affirmative defense. The allegations of the first affirmative defense were denied by a reply.

At the trial after the plaintiff had put in all its evidence, the defendants made an oral application for leave to amend their answer, by setting up certain matter which consisted, first, of substantially the same matter as that contained in the second affirmative defense, to which a demurrer had been sustained; and, second, matter in the nature of set-offs, consisting of two parts, viz.: (1) That from August 10, 1910, to July 7, 1915, defendant Adolf Loewe had conducted some 13 mortgage foreclosure cases for plaintiff, wherein the trial court had allowed in the decrees attorney fees aggregating \$863.81 in excess of what had actually been paid by the plaintiff to the defendant for his services therein, which excess it was alleged was unlawfully withheld by the plaintiff; and (2) that in certain other litigation from 1910 to the date of the commencement of this suit there was a large amount of certain other specified litigation, wherein plaintiff was either suing or sued, conducted for the plaintiff by some other attorney, wherein by the agreement defendant Adolf Loewe should have been employed, justifying reasonable attorney's fees largely in excess of the amount due on the note and mortgage involved in this suit. An objection to the trial amendment was sustained.

Upon the conclusion of the evidence there was judgment for the plaintiff as demanded in the complaint. Subsequently, upon an order of sale, the sheriff sold the property for an amount, \$150, less than required to satisfy the judgment, costs, and increased costs. Objections to the confirmation of the sale were overruled, and an order entered confirming it. Thereafter defendants applied to the court for an order staying the execution of the deficiency judgment of \$150 during the pendency of the appeal. The application was denied. The defendants have appealed from the judgment, the order con-

firmiting the sheriff's sale of real estate, and the order denying defendants' application to stay the execution.

[1-3] First, it is claimed error was committed in sustaining the demurrer to the second affirmative defense. This portion of the answer says: "The note and mortgage were given for money used in the improvement of the real estate mortgaged"—which must be taken as an admission that the note and mortgage were given, and that \$1,200 were received, by the appellants, as alleged in the complaint. We are aware of no rule permitting the defense, in a suit upon a promissory note, of a breach of simply an oral promise of future employment contemporaneously made to the defendant by the payee in the note, who at the time of taking it delivers to the maker the exact amount of money expressed in the note. As to the claim of being overreached, it is to be noticed the answer does not allege that the oral agreement provided the note should or might be paid by services to be rendered, but only that appellant would be employed in the future. Nor is it alleged that at the date of the note the appellants had no other means by which to pay, or that respondent understood they had no other way of paying. It is not claimed appellant Adolf Loewe was to give his time exclusively to the law work of the respondent, or that he obligated himself to do any law work for the respondent in the future. It was but a one-sided promise, revocable, or that might be ignored, at the pleasure of the promisor.

[4] Next, it is claimed the court erred in excluding evidence in support of the first affirmative defense. There was no evidence offered on the subject. Appellant Adolf Loewe testified that some time in 1909 or 1910 two officers of the respondent corporation told him they never paid their attorney the amount fixed by the court as attorney fee, but nothing was offered to show the respondent's attorney in the present case was acting under that or any similar agreement.

[5, 6] Assignments Nos. 3 and 4 relate to the refusal of the court to permit the trial amendment as hereinbefore described. As already noticed, the application was made after the respondent had put in its proof. A portion of the proposed amendment had been already disposed of adversely on a demurrer thereto. As to the remainder, if it be assumed that, generally speaking, it would be proper matter to be included in the answer, the application at that time was nevertheless addressed to the sound discretion of the court. It appears from the record the issues had been completed some eight months before the trial, and that several continuances had already been granted at the request of the appellants. We are satis-

fed there was no abuse of discretion by the trial court in denying leave to amend.

The fifth assignment is that the court erred in granting judgment and decree of foreclosure. The proof in support of the complaint was ample and uncontradicted.

[7, 8] In the sixth assignment it is claimed the court should not have confirmed the sheriff's sale of property, for three reasons: (1) Because the affidavit of publication of notice of the sheriff's sale was not properly signed as the same appeared in the sheriff's return of sale. Upon permission of the court, properly granted, the irregularity was corrected, and the affidavit correctly signed, at that hearing. (2) It is claimed the sale should have been set aside because of inadequacy of the price at which the property was sold. There were affidavits that the property was worth largely in excess of the amount for which it was sold, and it also appears that only a few months before the sale appellants filed a declaration of homestead upon the whole of the property alleging that its worth was \$4,000; but this seems to us to be immaterial. It was sold to the highest bidder, and the appellants cannot be injured by the sale of the property for less than the amount of the judgment. They have a year in which to redeem from the sale and the less the bid the smaller amount required to redeem. (3) It is claimed that the sale was irregularly made because the four lots were sold en masse, rather than in separate parcels. There is nothing to show that any one else was interested in the property. Together the several lots had been considered as a single tract, and suitable for a homestead by the declaration of appellants filed for that purpose; and the sheriff's return states the premises were sold in one parcel, "deeming that the most advantageous," which was according to the provision of section 583, Rem. Code.

[9] Finally, it is claimed the court erred in denying an application of the appellants for an order staying the execution of the deficiency judgment during the pendency of their appeal to this court. In this there was no error. The deficiency judgment was definite and certain. The statute (Rem. Code, § 1722) provides that in order to effect a stay of proceedings a bond, where the appeal is from a final judgment for the recovery of money, shall be given in a penalty double the amount of the judgment appealed from. It was a case in which there was no occasion for an application to the court. The matter was definitely fixed by the provisions of the statute.

The judgment is affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and MACKINTOSH, JJ., concur.

(111 Wash. 506)

**KING v. BLICKFELDT et al.**

Appeal of TITLE TRUST CO. et al.

(No. 15718.)

(Supreme Court of Washington. July 12, 1920.)

**1. Fixtures ⇨9—Elevator installed part of realty.**

An elevator installed in an apartment building under construction, under an agreement with the owner that title should remain in the elevator company until paid for, was a fixture and a part of the realty, as between the owner of the building and persons claiming as mortgagees or mechanics' lien claimants.

**2. Fixtures ⇨9—Elevator personal property as between elevator company and owner of building.**

Where an elevator company retained title to an elevator installed in a building under construction until paid for, the elevator plant remained personal property as between the elevator company and the owner of the building.

**3. Fixtures ⇨20—Elevator plant personal property as between seller retaining title and third persons with knowledge.**

Where an elevator plant was installed in a building under construction, under an agreement that title should remain in the elevator company until the plant was paid for, the plant was personal property, and not a fixture, as between the elevator company and third persons and incumbrancer with knowledge of the agreement.

**4. Fixtures ⇨20—Elevator installed under conditional contract remained personalty as against prior incumbrancers.**

An agreement between an owner of realty and an owner of personal property sold by the latter to the former to go into the realty, under such condition, as to its relation to the realty, as would under ordinary circumstances clearly make it a fixture and a part of the realty, may be effective to preserve the personal status of the property so sold, and prevent it becoming a fixture, even against prior incumbrancers, provided the material or thing so sold could be removed without material damage thereto impairing the security of the prior incumbrancer, but it would be a part of the realty as to subsequent incumbrancers without notice.

**5. Fixtures ⇨20—Elevator plant installed contemporaneously with creation of incumbrances part of realty.**

Where an elevator plant was installed in a building under construction, under an agreement whereby the elevator company retained title until it should be paid for, and at about the time the work of installing the elevator started other persons undertook to advance money on mortgage and furnish labor and materials, and continued to do so for a number of months while the elevator was being installed, without notice of the agreement between the elevator company and the owner of the building, the ele-



vator, as to such mortgages and furnishers of money, labor, and material, became a part of the realty as fast as it was installed, even though it was never completed.

En Banc.

Appeal from Superior Court, King County;  
J. T. Renald, Judge.

Action by D. H. King against J. M. Blickfeldt and others to foreclose mechanics' and materialmen's liens. From a decree subordinating their liens and claims to the right of the Otis Elevator Company to remove an elevator installed in the building, the Title Trust Company, the Inlaid Floor Company, and the Seattle Marble & Tile Company appeal. Decree modified, and cause remanded with directions.

Roberts & Skeel and Jones, Riddell & Brackett, all of Seattle, for appellants.

Bogle, Merritt & Bogle, of Seattle, for respondent.

PARKER, J. This action was commenced in the superior court for King county to foreclose a number of mechanics' and materialmen's liens held by the plaintiff, King. Our present inquiry has to do only with the mortgage lien claim of the defendant and cross-complainant Title Trust Company, and the mechanics' and materialmen's lien claims of the defendants and cross-complainants Inlaid Floor Company and Seattle Marble & Tile Company, as against the claim of title made by the defendant and cross-complainant Otis Elevator Company under a claimed conditional sale of the elevator installed by it in the building in question. A trial in the superior court upon the merits adjudicating the rights of all these parties as well as others resulted in a decree sustaining the claim of title made by the Otis Elevator Company to the elevator in question as superior to these mortgage and lien claims. From this disposition of the cause Title Trust Company, Inlaid Floor Company, and Seattle Marble & Tile Company have appealed to this court.

On September 20, 1917, Otis Elevator Company entered into a written contract with the Real Property Investment Company, the owner of the real property in question, situated in the city of Seattle, by which it agreed to furnish, erect, and install in the building then in course of construction upon the property a passenger elevator. The contract, which was in the form of a proposal and acceptance, contained, among other stipulations, the following:

"We are to retain title to and possession of all machinery, implements, and apparatus furnished by us under terms of this proposal, until final payment shall have been made."

This contract was never filed in the office of the county auditor as a conditional sale contract, nor did any of appellants have

any actual knowledge of its existence until after each of their lien claims accrued. This work of erecting and installing the elevator in the building was commenced by the Elevator Company on December 15, 1917, which work continued until near March 19, 1918, when it had been completed and was approved by the supervising architect. The furnishing and installation of the elevator not being paid for as agreed upon, the Elevator Company claimed title to the elevator and the right to remove it from the building freed from the mortgage and lien claims of appellants.

On December 6, 1917, Real Property Investment Company conveyed by deed, absolute in form, the lots and the building thereon then in course of construction to Title Trust Company, which deed was duly recorded in the office of the auditor of King county on the following day. This deed was intended as a mortgage to secure a loan of \$20,000 agreed to be made by Title Trust Company to Real Property Investment Company. This loan was consummated in part only, the Real Property Investment Company receiving from Title Trust Company only the following amounts thereon at the times mentioned: On December 13, 1917, \$3,000; on December 30, 1917, \$500; on January 2, 1918, \$500; on January 17, 1918, \$500; on February 2, 1918, \$800; and on February 9, 1918, \$3,000; in all, \$8,300—which, together with the interest accruing thereon, was the amount for which the trial court awarded foreclosure in favor of Title Trust Company, but subject to the right of the Elevator Company to remove the elevator from the building freed from the claims of Title Trust Company under its mortgage. This period, it will be noticed, was substantially contemporaneous with the period of the erection and installation of the elevator.

On December 20, 1917, the Seattle Marble & Tile Company, in pursuance of a contract made in behalf of the owner of the property with them, commenced to furnish and put in place the marble in the vestibule of the building, which furnishing of material and work continued to and was completed on or about February 27, 1918. This period, it will be noticed, was substantially contemporaneous with the erection and installation of the elevator in the building. The superior court decreed foreclosure of the lien of the Seattle Marble & Tile Company for the unpaid balance due them, subject, however, to the right of the Elevator Company to remove the elevator as its absolute property.

On February 2, 1918, Inlaid Floor Company, in pursuance of a contract entered into by them with the owner of the building, commenced to furnish material for and lay floors in the building, which furnishing of material and work continued until March 26, 1918. This period, it will be noticed, was contemporaneous with about the latter half of

the period of the erection and installation of the elevator in the building. Foreclosure of the lien of Inlaid Floor Company for the balance due them was awarded by the decree, subject, however, to the right of the Elevator Company to remove the elevator as its absolute property.

Our principal inquiry being as to whether or not the elevator upon its installation in the building became such a fixture as to become a part of the realty as between the Elevator Company and appellants, there being no agreement between them, nor any agreement between the owner and the Elevator Company of which they had notice, as to the elevator plant remaining the property of the Elevator Company, and therefore personal property until paid for, it becomes necessary for us to note the relation of the elevator to the general use of the building; what the elevator plant consisted of; and the manner of its physical attachment to the building and the ground upon which it rests. The building is an apartment house of five stories, all of which the elevator was designed to serve. There was built into the building as a part of its original construction a permanent shaft for the elevator. One could hardly say that the elevator plant was of a special or peculiar type, or that as to most of its parts, such as the car, cables, counterweights, etc., they were made specially for installation in this particular plant. Indeed, most of its parts, viewed separately, could well be classed as stock parts. However, in its installation there was constructed as a part of the plant a concrete foundation in the basement, on which the engine or motor rested and was firmly fastened; the guldeposts running up the sides of the shaft both for the car and the counterweights were firmly fastened to the building; and there were also other parts of the plant physically attached to the building. Indeed, it was installed and attached to the building, generally speaking, in a manner quite familiar to every one who has occasion to visit such buildings. In all outward appearances it seems to be as much a permanent fixture and a part of the building, and as necessary to the ordinary efficient use of the building, as any other permanently constructed part of the building. One buying the property from the owner, or one taking a mortgage on the property from the owner, or one performing labor and furnishing materials for which he would have a lien upon the property, would, we think, without question assume from all outward appearances, he having no knowledge of any special agreement or understanding existing between the owner and the one who installed the elevator plant, that it was a permanent fixture and a part of the realty to which he could look as part of his security.

[1, 2] If this were a controversy between the owner of the building and appellants, the former claiming the elevator plant to be per-

sonal property and not a part of the realty, and the latter claiming the plant to be a fixture and a part of the realty subject to their mortgage and lien claims, we would have little hesitancy in holding the plant and all its parts to be a fixture and subject to appellants' mortgage and lien claims. Whatever seeming conflict there may be in the holdings of the courts touching the question of what are fixtures under the varying circumstances of the numerous cases, we know of no holding which would lend substantial support to the claim of this elevator being other than a fixture and a part of the realty as between the owner of the building and appellants. The reasoning of our own decisions, even those holding that the particular property involved was not a fixture is all but conclusive in support of this view of the law. *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744; *Wade v. Donau Brewing Co.*, 10 Wash. 284, 38 Pac. 1009; *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Filley v. Christopher*, 39 Wash. 23, 80 Pac. 834, 109 Am. St. Rep. 853. On the other hand, if it were a controversy between the owner of the building and the Elevator Company as to whether or not the elevator plant is personal property as between them, we would as readily hold it to be personal property, since, by their express agreement that title should remain in the Elevator Company until the purchase price was paid in full, they impliedly agree that as between them it should be regarded as personal property until paid for. *Boeringa v. Perry*, 96 Wash. 57, 164 Pac. 773.

[3] We would also hold the elevator plant to be personal property even as between the Elevator Company and appellants, or it were shown that the latter had knowledge of the agreement and understanding in that behalf made between the owner and the Elevator Company. *Allis-Chalmers Manfg. Co. v. City of Ellensburg*, 185 Pac. 811. These considerations, while falling short of solving our present problem, nevertheless furnish us a starting point, since we are to determine whether or not appellants are in as favorable a position as against the claim of the Elevator Company as subsequent purchasers or incumbancers for value and without notice of the claim of the Elevator Company.

[4] Generally speaking, we think it may safely be said that an agreement between the owner of realty and the owner of the personal property sold by the latter to the former to go into the realty under such conditions as to its relation to the realty as would, under ordinary circumstances, clearly make it a fixture and a part of the realty, may be effective to preserve the personal status of the property so sold, and prevent it becoming a fixture and a part of the realty, even against prior incumbancers; providing the material or thing so sold and going into the realty could be removed therefrom without material damage thereto impairing the security of the

prior incumbrancer. On the other hand, generally speaking, we think it may safely be said that an agreement between the owner of realty and the owner of the personal property sold by the latter to the former to go into the realty under such conditions as to its relation to the realty as would, under ordinary circumstances, clearly make it a fixture and a part of the realty, will not preserve the personal status of the material or thing so sold and going into the realty and prevent it becoming a fixture and a part of the realty as against subsequent incumbrancers, who have no notice, until after the accrual of their claims, of the agreement by which the owner of the realty and the owner of the personal property assumed to preserve the personal status of the latter and prevent it becoming a fixture and a part of the realty. These considerations do not quite solve our present problem; but they constitute, we think, another step in that direction, since we have seen that the advancing of the \$8,300 by appellant Title Trust Company to the Real Property Investment Company, secured by the mortgage in pursuance of the loan agreement between them, and the furnishing of work and material by the other appellants upon which their lien claims rest, were all substantially contemporaneous with the construction and installation of the elevator plant by the Elevator Company. So the question still remains, are the appellants in the position of subsequent incumbrancers for value and without notice of the agreement between the Real Property Investment Company and the Elevator Company by which they assume to prevent the elevator plant becoming a fixture and a part of the realty until paid for? No decision has come to our notice dealing with the rights of purchasers or incumbrancers whose rights as such accrued contemporaneously with the fixtures going into and becoming a part of the realty. However, the reasoning of the decisions wherein there has been considered the rights of both prior and subsequent incumbrancers to look to the fixtures as part of the realty, we think, will materially aid us in this inquiry.

In *Wade v. Donau Brewing Co.*, 10 Wash. 284, 38 Pac. 1009, there was involved the question of refrigerating machinery becoming a fixture and a part of the realty of a brewing plant, which machinery was placed in the plant at the instance of the owner under an express agreement that it should remain the property of the manufacturing company placing it there until it was paid for. The controversy was between the plaintiff, Wade, in the foreclosure of his mortgage, and the Manufacturing Company so furnishing the machinery, he claiming that the machinery had become a fixture as to him, he being ignorant of the agreement between the owner and the Manufacturing Company, and that he was in effect a subsequent mortgagee. A considerable part of the machinery was placed in the plant after

the execution of the mortgage, but apparently all of it was placed there before the bonds which the mortgage was executed to secure were actually issued. It was held that as to Wade and his rights under his mortgage he was in legal effect a subsequent mortgagee, and that the prior agreement as to the personal status of the machinery after its installation in the plant did not, as to his mortgage rights, prevent the machinery becoming a fixture, and therefore as much a part of his security as all other portions of the realty. That case it will be readily noticed dealt with a situation wherein the dividing line between prior and subsequent incumbrancers was approached almost as closely as the situation we are here considering.

In *German Savings & Loan Society v. Weber*, 16 Wash. 96, 47 Pac. 224, 38 L. R. A. 267, there was involved the question of whether or not windows, doors, sashes, frames, and wainscoting placed in a building with the express understanding between the one furnishing such material and the owner that it should remain the property of the former until paid for, became fixtures and a part of the realty, subject to the lien of a mortgage loan and the realty fully executed prior thereto. It was held that, as between the owner and the one furnishing the material, it did not become fixtures, and that the title thereto remained in the latter until paid for, since they in effect agreed that it should remain personal property. It was also held that the material did not become fixtures, it not being paid for, even as to the mortgagee, the theory of the decision manifestly being that the mortgagee lost none of his security by giving effect to the agreement between the owner and the one furnishing the material in view of the fact that the material could be removed without injury to the realty, leaving the mortgage security undiminished from what it was when the mortgage was given. The reason of that decision and the review of the authorities therein cited is of material aid here, as emphasizing the thought that the most important inquiry in such cases is, did the incumbrancer when he acquired his security have a right, in the light of his then knowledge of the premises, to rely upon the assumption that the particular part of the building in question was a fixture and a part thereof?

In *Boeringa v. Perry*, 96 Wash. 57, 164 Pac. 773, there was involved a chattel mortgage upon pipes in the ground used for irrigation purposes; the only title of the mortgagor in the land being that of an entryman upon government land. He thereafter lost his right to perfect his entry of the land, it being thereafter filed upon by another entryman. The controversy over the mortgagee's right to the pipes arose upon his attempted foreclosure and removal of the pipes as against the second entryman. It was held that the mortgage could be foreclosed as

against the second entryman in view of the fact that he was not a subsequent purchaser of the land for value, so far as the pipes were concerned, and that they could be removed without material injury to the land.

In *Allis-Chalmers Manfg. Co. v. City of Ellensburg*, 185 Pac. 811, a conditional sale contract of material in the form of equipment for an electric power plant for the city, which sale of equipment was made to the contractor, in which it was agreed that the title to the equipment so furnished should remain in the seller until paid for, was recognized as binding upon the city, it having actual notice of the existence of the contract at the time of the installation of the equipment, and the seller was held to have the right to remove the equipment from the plant unless the city should pay therefor as agreed by the contractor who had abandoned the work.

These decisions come as near touching our present problem as any to be found in our own reports, and they are of aid here only in a general way. We now notice some decisions from other states, the reasoning of which, at least, we think will throw more light upon our present inquiry. In *Campbell v. Roddy*, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889, we have a decision which counsel for respondent Elevator Company particularly rely upon, and we agree with them that it is one of the leading cases in this country touching the question here presented. The substance of what was there involved and the holding of the court is well stated in the syllabus to the official report of the decisions as follows:

"A vendor of an engine, boiler, and machinery, knowing that they were to be annexed to real estate, took a chattel mortgage upon them for a part of the price, but failed to register it. The mortgagor of the chattels afterwards annexed them to real estate upon which he had already given a mortgage. Held, that the lien of the chattel mortgage should be protected so far as it would not diminish the security which the real estate mortgagee would have had if the annexation had not been made."

Of course if these appellants are prior incumbrancers in that their rights as such accrued before it can be said that the elevator plant or any part of it became attached to the realty, the holding of that case, as well as some of our own already noticed, would be decisive against them. But the reasoning of that decision, as does some of our own, we think, lend support to the contentions here made in appellants' behalf in view of the arising of their rights contemporaneous with the installation of the elevator plant. In that decision we read:

"As between a lienor who consents to have the subject-matter of his lien transmuted into a shape by which subsequent purchasers and mortgagees are liable to be subjected to deceptive dealings, there seems to be no equitable

ground upon which the lien should be recognized against an innocent subsequent mortgagee or purchaser for value. The entire spirit of our registry acts is opposed to the notion that, in such a juncture of affairs, the real estate purchaser would not be regarded as a bona fide purchaser against whom the chattel mortgage would be void. But, as already observed, the real estate mortgagees, in the present case, held their lien before the attachment to the realty of the mortgaged chattels. It is true that by force of the annexation they would become subjected to the lien of the real estate mortgage absolutely, unless the lien of the chattel mortgage intervenes. Any property belonging to the mortgagor, which he chooses to annex to the mortgaged premises, becomes realty. But it is difficult to perceive any equitable ground upon which the property of another, which the mortgagor annexes to the mortgaged premises, should inure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance at the time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long therefore as he is secured the full amount of the indemnity which he took, he has no ground for complaint. There is therefore no inequity towards the prior real estate mortgagee, and there is equity toward the mortgagee of the chattels, in protecting the lien of the latter to its full extent so far as it will not diminish the original security of the former."

[5] As to the law touching the rights of subsequent purchasers and incumbrancers, in the note to *Lawton Pressed Brick & T. Co. v. Ross-Kellar T. P. B. M. Co.*, 49 L. R. A. (N. S.) 596, the editor says:

"With the exception of the decisions alluded to, it seems to have been unanimously held that the rights of a purchaser of the realty without notice of the claim of the seller of fixtures are unaffected by the latter's retention of the title thereto, or reservation of a right to retake them upon default in payment of the purchase price."

The decisions which he notes as exceptions and holding contrary to what seems to be the almost unanimous weight of authority are the case to which the note is appended and certain early New York cases. A number of decisions are cited in support of this statement of the learned editor, among which are the following: *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542; *Ridgeway Stove Co. v. Way*, 141 Mass. 557, 6 N. E. 714; *Knowlton v. Johnson*, 37 Mich. 47; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493.

Now are these appellants in as favorable position in asserting that as to them this elevator plant is a fixture and a part of the realty, subject to the satisfaction of their mortgage and lien claims, as if they were subsequent purchasers or incumbrancers in the sense that their mortgage and lien claims

were wholly subsequent, in time of their inception, to the actual completion of the elevator plant and all of it becoming a part of the building as a fixture? We think that the reason of the law calls for a holding that they are. This elevator plant did not become attached to and a permanent part of the building at any one instant of time, but it became attached by progressive stages, while the advancements were being made upon the mortgage and work done, and material furnished and placed in the building by appellants at substantially the same rate of progress. While appellants were advancing money upon the mortgage and were performing labor and furnishing material in the construction of the building, they saw the elevator plant steadily becoming a part of the building, we think, under such circumstances and conditions as to warrant each of them assuming that the elevator plant and its several parts was becoming a fixture or fixtures in the building as its installation progressed. They had every reason to believe that the Elevator Company was looking for protection only to the personal liability of the owner or to its lien right against the building and the realty of which the elevator was becoming a part, just as appellants were looking for their protection to their mortgage and lien rights against the building and the realty of which the elevator was contemporaneously becoming a part.

Some contention is made in respondent's behalf rested upon the theory that the elevator plant was never actually completed and that possession thereof was and is retained by respondent. Just before the supervising architect certified to the completion of the building and elevator plant the running of the elevator was tested by the parties concerned, and found to be completed and in good running condition. Thereupon an agent of the Elevator Company took away with him the so-called reverse lever, the use of which was necessary to the starting and stopping of the elevator. This was an insignificant part of the elevator as a whole. This, it is insisted, was a retaining of possession of the elevator by the Elevator Company, from which it is argued that the elevator has never passed out of its possession, and is therefore not yet a fixture in the building. We think this position is wholly untenable. Neither the building nor the elevator is in the physical possession of the Elevator Company. Of course it may well be said that no part of the elevator became a fixture and a part of the realty until it in law passed out of the possession of the Elevator Company, but we think each part of the elevator as it became permanently installed passed out of the possession of the Elevator Company, and that it

is not necessary to fix the parting of such possession from the Elevator Company as to the whole of the plant at any particular time. Its several parts were constantly passing out of the possession of the Elevator Company just as the advances made by Title Trust Company upon the mortgage and the material furnished by the other appellants passed out of their possession. Counsel calls our attention to the agreement retaining title in the material involved in *German Savings & Loan Society v. Weber*, 16 Wash. 96, 47 Pac. 224, 38 L. R. A. 267, which agreement provided for not only the retaining of title, but possession of the material furnished by the owner furnishing it, until it was paid for. We have no such agreement here, and, besides, the retaining of possession, if such be the effect, accruing in that controversy, was wholly foreign to the theory upon which that case was decided, which was simply that the mortgage was held inferior to the property right of the one furnishing the material under a contract reserving title to the property in him, because the mortgage was executed and the debt which it secured created long before the furnishing of such material, and the removal of the material would not in the least impair the mortgagee's security.

We have mentioned the fact that the contract between Real Property Investment Company and the Elevator Company agreeing that title should remain in the latter until the elevator should be paid for was never filed in the office of the county auditor as a conditional sale contract, merely for the purpose of making it plain that the question of constructive notice is not here for our consideration. We do not want to be understood as intimating any opinion as to whether or not such filing of the contract would have required appellants to have noticed it and rendered it effective as against them.

We feel constrained to hold that the decree of the trial court should be modified so that appellants Title Trust Company, Inlaid Floor Company, and Seattle Marble & Tile Company shall be awarded foreclosure of their mortgage and lien claims as against the elevator plant as a part of the realty, and that the claim of property made by the Elevator Company in the elevator plant should be held for naught as against these mortgage and lien claims. It is so ordered, and the case is remanded to the trial court with directions to correct its decree accordingly.

HOLCOMB, C. J., and TOLMAN, FULLERTON, MITCHELL, MACKINTOSH, and BRIDGES, JJ., concur.

(111 Wash. 612)

**AMERICAN STATE BANK v. BUTTS et al.**  
(No. 15815.)(Supreme Court of Washington. July 20,  
1920.)**1. Evidence  $\Leftrightarrow$  113(19)—Assessment rolls not evidence of market value.**

The production of assessment rolls, showing the assessed value, is not any evidence of market value, as between parties other than the owner and the assessing municipality.

**2. Fraudulent Conveyances  $\Leftrightarrow$  52(1)—Reconveyance of homestead of less value than \$2,000 not decreed.**

A reconveyance of a homestead, fraudulently conveyed to hinder and delay creditors, will not be decreed, where there is no evidence showing that the property was in excess of the value of \$2,000.

**Department 1.**

Appeal from Superior Court, Whitman County; John Truax, Judge.

Action by the American State Bank against George W. Butts and others. Judgment for defendants, and plaintiff appeals. Affirmed.

G. E. Lovell, of Ritzville, for appellant.

Samuel P. Weaver and S. H. Boyles, both of Sprague, for respondents.

**MACKINTOSH, J.** The appellant recovered a judgment against George W. Butts and wife on a promissory note, dated July 1, 1917. In January, 1918, the note was overdue, and payment had been demanded. On the 24th of that month Butts transferred 200 acres of real property, being all of the property standing in his name, to his daughter, Dollie E. Fish, a girl then of the age of about 20 years, and who lived at home with her parents. On March 2, 1918, judgment was taken against him on the note; execution was issued, and a return made of "no property found." Thereupon the appellant began this action to have set aside, as fraudulent, the transfer from Butts and wife to their daughter. The property transferred constituted the homestead of Butts and wife, the appellant saying in his brief, "We are willing to admit that this is a homestead."

The appellant's suit, then, amounts to this: That it is asking to have the homestead returned to Butts and wife for the reason that the transfer to their daughter was fraudulent, so that the lien of its judgment may attach to that residue which would remain after the deduction of the homestead exemption, the statute providing for the reaching of the excess in value of real estate claimed as a homestead over the amount exempted from execution. *Traders' National Bank v. Schorr,*

20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17. It is self-evident that if the transfer to the daughter was of property which did not exceed in value the \$2,000 exemption, the question of whether the transfer was made in good faith or not is immaterial. Our first search, therefore, will be into the evidence to determine whether there was any proof establishing the value of the homestead at the time of the transfer, and if that search reveals no testimony showing that the value was in excess of \$2,000, we are not called upon to look farther into the transaction.

[1] The testimony of the respondents and their witnesses was that the homestead, in January, 1918, did not exceed \$2,000 in value, and that that was the sum which the daughter paid. The testimony of the appellant is remarkably free from any evidence as to the value, being confined entirely to the testimony of a deputy county assessor, who testified that the assessment rolls, presumably for the year 1918, showed that the property had been assessed for \$1,700, and that the ratio fixed by the state board of equalization for assessment was  $38\frac{7}{10}$  per cent. of the real value. This was not evidence at all of the fair market value. The production of assessment rolls showing the assessed value has often been held not to be any evidence of market value as between parties other than the owner and the assessing municipality. In *re Northlake Ave.*, 96 Wash. 344, 165 Pac. 113; *Savannah, A. & M. Ry. v. Buford*, 106 Ala. 303, 17 South. 395; *Martin v. New York, etc., R. R.*, 62 Conn. 331, 25 Atl. 239; *Kenerson v. Henry*, 101 Mass. 152; *Ridley v. Seaboard, etc., R. Co.*, 124 N. C. 37, 32 S. E. 379; *Anthony et al. v. New York, etc., Ry.*, 162 Mass. 60, 37 N. E. 780; *Pratt Consol. Coal Co. v. Morton*, 14 Ala. App. 194, 68 South. 1015; *Mayor, etc., of Baltimore v. Carroll*, 128 Md. 68, 96 Atl. 1076; *Kelley v. People's, etc., Fire Ins. Co.*, 181 Ill. App. 142; *American Steel, etc., Co. v. Biliter*, 200 Ill. App. 175; *Marine Coal Co. v. Pittsburgh, etc., Co.*, 246 Pa. 478, 92 Atl. 688; *Girard Trust Co. v. City of Philadelphia*, 248 Pa. 179, 93 Atl. 947.

The assessing officer who had actually made an assessment might be qualified to testify as to market value, but the production of the books of the assessor's office and the testimony of some employé of that office as to their contents is not competent evidence to establish the disputed matter of this case.

[2] There being, therefore, no evidence in the case showing that the property transferred to the respondent Dollie E. Fish was in excess of the value of \$2,000, it would be an idle and useless thing to order the property reconveyed to her parents, even if the testimony should be clear and convincing that the transfer to her was fraudulent.

For the reasons stated, the trial court properly found for respondent. Judgment affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and MITCHELL, JJ., concur.

(111 Wash. 590)

**HARDINGER v. HAINSWORTH et al.**  
(No. 15863.)

(Supreme Court of Washington. July 15, 1920.)

1. Guaranty  $\S$  64, 65—Vendors assigning contract for deed and guaranteeing payment cannot complain that title was merged in assignee.

Defendants having secured deed to plaintiff from the person to whom they had sold property, having transferred their contract for deed with the buyer to plaintiff, and having advised plaintiff to sell the property, cannot complain because title to it by the deed from the buyer was merged in plaintiff, plaintiff suing on defendants' guaranty of payment of balance of price under contract for deed by original purchaser, case not being within rule that, if right of action is permitted to lapse against principal obligation, guarantor is released; defendants' obligation being in effect original.

2. Guaranty  $\S$  81—Assignee of sellers suing on guaranty of price not guilty of laches.

Assignee from vendors of contract for deed, suing on vendors' guaranty of payment of price in full by buyer, held not guilty of laches in failing to bring action within a reasonable time to estop him from asserting any right in the guaranty or contract sued on; the action having been brought before limitations had run.

3. Appeal and error  $\S$  1073(1)—Failure to tender deed as provided in judgment before signing of judgment not prejudicial.

In an action by the assignee from the sellers of contract for deed against the sellers on their guaranty of payment of the price in full by the buyer, in view of the judgment making payment conditional on plaintiff assignee's making and executing deed of the property to defendant sellers, he having title under deed from the buyer, failure of plaintiff assignee to tender deed prior to the signing of the judgment held not prejudicial to defendant sellers.

4. Guaranty  $\S$  36(4)—Measure of damages of assignee of contract of sale guaranteed price in full.

The assignee of contract for deed from the sellers, suing on their guaranty of payment in full of the price by the buyer, was entitled to recover the balance of the purchase price, plus interest and taxes, the sums covered by the writings between the parties.

Department 1.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by C. T. Hardinger against J. Walter Hainsworth and another. From judgment for plaintiff, defendants appeal. Affirmed.

Roberts & Skeel and L. B. Schwellenbach, all of Seattle, for appellants.

C. T. Hardinger, of Seattle, in pro. per.

MAIN, J. This action was based upon a writing called a guaranty. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and judgment sustaining the plaintiff's right to recover. From this judgment the defendants appeal. The facts may be summarized as follows:

Prior to September 15, 1909, the appellants, being then the owners of certain real property in the city of Seattle, sold the same on written contract to one Clarence V. Atkinson. A small payment was made upon the contract at the time of this execution, and the balance was to be made in monthly installments. On September 15, 1909, the appellants transferred the contract to the respondent in this action, and at the same time executed and delivered to him a quitclaim deed covering the same property. The assignment was written upon the back of the contract, and recited:

"We hereby guarantee the payment of the balance of the purchase price, with interest."

Atkinson made the monthly payments upon the contract to the respondent until July, 1910, since which time no payments have been made. On January 15, 1911, the appellant J. Walter Hainsworth procured a quitclaim deed from Atkinson, conveying the property to the respondent. Thereafter, at the suggestion of Hainsworth, the respondent listed the property for sale. He was directed to go ahead and sell and "try to get your money out of it." The property was not sold, and, no payments having been made on the contract subsequent to July, 1910, on September 9, 1915, the appellants signed a second writing, which recites:

"For the purpose of preventing the running of the statute of limitation and in consideration of his forbearance to commence suit against us at this time, we hereby renew in favor of C. T. Hardinger, our written guaranty indorsed upon the back of the contract of purchase issued by us to Clarence V. Atkinson."

This writing further recites that it is a renewal upon the same terms and conditions as set out in the original contract "of assignment and guaranty indorsed upon said contract." It is upon this writing that recovery is sought in the present action.

[1] The appellants first claim that this is a guaranty contract, and that the respondent has waived his right to proceed thereon be-

cause of the lapse of any right of action against Atkinson. The quitclaim deed which the latter gave was procured by Hainsworth, and was delivered to the respondent by him; the apparent purpose being to get the title to the property in such condition that it could be easily transferred in the event of a sale. While the evidence does not make it very clear, it is apparent that the respondent only held the title as security for the money which he had paid to the appellants at the time he took the assignment. Admitting, but not deciding, the general rule to be as claimed by the appellants that, if the right of action is permitted to lapse against the principal obligation, the guarantor is released, it is not applicable to the facts in this case. The appellants having secured the deed from Atkinson, and having advised the respondent to sell the property, they cannot complain because the title to the property by the deed from Atkinson was merged in respondent. The writing upon which the action is based refers to the prior writing by which the payment of the purchase price with interest is guaranteed. The obligation, while called a guaranty by the parties, became in effect an original obligation of the appellant. *Ekre v. Cain*, 66 Wash. 659, 120 Pac. 523.

[2] The second contention is that the respondent was guilty of laches in failing to bring an action within a reasonable time, and therefore is estopped to assert any right in the contract sued upon. When the statute of limitations was about to run upon the first writing as recited in the second for the purpose of preventing the running of the statute, that writing was made. The present action was brought before the statute of limitations had run upon the second writing. The record discloses no reason for invoking the doctrine of laches; it was the apparent intent of the parties when the second writing was entered into that a right of action should be kept alive for the statutory period. The case of *Hogan v. Kyle*, 7 Wash. 595, 35 Pac. 399, 88 Am. St. Rep. 910, much relied upon by the appellants, was upon different facts. There, the action was between the original parties to the contract. The seller, after all the payments had become due thereon, delayed bringing the action for the purchase price for such length of time that it was held that he had elected by his silence to accept a forfeiture of the contract. This case upon the facts as above stated is not within the holding in that case. The appellants further contend that, since the respondent did not tender a deed prior to the time of the signing of the judgment, his right of recovery is defeated. The complaint alleged, among other things, that—

"The plaintiff herewith tendered to the defendants a deed to said above-mentioned lots upon payment of the amount due."

[3] The judgment recites that upon payment by the appellants to the respondent of the sum of \$950.92, with interest, that the respondent shall convey the property to the appellants. It thus appears that the payment of the judgment is conditioned upon making and executing the deed. Even though the deed should have been tendered prior to the signing of the judgment, the appellants have not been prejudiced by failure of the respondents so to do, and the judgment should not be reversed for this reason.

[4] Finally, it is contended that the trial court did not apply the correct measure of damages. As we understand the record, the recovery allowed was for the balance of the purchase price, plus interest and taxes. These are the sums that were covered by the writings between the parties to this action, and there was no error in the measure of damages allowed.

The judgment will be affirmed.

HOLCOMB, C. J., and PARKER, TOLMAN, and MITCHELL, JJ., concur.

(111 Wash. 660)

**OLSEN et al. v. PEERLESS LAUNDRY.**  
(No. 15860.)

(Supreme Court of Washington. July 22, 1920.)

1. Trial  $\S$  164—Plaintiff entitled to benefits from defendant's testimony after refusal of nonsuit.

Defendant having proceeded to put in its testimony after the court's refusal of its motion for nonsuit, plaintiff is entitled to receive any and all benefits therefrom.

2. Municipal corporations  $\S$  705(2)—Driver of motortruck held negligent towards pedestrians.

Driver of a motortruck, who, when within five or six feet of pedestrians at a crossing, must have realized that it would be necessary either for him or them to do something to avoid collision, but did not alter his course nor stop, nor slacken speed, nor blow his horn, or give other warning, was negligent.

3. Municipal corporations  $\S$  705(2)—Driver of motor vehicles must sound horn.

Drivers of automobiles and motortrucks must sound their horns on all occasions where it can be said that to do so will probably avoid accident.

4. Municipal corporations  $\S$  706(6)—Motortruck driver's negligence for jury.

In an action against a laundry for injuries to a pedestrian by its motortruck, the driver's negligence held for the jury.

5. Municipal corporations  $\S$  706(7)—Contributory negligence of pedestrian injured by motortruck for jury.

In an action for injuries to a pedestrian by a laundry's motortruck, plaintiff's contributory



negligence in attempting to cross street before the approaching truck *held* for the jury.

6. Municipal corporations  $\S$ 705(10)—Whether pedestrian must continue to look for vehicles while crossing street depends on circumstances.

Before undertaking to cross a street, a pedestrian must look for approaching vehicles, but whether he must continue to look while crossing depends on many circumstances and conditions, as the amount of traffic, the probability of vehicles approaching, terms of relevant statutes or ordinances, etc.

7. Witnesses  $\S$ 268(9)—Cross-examination of injured pedestrian's companion as to talk between them at time improper.

In an action against a laundry for injuries to a pedestrian by its mortortruck at a street crossing, defendant's cross-examination of plaintiff's companion at the crossing as to what was the talk going on between her and plaintiff *held* improper.

8. Damages  $\S$ 132(6)—\$5,458 for 'breaking femur and shortening leg not excessive.

Verdict for \$5,458 in favor of pedestrian, struck by defendant's mortortruck at a street crossing, whose left femur was broken, so that she was confined to bed for six weeks, while the injury was probably permanent and would shorten her leg by one-half inch, *held* not excessive.

Department 2.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Suit by Marla Olsen and others against the Peerless Laundry. From judgment for plaintiffs, defendant appeals. Affirmed.

William Wray, of Seattle, for appellant.

Walter S. Osborn, of Seattle, for respondents.

BRIDGES, J. This was a personal injury suit. The plaintiff, Marla Olsen, and her companion, Mrs. Peters, on the 20th day of February, 1919, were walking easterly on the north sidewalk of Pine street in the city of Seattle, Wash., intending to cross Third avenue. When they reached the intersection of these streets, and before stepping into Third avenue, they each looked north and south on Third avenue to see whether there were any approaching vehicles, and, observing that the way was clear, and seeing nothing approaching, they started across Third avenue in the line of the north sidewalk of Pine street. When they had proceeded about two-thirds of the way across the street, the defendant's autotruck or delivery wagon suddenly loomed up in front of them, just missing, but brushing, the clothing of Mrs. Peters, who was on the right of Mrs. Olsen, that being the direction from which the truck came, and, striking Mrs. Olsen, probably with the rear

fender, knocked her down, causing her serious injury.

At the time in question there was considerable traffic on Pine street, but apparently none on Third avenue within the immediate vicinity of this crossing. Neither the plaintiff nor her companion saw the approach of the truck. The driver of the truck testified that he approached Pine street from the south on Third avenue, and found travel on Pine street such that he was required to, and did, stop near the curb at the southerly intersection of these streets. As soon as the traffic on Pine street had cleared he started across in low gear, going at the rate of six or eight miles per hour until his truck struck the plaintiff. When he was on the street car tracks on Pine street, which would be about the center of that street, he observed the plaintiff and her companion crossing Third avenue, at the sidewalk crossing. When within five or six feet of them he again observed the pedestrians, and should have realized, and probably did realize, that unless he or they stopped or changed course there would be a collision. He did not, however, change his course, slacken his speed, blow his horn, or give any other signal of his approach, but went ahead, assuming that the plaintiff and her companion would stop and allow him to pass in front of them. At the close of plaintiff's testimony, the defendant moved for a nonsuit, which the court denied. At the close of the taking of all the testimony in the case, the defendant asked for an instructed verdict in its favor, which was also denied. The court likewise denied its motion for a new trial. There was a verdict for the plaintiff in the sum of \$5,458. From the judgment entered on this verdict this appeal is taken.

[1] The appellant contends that the testimony fails to show any negligence on the part of the driver of the autotruck, but does show contributory negligence, as a matter of law, on the part of the plaintiff, Mrs. Olsen. In considering these questions we must take into consideration all the testimony in the case. The appellant having proceeded to put in its testimony after the court's refusal of its motion for nonsuit, the respondent is entitled to receive any and all benefits therefrom. *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264; *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 667, 22 L. R. A. (N. S.) 471.

[2] The testimony of the driver of the truck or delivery wagon was sufficient in itself to take the case to the jury on the question of negligence. He says he was driving his car across Pine street at a speed of about six or seven miles per hour, and could have stopped it within three or four feet; that

when he reached the center of Pine street he saw the plaintiff and her companion walking across Third avenue, and that at that time they were about halfway across that street. When within five or six feet of these pedestrians the driver again saw them, and must have realized that it would be necessary that he or they must do something to avoid a collision. He frankly admits that under these circumstances he did not alter his course nor stop nor slacken his machine, nor blow his horn, nor give other warning of his approach, but went straight ahead because he thought or supposed that the plaintiff and her companion saw him or would see him, and that they would stop and allow him to pass in front of them. Plainly, in so driving he was guilty of negligence. He had no right to conclusively presume that the plaintiff or her companion saw him, or would see him, and that they would get out of his way. The conduct of these ladies and all the surrounding circumstances show, and should have indicated to the driver, that they were not aware of his approach. Under these circumstances, ordinary precaution and care would have required him to blow his horn, slow down, stop, or swerve to the right or left. Any one of these acts would probably have avoided the injury.

Again, there was introduced in evidence an ordinance of the city of Seattle which expressly gave to pedestrians the right of way at street intersections. It may be difficult to lay down any fixed rule, showing just what rights and privileges this right of way may give to pedestrians or take from the drivers of automobiles. It certainly does not mean that the driver of a truck or automobile would have the right to use the intersection without any regard for the rights of the pedestrians, or in such manner as would require the latter, as a matter of right, to stop and yield the right of way. As was said in the case of *Johnson v. Johnson*, 85 Wash. 18, 147 Pac. 649:

"If the conceded right of way means anything at all, it puts the necessity of continuous observation \* \* \* on the driver of the automobile when approaching a crossing, just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than at crossings."

[3, 4] In this case it seems to us that each act of the driver of the auto delivery was on the assumption that he had the right of way, and that the pedestrian must stop and yield to him. Aside, however, from the question of right of way, we are greatly impressed with the idea that had the driver used his horn this accident would not have happened. Drivers of automobiles and autotrucks should know that the law will insist that they must sound their horns on all occasions where it can be said that, had such been done, an accident might or probably would have been

avoided. We have no question, therefore, that there was amply sufficient testimony to take the case to the jury on the question of the negligence of the driver of the autotruck.

[5] But it is strongly insisted that the testimony shows that the plaintiff was guilty of contributory negligence, as a matter of law. With this contention we cannot agree. What we have already said concerning the right of way is applicable to this branch of the case; but, aside from that question, there was sufficient testimony to take the case to the jury. Both Mrs. Olsen and her companion testified that when they reached Third avenue, and before stepping down on to that street, they looked north and south on Third avenue, and did not see any vehicle approaching, and found the way to be apparently clear. All of the circumstances would indicate that at the time they so looked the appellant's delivery wagon was standing near the curb on the south side of Pine street, awaiting an opportunity to cross that street.

[6] It is true the testimony for the plaintiffs is not very clear whether, after stepping on to Third avenue, Mrs. Olsen thereafter looked for approaching vehicles; but we cannot say, as a matter of law, that such was her duty. We have time and again said that one must, before undertaking to cross a street, look for approaching vehicles, but whether after so doing, and while making the crossing, he must again look, or continue to look, depends on many circumstances and conditions; such as the amount of traffic; the probability of their being approaching vehicles; whether the statutes or ordinances give him the right of way; whether other objects or things have attracted his attention. Manifestly this is a question for the jury. This identical question has been before this court in a number of cases. In the case of *Redick v. Peterson*, 99 Wash. 368, 169 Pac. 804, Judge Holcomb, speaking for the court, said:

"The question then is, is it contributory negligence for a pedestrian, after having looked once in a direction along the street for vehicles that might interfere with safe passage across the street at a regular street crossing, and in other necessary directions along the street, to fail to look a second time in the first direction. We think not, as a matter of law." *Johnson v. Johnson*, supra; *Adair v. McNeil*, 96 Wash. 160, 163 Pac. 393.

In the case of *Chase v. Seattle Taxicab Co.*, 78 Wash. 537, 139 Pac. 499, this court said:

"Upon the second proposition, it is equally obvious that the question of contributory negligence \* \* \* was for the jury. The respondent saw the taxicab a block to the south, and proceeded in a uniform course without hesitation or vacillation. Whether this failure to look a second time was such negligence as to prevent a recovery was for the jury."

The cases from which we quote cite many of the authorities on this question.

[7] The appellant in cross-examining Mrs. Peters, who was crossing the street with Mrs. Olsen, asked the following question:

"What was the talk going on between you and Mrs. Olsen from the time you left the Standard Furniture Company until the time you got to Third and Pine and started to cross?"

Objection to this question was sustained. Appellant predicates error thereon. It contends that it had a right to show what these ladies were talking about for the purpose of indicating whether they were paying attention to approaching vehicles. If the purpose of the question had been to find out whether these ladies were talking, it might have been proper cross-examination, but the subject of their conversation could not possibly lend any light to the jury. Appellant also complains of certain other rulings of the court with reference to the introduction of testimony. We have carefully considered them, and do not find any error in them.

[8] It is next contended that the verdict is excessive. The testimony shows that as a result of this injury there was a fracture of the neck of the left femur about three-quarters of an inch below the head of the femur. The plaintiff was required to stay in bed for more than six weeks, during all of which time she suffered much. At the time of the trial she could get about only on crutches. The medical testimony was to the effect that there had not been a bony union, and it was very questionable whether there ever would be such; that the injured limb was, at the time of the trial, about one-half inch shorter than it was before the injury; and that the injury was in all probability permanent. Under these circumstances we cannot say the verdict is excessive.

Finding no error, the judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and TOLMAN, JJ., concur.

(111 Wash. 634)

MARTIN v. BATEMAN et ux. (No. 15842.)

(Supreme Court of Washington. July 21, 1920.)

1. Frauds, statute of §74(1)—Contract to convey realty to attorney within statute.

A contract to convey an interest in real property to an attorney at law in consideration for services is within the statute.

2. Specific performance §128(2)—Judgment for damages improper, where plaintiff knew specific performance could not be had.

Where plaintiff attorney knew, at the time of commencing his suit for specific performance of agreement to convey realty to him in return for services, that defendants had parted with

their interests in the property, and that specific performance could not be had, it would have been error to render an alternative judgment for damages; plaintiff having had knowledge of the court's lack of jurisdiction to decree specific performance when he commenced suit.

3. Pleading §248(16)—Trial amendment to complaint commencing new action properly denied.

In an action by an attorney for specific performance of defendant's agreement to convey to him an interest in realty for services, the trial court properly refused to allow a trial amendment to the complaint, which would have abandoned the stated cause of action, and commenced an entirely new one; the judgment subsequently entered not being a bar to the new action.

#### Department 2.

Appeal from Superior Court, Lincoln County; Joseph Sessions, Judge.

Suit by H. N. Martin against C. C. Bateman and Emma Bateman, husband and wife. From judgment for defendants, plaintiff appeals. Affirmed.

M. E. Jesseph and W. A. Wilson, both of Davenport, for appellant.

Fred B. Morrill, of Spokane, and F. H. McDermont, of Davenport, for respondents.

PER CURIAM. The appellant, Martin, sued the respondents, Bateman and wife, in the superior court of Lincoln county, seeking a decree of the court, decreeing him to be the owner of a half interest in some 480 acres of land situated in the county named, and requiring the respondents to convey such interest to him. In his complaint he alleged that the respondent C. C. Bateman was formerly the owner of the land mentioned; that he had, while such owner, executed three separate mortgages covering the land, aggregating approximately \$20,000; that one of such mortgages had been foreclosed, and the land sold thereunder and a sheriff's deed issued; that another had been foreclosed, the land sold thereunder, and the time for redemption had about expired; and that an action was pending to foreclose the third; that, with these conditions existing, the respondent C. C. Bateman employed him, as an attorney at law, to appear for the respondents, and effect for them a right of redemption from such foreclosure sales, agreeing to give him "a one-half interest in and to said described real estate in consideration for such services"; that he entered upon such service, and procured for the respondents the right to redeem from such sales on the payment of \$17,000, and otherwise performed all of the conditions of his contract; that the respondents thereupon refused to convey to him a one-half interest in the property, and that he had been in no manner remunerated for his services. The prayer was for the relief

first stated, and for such other and further relief as the court should deem meet and equitable.

The answer admitted the employment of the appellant as an attorney at law to perform legal services in the cases mentioned, but denied the contract alleged, and further alleged a payment in full for the services performed.

On the trial of the cause it developed from the appellant's testimony that the agreement upon which he relied was oral, and that the respondents had parted with their title to the land prior to the commencement of the action, a fact known to the appellant, whereupon the court held that there could be no recovery, either in specific performance or in damages. The appellant thereupon, through his counsel, asked leave to amend his complaint, "so as to allege that the profits to be derived were to be divided instead of the land; that it was a partnership agreement between Mr. Bateman and Mr. Martin with reference to these profits, if any." No amended complaint was tendered, and the court, on the objection of the other side, refused to allow the amendment, but did allow the appellant to introduce such evidence as he desired tending to support the cause of action the proposed amendment suggested. At the conclusion of the appellant's case, the court sustained a challenge to the sufficiency of the evidence, and entered a judgment, dismissing the action, with costs against the appellant. From this judgment Martin appeals, assigning as error: First the entry of the judgment against him; and, second, the refusal of the court to allow a trial amendment to the complaint.

[1, 2]. On the complaint in the record clearly there could be no recovery. In the first place, the contract was one to convey an interest in real property, and, being oral, was within the statute of frauds. In the second place, it was known to the appellant at the time of commencing his suit that the respondents had parted with their interests in the property, and that specific performance could not be had even were the suit otherwise maintainable. The court was thus without jurisdiction to decree a specific performance, and, this being known to the appellant at the time of the commencement of the suit, it would have been error to render an alternative judgment for damages. *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; *Peters v. Van Horn*, 87 Wash. 550, 79 Pac. 1110; *Wright v. Suydam*, 59 Wash. 530, 108 Pac. 610, 110 Pac. 8; *Smith v. Flathead River Coal Co.*, 64 Wash. 642, 117 Pac. 475.

[3] Nor are we able to conclude that the court abused its discretion in refusing to allow a trial amendment to the complaint. While the statement of the appellant's counsel as to the nature of the change desired is somewhat meager, enough is detailed, when

considered in the light of the subsequent evidence introduced, to show that the proposed change would have introduced issues radically different from the issues made by the original complaint; issues, also, which the respondents were entitled to have definitely stated, issues which they were entitled to have time to prepare to meet, and issues on which they were possibly entitled to a trial by jury. In fine, the proposition was to abandon the stated cause of action and to commence an entirely new action. Since the judgment entered is not a bar to the new action, it would be too much to say we think that the court erred in a ruling, the effect of which is only to require the appellant to commence the action in the regular way.

The judgment is affirmed.

(111 Wash. 626)

**HAGGERTY et al. v. BOGLE et ux.**  
(No. 15786.)

(Supreme Court of Washington. July 21, 1920.)

**1. Mortgages ⇨171(7)—Public must take notice of general index of records required by statute.**

In view of Rem. Code 1915, § 8787, requiring every auditor to keep a general index, direct and inverted, of recorded deeds, etc., all must take notice of what the general index shows, and none may be heard to say that, because the auditor for his own or public convenience may record some of the instruments there indexed in one book and some in another, he may shut his eyes to what the index, speaking as the statute directs, tells him of the existence of an absolute deed, intended as a mortgage, but recorded in a book of deeds and not of mortgages.

**2. Mortgages ⇨171(3) — Absolute deed intended as mortgage notice to all when recorded and indexed.**

A deed, absolute in form, but intended as a mortgage, is notice to all the world of any and all rights which may be claimed thereunder, when recorded and indexed as its form suggests and as Rem. Code 1915, §§ 8781-8787, require.

**3. Mortgages ⇨146—Mortgagee assuming liability may not pass burden to purchaser subject to mortgage.**

Mortgagee, having assumed a liability by giving a warranty deed to the purchasers from the mortgagor, a liability not imposed by contract or by law, whatever the liability of the mortgagor may be, will not be permitted to pass the burden thereof to the purchasers of the property subject to the mortgage, in possession under claim of title, and in a position to demand their obligation be limited to the strict terms of the mortgage.

Department 2.

Appeal from Superior Court, King County;  
Boyd J. Tallman, Judge.

Action by J. J. Haggerty and Georgiana Haggerty, trustees, against the Building Investment Company, a corporation, the American Savings Bank & Trust Company, a corporation, and W. H. Bogle and Mary J. Bogle, his wife. From judgment dismissing the action, plaintiffs and defendant American Savings Bank & Trust Company appeal. Reversed and remanded for further proceedings.

H. A. P. Myers, of Seattle, for appellants.  
Bogle, Merritt & Bogle, of Seattle, for respondents.

TOLMAN, J. The facts in this case are not seriously in dispute and may be stated chronologically as follows: On May 27, 1902, the defendant Building Investment Company purchased from the Moore Investment Company, lots 21 and 22, in block 17 of Capital Hill addition No. 2, in the city of Seattle, and on the same day agreed with respondents to sell them the lots so purchased and to erect thereon a residence according to certain agreed plans and specifications. The price of the lots being fixed, and respondents to pay in addition thereto the cost of the house to be erected plus supervisory expenses agreed upon, the respondents then paid \$1,000 on account of such purchase, and took a receipt in which was set forth the substance of the agreement; but the formal contract covering the transaction was not executed until June 30 following. In the initial agreement it was provided that the Building Investment Company should negotiate a building loan of \$3,000 to be secured by a mortgage on the property, and it obtained such loan from appellant American Savings Bank & Trust Company. The mortgage given to secure this loan being placed of record on May 30, 1902, the respondents afterwards by the deed which they received from the Building Investment Company assumed this mortgage and have since paid it. On June 10, 1902, appellant J. J. Haggerty, acting for and on behalf of appellant the American Savings Bank & Trust Company, took from the Building Investment Company a deed, absolute in form, to the lots in question (and other property), but intended as a mortgage to secure \$2,400 then advanced by the American Savings Bank & Trust Company to the Building Investment Company, and to secure such future advances as the bank might make to the building company. This deed was filed for record on June 10, 1902, and afterwards recorded in a book of deeds, and indexed as a deed. Respondents, without any actual knowledge of the execution, delivery, and recording of this deed, completed their payments to the Building Investment Company, and on August 2, 1902, received a deed from the Building Investment Company in accordance with the terms of their contract, which deed was filed for

record November 15, 1902, and was the first record notice of respondents' interest in the land. The residence was completed and respondents went into possession about October 1, 1902, and have since occupied the property as their home.

This action was brought to foreclose as a mortgage the deed given by the Building Investment Company to Haggerty, the complaint alleging the facts relating to the loan and the execution and delivery of the deed to secure it; that it was agreed that the property described in the deed, other than the lots now in question, should be released upon the payment of \$200 for each lot; and that all other lots had been so released. The complaint further alleges that, by reason of litigation involving some of the lots, a lien was established thereon which the appellants were compelled to and did pay, and prays for a judgment for the amount unpaid on the original deed, plus the advances, and for the foreclosure of the deed as a mortgage. The answer, after certain denials, alleges that the respondents purchased the property in good faith, without notice or knowledge of any claim on the part of appellants; that if the bank made any advances to the building company they were made with knowledge of respondents' rights; that if advances were made to discharge a lien upon the other lots such advances were made because appellants were liable under a warranty deed made by them conveying such property, and not otherwise; and further alleges that prior to the commencement of the action appellants had received sufficient from the sale of other lands covered by the deed to pay in full any claims they may have had.

The cause was tried to the court, and after hearing the evidence upon both sides the trial court dismissed the action upon the ground that the deed in question was not constructive notice to respondents, because it was not recorded as a mortgage in a book of mortgages.

An examination of the authorities at once reveals that, in passing upon the question which is here presented, the courts of the several states have been largely influenced by the statutes in force at the time and place where the question arose. Our recording statute, Rem. Code, § 8781, provides:

"All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world."

Section 8784 provides that irregularly executed instruments, when recorded, shall impart notice to third persons from the date of recording to the same effect as though properly executed. Section 8785 directs that

for the purpose of recording deeds and other instruments the county auditor shall procure such books as the business of his office requires. Section 8786, is as follows:

"He must, upon the payment of his fees for the same, record separately in large well-bound books in a plain hand—

"(1) Deeds, grants and transfers of real property, mortgages and releases of mortgages of real estate, powers of attorney to convey real estate, and leases which have been acknowledged or proved;

"(2) Marriage contracts;

"(3) Official bonds;

"(4) Instruments describing or relating to separate property or community interest of married women;

"(5) Patents to lands and receiver's receipts, whether for mineral, timber, homestead or preemption claims or cash entries;

"(6) Certificates of sales for county or municipal taxes;

"(7) All such other papers or writings as are required by law to be recorded and such as are required by law to be filed if requested so to do by the party filing the same."

And section 8787, so far as it affects the present question, reads:

"Every auditor must keep a general index, direct and inverted. The direct index shall be divided into seven columns, and with heads to the respective columns, as follows: Time of reception, grantor, grantee, nature of instrument, volume and page where recorded, remarks, description of property. He shall correctly enter in such index every instrument concerning or affecting real estate which by law is required to be recorded, the names of grantors being in alphabetical order. The inverted index shall also be divided into seven columns, precisely similar, except that the 'grantee' shall occupy the second column and 'grantor' the third, the name of grantees being in alphabetical order. For the purpose of this act, the term 'grantor' shall be construed to mean the person conveying or encumbering the title to any property, or any person against whom any lis pendens, judgment, notice of lien, order of sale, execution, writ of attachment, or claims of separate or community property shall be placed on record."

[1] It will at once be seen that the statute makes no distinction between deeds and mortgages, and, so far as recordable instruments are by statute classified, deeds and mortgages are placed in the same class. It is true that section 8785 authorizes the auditor to procure such books for records as the business of his office requires, and we know that it has been the custom to procure and keep mortgage records distinct from the records of deeds. But while recorded in distinct and separate books for convenience and not by any statutory requirement, all are alike entered in the same general index which is required to be kept by section 8787, and, since every searcher gains the information from the general index which leads him to the instrument desired, we think all must take notice of what the general index reveals, and

none may be heard to say that because the auditor may, for his own convenience, or that of the public, record some of the instruments there indexed on one book, and some in another, he may shut his eyes to what the index, speaking as the statute directs, tells him. It is true that in *Bernard v. Benson*, 58 Wash. 191, 108 Pac. 439, 137 Am. St. Rep. 1051, the broad statement was made:

"The custom has been uniform throughout the state to record all instruments affecting the title to real estate in deed records, those creating an incumbrance against real estate in mortgage records, and those evidencing title to personal property in miscellaneous records. This custom has been so general and has existed for so long a period of time that it is our duty, not only to judicially notice it, but to apply it as well."

[2] As will be seen from the language quoted, the court there assumed that it was dealing with an instrument affecting the title to real property which had been recorded as though it related to personalty only, and so far as what is said appears to separate and distinguish deed records from mortgage records it was obiter only, no doubt inadvertent, and should be disregarded. When so read, the holding there is in harmony with the rule long followed by this court. *Dunsmuir v. Port Angeles Gas, etc., Co.*, 24 Wash. 104, 63 Pac. 1095; *Bonneviere v. Cole*, 90 Wash. 526, 156 Pac. 527. Since the plain language of the statute treats deeds and mortgages alike, classifies them together, and specifically directs that all instruments affecting real property shall be indexed in the same general index, we find no difficulty in holding with the great weight of authority that a deed, absolute in form, but intended as a mortgage, is notice to all the world of any and all rights which may be claimed thereunder, when recorded and indexed as its form suggests and the statute requires. 23 R. C. L. 188; *L. R. A.* 1916B, 600; *Kent v. Williams*, 146 Cal. 3, 79 Pac. 527; *Security Savings & Trust Co. v. Loewenberg*, 38 Or. 159, 62 Pac. 647; *Livesey v. Brown*, 35 Neb. 111, 52 N. W. 838; *Marston v. Williams*, 45 Minn. 116, 47 N. W. 644, 22 Am. St. Rep. 719; *Ruggles v. Williams*, 1 Head (Tenn.) 141; *Clemons v. Elder*, 9 Iowa, 272; *Equitable Building & Loan Ass'n v. King*, 48 Fla. 252, 37 South. 181; *Kennard v. Mabry*, 78 Tex. 151, 14 S. W. 272. Other authorities are collated and discussed in an exhaustive note found in 8 Am. & Eng. Ann. Cas. 104.

Our views upon the main issue, as have been expressed, make it necessary to consider the defenses specially pleaded, and, as we are without the assistance of any findings thereon by the trial court, we have carefully examined the record for the facts. It is not seriously claimed that the bank, when it made the original loan, had any actual knowledge or respondent's rights, and we think that defense is not established.

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[3] The second defense, that the subsequent advances were made not as a loan to the building company, but in satisfaction of a liability established by judgment against Haggerty, is more serious. In the action establishing that liability, Haggerty and wife were the only defendants, and the court found that they (though, as claimed both here and there, they were mortgagees only) gave to the purchaser a warranty deed; that the property was then subject to certain lienable claims which the purchaser was obliged to and did pay, and gave judgment against Haggerty for the amount thereof, which judgment was paid, not voluntarily as an advance under the mortgage, but involuntarily because of the liability flowing from the execution and delivery of the warranty deed. We find nothing in the record which in any wise convinces us that it was the duty of Haggerty, under the terms of the mortgage, to give the purchaser a warranty deed, and, though the mortgage was in the form of an absolute deed, the law imposes no such duty. Having assumed a liability which neither the contract nor the law imposes, whatever the liability of the mortgagor may be, we think it inequitable that he should be permitted to pass the burden thereof to respondents, who were then in possession under a claim of title, and in a position to demand that their obligation be limited to the strict terms of appellant's mortgage.

We see nothing inequitable in the agreement, which the evidence seems to establish, that the lots mortgaged, other than the ones in question here, should be released upon the payment of \$200 each, as they were of little value and subject to prior mortgages. Respondents are entitled to have credited upon the original loan \$200 for each lot which was actually released and not lost by the foreclosure of a prior mortgage, and for any sum then remaining unpaid upon the original loan of \$2,400 appellants are entitled to a judgment and the usual decree of foreclosure.

Reversed and remanded for further proceedings in accordance with the views herein expressed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(112 Wash. 6)

ROBINSON, THIEME & MORRIS v. WHITTIER et al. (No. 15785.)

(Supreme Court of Washington. July 26, 1920.)

1. Usury  $\S$  23—Services for extra interest to evade usury statute invalid.

An agreement by the lender to render services to the borrower in return for the borrow-

er's executing a note for more than the amount, made to evade the usury statute, is invalid.

2. Usury  $\S$  117—Contract to render services for extra compensation held intended to evade statute.

Where the owner of a logging business executed notes for sums larger than the amount borrowed, an agreement by the lender to visit the operations of the borrower, inspect them, and give advice is so vague and indefinite as to show, in connection with the borrower's testimony that the additional sum stated in the notes was compensation for the loan and that the services were valueless to him, that the agreement was an attempt to evade the usury statute.

3. Chattel mortgages  $\S$  86—Redating and reacknowledging did not extend time for filing.

Where a chattel mortgage with the affidavit of good faith was not filed within ten days after its execution, as required by Rem. Code 1915,  $\S$  3660, 3661, the redating and reacknowledging of the mortgage without again swearing to the affidavit does not make the filing of the mortgage within ten days thereafter sufficient to render it valid against creditors.

4. Chattel mortgages  $\S$  191—Unauthorized act of mortgagee's agent held not to give possession to mortgagee.

Where the chattel mortgagor delivered mortgaged property to the mortgagee's drayman to be transported to a designated place, but the drayman, without the mortgagee's knowledge, took it to another place not under the mortgagee's control, from which it was removed by the mortgagor before the mortgagee had knowledge of the transaction, the mortgagee did not acquire possession of the property so as to be entitled thereto as against creditors, notwithstanding his failure to file the mortgage.

Department 1.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Robinson, Thieme & Morris against H. C. Whittier and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Roberts & Skeel and L. B. Schwellenbach, all of Seattle, for appellant.

Gates & Helsell and Van Dyke & Thomas, all of Seattle, for respondents.

MITCHELL, J. This is an action upon four promissory notes aggregating \$3,250 and to foreclose a chattel mortgage to secure the same, given by H. C. Whittier to the plaintiff. Fairbanks-Morse & Company and Mill & Mine Supply Company were made parties defendant because they had taken possession of certain of the chattels covered by the mortgage. Defendant Whittier answered with the defense of usury, and the other defendants pleaded usury and a failure to file the chattel mortgage within ten days after

its execution and delivery. Upon the trial the defenses were satisfactorily proved, and from the judgment to that effect plaintiff has appealed.

The notes, in the total sum of \$3,250, bearing 8 per cent. interest per annum, were dated August 2, 1918, and were made payable at several dates from August 15 to October 15, 1918. It is conceded that Whittier received only \$2,250. Appellant claims the transaction was not usurious and attempts to vindicate the additional \$1,000 (which by being included in the notes was to bear interest) upon the claim that it was intended as pay to appellant for services to be rendered, according to the terms of a separate writing therefor signed by Whittier at that time. Whittier was engaged in a small logging business in King county. He became financially embarrassed. He applied to appellant for a loan, explaining his condition. Appellant was engaged in the real estate, loan, and insurance business in Seattle. Whittier asked for a loan of \$2,000, but finally decided on \$2,250. George R. Thieme, who conducted the negotiations for the appellant, made Whittier come back several times, and finally Whittier told him that rather than fall down on the proposition he could afford to and would pay \$1,000 for the loan. Then the notes and mortgage were prepared and given, and at the same time, upon requirement of the appellant, there was signed by both parties the written instrument in question, wherein appellant agreed "to visit the timber operations of the party of the first part from time to time, inspect the operations, advise regarding purchase of equipment, co-operate in making of sales, and generally give first party the benefit of the business judgment and experience of the party of the second part."

[1] In support of the legality of this agreement it is argued by appellant that if the circumstances attendant upon the making of a loan may require any kind of services to be rendered to the borrower, for such services rendered in good faith the lender may properly require compensation, in addition to a reasonable amount of interest upon the money loaned. The argument may be conceded, since the proposition contained therein admits the quality or test of good faith. A money lender bent upon violating the rule of public policy contained in the statute against usury not infrequently resorts to the subterfuge of a contemporaneous contract for pay for services rendered or to be rendered by the lender or for profits earned upon a transaction other than the making of the loan, to conceal the true nature of the transaction. The form of the agreement is immaterial; and as was written upon this subject in *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998:

"But we have steadfastly held that any device, however specious, to defeat the law will

not be tolerated, and this, too, whether it is made the subject of proof or is apparent from the admitted facts."

[2] The contract, couched in vague and general terms as to the kind of services to be rendered, is indefinite as to time. If measured by the length of time the notes were to run, then appellant was to receive \$1,000 and interest out of ten weeks' output of this small logging business. Whittier failed and ceased logging operations about the last of August. In proof of the good faith of the contract for services, appellant testified to what it actually did. There is some dispute in this regard, but we are satisfied, as evidently the trial court was, that it amounted to practically nothing. Thieme, who looked after the matter for the appellant, was inexperienced in conducting logging operations. He visited the camp two or three times before it closed down; for what purpose it is not shown; certainly he neither called for nor upon Whittier upon either of those visits. Whittier testified he had a foreman at the camp and that there was nothing for appellant to do and that it did not perform any services there. The market for logs was good, with prices going up. Appellant, by one of its officers, claims to have examined a motor truck to be used at the camp about the time the loan was made, but the record shows Whittier had already purchased it. After the camp was shut down, while it is true appellant became active in the matter of the disposition of the logs, its manifest purpose in so doing was to get as much money as possible out of a bad situation, to apply on the loan. Whittier testified the \$1,000 "was for interest on the loan." True, that at the time of having the contract written he made a statement to the contrary, but we are convinced he did so under pressure of the plan adopted by the appellant in making the loan. We are satisfied the means employed amounted to a shift or device to cover illegal interest on money loaned, and that the transaction was usurious.

[3] Appellant also contends, contrary to the finding of the trial court, that the chattel mortgage was filed within ten days from the time of the execution thereof. The mortgage, to be good against respondents Fairbanks-Morse & Company and Mill & Mine Supply Company, who were creditors, must, under section 3660, Rem. Code, have been accompanied by the affidavit of the mortgagor that it was made in good faith, etc., acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor. The facts are that at the time of making the notes, August 2, 1918, Whittier executed and delivered the chattel mortgage duly acknowledged and accompanied by his affidavit of good faith, etc. Appellant held it until August 20, 1918, without filing it with the county auditor. On August 20, 1918, Mr. Thieme called Mr. Whittier into



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his office, told him he had neglected to file the mortgage, and had an understanding with him which was put in writing and signed by Mr. Whittier. The writing, addressed to the appellant, refers to and identifies the chattel mortgage and says:

"I hereby consent to said mortgage being re-dated August 20, 1918, and acknowledgment being retaken as of this same date."

Then, appearing before a notary public, Mr. Whittier, without signing or re-signing the instrument or any part of it, and without making any affidavit of good faith, etc., simply reacknowledged the mortgage. The notary public changed the date to August 20, and on August 23, 1918, appellant filed the mortgage in the office of the county auditor. The instrument or any part of it has not been in the possession of the mortgagor since it was executed and delivered by him on August 2, 1918. It will be noticed that the statute (section 3660, Rem. Code) makes no difference as to the class of creditors. Those protected are all the creditors, "both existing and subsequent, whether or not they have or claim a lien upon such property." The statute is plain in requiring the making of the mortgage proper; that it be accompanied by the affidavit of good faith; that it be acknowledged and filed within ten days from the time of the execution thereof. Each and all are essentials without which it can have no validity against creditors. Section 3661 of the Code also provides, "Every such instrument within ten days from the time of the execution thereof shall be filed;" that is, an instrument made in observance of and containing the formalities mentioned in the former section. It is not contended that Mr. Whittier was actually sworn on August 20 as to the good faith of the transaction. That he did not intend his former affidavit to be revived or repeated by his conduct on August 20 is made manifest by his writing to the effect that the mortgage be redated and the acknowledgment retaken on that date. The oral proof is to the same effect. He specified certain parts of the old instrument and thereby necessarily excluded another part. It is claimed by appellant, however, that the affidavit, having been actually made on August 2, was sufficient under the statute.

Our attention is called to the case of *Allen v. American Loan & Trust Co.*, 79 Fed. 695, 25 C. C. A. 147, wherein the chattel mortgage statute of this state as it then existed was considered. In that case an instrument which covered both real and personal property had been executed without an affidavit of good faith and recorded only as a real estate mortgage. Later the mortgagor executed an affidavit of good faith, caused the same to be attached to the mortgage, and it was thereafter duly recorded as a chattel mortgage. The court held the legal effect of what was done equal to a rewriting, re-signing, and reac-

knowledge of the instrument; that is, by his act of attaching a new instrument to the old one and delivering it he thereby impliedly made the instrument in all of its parts a new one as of that date. The present case is distinguishable, for here nothing new was attached to the instrument, nor was there any new delivery, and by a familiar rule of construction, Whittier, by his writing and conduct pursuant thereto, excluded the remaking or redating of the affidavit of good faith.

Further, appellant relies upon the cases of *Engleright v. Annesser*, 19 Ohio Cir. Ct. R. 73, and *Perry v. Rutan*, 10 U. C. Q. B. 637. Each of those cases considered a chattel mortgage statute that required the mortgagee to make the affidavit of good faith, and in each case the affidavit had been made prior to filing but on a date different from that of the execution of the mortgage. In each case it was contended by the creditor that a proper construction of the statute required the mortgagee to make the affidavit at the time the mortgage was executed. In each case the statute, different from ours, contained no provision with reference to the time within which the instrument should be filed after it was executed, acknowledged, and accompanied with the affidavit of good faith. In each case the decision was against the creditor. In the Ohio case the court observed that the statute was silent as to when the affidavit should be made, while in the Upper Canada case, where the affidavit was made some days later than the mortgage and just before filing it, it was aptly said that such course was calculated to advance rather than defeat the object which the Legislature had in view. If an affidavit of good faith by the mortgagor which antedates the filing by a period of time in excess of that provided by the statute within which the instrument must be filed is to be held sufficient, then the object which the Legislature had in view would be defeated rather than advanced. The subject is covered by the statute the terms of which must control.

[4] Lastly it is contended that even if the mortgage was invalid the taking of possession of the property by appellant before any rights of respondent creditors accrued would cure such invalidity. We do not find that the appellant ever took possession of the property involved, nor does the finding of the trial court upon that subject so declare. Upon closing down the logging camp appellant's drayman, for and under the directions of Mr. Whittier, took certain chattels from the camp to be stored as directed by Mr. Whittier in Seattle, looking to an adjustment of his affairs among all the creditors. On arriving in Seattle the drayman, contrary to the instructions of Mr. Whittier and surreptitiously, diverted the things to some place at or near Monroe, Wash. not under the care of appellant. The next day, upon learning of the location of the articles, Mr. Whittier,

with respondent creditors, took possession of the articles and at that time delivered to each of the respondent creditors those articles that were purchased from him and for which he had not been paid. Appellant's testimony shows it knew nothing of and did not authorize the removal of the goods from the logging camp. Under these circumstances there was no possession by appellant; hence the rule relied on has no application here.

Judgment affirmed.

HOLCOMB, C. J., and MAIN, TOLMAN, and PARKER, JJ., concur.

(111 Wash. 600)

**STATE v. GOTTSTEIN.** (No. 15830.)

(Supreme Court of Washington. July 16, 1920.)

1. Criminal law  $\S$  795(2)—Lesser crime must be submitted, unless evidence positively excludes commission.

Under Rem. Code 1915,  $\S$  2187, authorizing the jury to find accused guilty of an inferior degree of the offense charged, the lesser crime must be submitted to the jury along with the greater, unless the evidence positively excludes any inference that it was committed, and, to require such submission, defendant is not required to show facts justifying the conclusion that the lesser crime was committed.

2. Homicide  $\S$  18(5)—Killing in attempt to commit robbery is "murder in the first degree."

A killing in an attempt to commit robbery is "murder in the first degree" under the express provisions of the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Murder in the First Degree.]

3. Homicide  $\S$  309(5)—Instruction on manslaughter not pertinent to evidence showing self-defense.

An instruction as to manslaughter would not be pertinent, though the evidence showed that the killing was in self-defense.

4. Homicide  $\S$  341—Defendant not entitled to complain of granting in part of improper request for instructions.

Where the court would have been justified in submitting to the jury only murder in the first degree, but defendant requested instructions on murder in the second degree and manslaughter, he could not complain that the request was granted in part by charging on murder in the second degree.

5. Criminal law  $\S$  413(2)—Evidence as to defendant's statements to his wife self-serving.

Where defendant did not testify on a trial for homicide, but a witness for the state testified that defendant asked him to tell defendant's wife certain things not true regarding defendant's movements, the wife's testimony as

to her husband's statements regarding his movements, was inadmissible as self-serving declarations, and not admissible to contradict the witness for the state.

6. Criminal law  $\S$  364(6)—Declarations by defendant to his wife too remote in time to be res gestæ.

Declarations by defendant to his wife concerning his movements after his return to his home from the scene of the crime were too remote in time to be part of the res gestæ.

7. Witnesses  $\S$  287(4)—Defendant not entitled to complain of admission of facts on redirect examination, when inquired about on cross-examination.

Where a witness for the state, on hearing of deceased's disappearance, had written defendant's name on a slip of paper, sealed it up, and given it to a deputy sheriff, to be opened if he disappeared or the body of deceased was found, and defendant cross-examined him regarding such matter, without bringing out the name so written, he could not complain that, on redirect examination, the paper was introduced in evidence.

**Department 2.**

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

William Gottstein was convicted of murder in the second degree, and he appeals. Affirmed.

Walter B. Allen, of Seattle, for appellant. Fred C. Brown, C. E. Claypool, and John D. Carmody, all of Seattle, for the State.

TOLMAN, J. Appellant was, by information filed in the superior court for King county, charged with the crime of murder in the first degree. From a verdict of guilty of murder in the second degree, and a judgment and sentence based thereon, the case is brought here for review on appeal.

[1-3] The first assignment of error is that the court erred in refusing to submit to the jury by proper instructions the crime of manslaughter. In *State v. Palmer*, 104 Wash. 396, 178 Pac. 547, it is said:

"It would seem from this that the voluntary killing upon sudden heat, which was formerly included in the crime of manslaughter, has been taken out of that classification by the act, and, as the law now stands, every killing which is accompanied by a design to kill is either murder in the first degree or murder in the second degree, depending upon whether that design was or was not accompanied by premeditation. No longer is the intentional killing upon sudden heat, or the intentional killing, no matter how provoked, classified as manslaughter; and as soon as it appears that the killing was with a design to effect death, the element of manslaughter disappears from the case. That grade of homicide is characterized by the fact that the one guilty of it possessed no design to kill. If the purpose to kill is present, the offense must be murder in one of its degrees."

The law as thus stated is not criticized, but it is argued that it must affirmatively appear from the evidence that the crime of manslaughter is excluded before the court will be justified in refusing to submit that crime to the jury. It has been frequently held that, where the evidence excludes the lesser offense, such lesser offense should not be submitted to the jury. *State v. Kruger*, 60 Wash. 542, 111 Pac. 769, and authorities there cited.

The statute (Rem. Code, § 2167) provides that, upon an indictment or information for an offense consisting of different degrees, the jury may find the accused not guilty of the degree charged, and guilty of any inferior degree, and therefore the correct rule is that the lesser crime must be submitted to the jury along with the greater, unless the evidence positively excludes any inference that the lesser crime was committed, and it is not incumbent upon the defendant, before such an instruction will be given, to show facts from which a jury might draw the conclusion that the lesser crime and not the greater was in fact committed. Still we think the trial court was right in this case in refusing to submit the crime of manslaughter, for, after a careful study of the record, we think the evidence excludes the possibility that the killing occurred without design, except possibly that it was done in an attempt to commit robbery, which is expressly made murder in the first degree by our statute. Considering all of the circumstances shown, the nature of the wound, and the point where the bullet entered at the left and rear part of the head of deceased, we cannot conceive that the shot was fired in self-defense, and, even if so fired, the killing would have been excusable or justifiable, and no crime, either of murder or manslaughter, would have been committed, and no instruction as to manslaughter would have been pertinent.

[4] While the trial court, as we view the evidence, would have been justified in submitting to the jury first degree murder only, yet the defendant, having requested instructions on murder in the second degree and manslaughter, cannot now complain because his request was in part granted. If, under the evidence, it was error to submit the question of murder in the second degree, the defendant by his request invited such error, *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

[5, 6] It is next argued that the trial court erred in excluding certain testimony sought to be drawn from the defendant's wife as to what her husband told her regarding his movements on the day the crime was supposed to have been committed. This evidence, it is urged, is admissible to contradict testimony given by one of the state's witnesses to the effect that the defendant on that day, after returning to Seattle from the scene of the crime, asked him to tell the wife, if she should inquire, certain things regarding

his movements which were not true. And also it is urged that what the defendant then told the wife was a part of the *res gestæ*. The cases cited to sustain this contention seem to lay down the rule that, where an attempt is made to impeach a witness by proving former statements made by him in conflict with his testimony, his credit cannot be sustained by proof that he made, to other persons before being called as a witness, the same statements as detailed in his testimony; but such statements may be admissible, if made before the effect could be foreseen, to show that his testimony is not a fabrication of recent date. *People v. Doyell*, 48 Cal. 85; *Stolp v. Blair*, 68 Ill. 541; *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050; *Hester v. Commonwealth*, 85 Pa. 139; *Ogden v. Peters*, 15 Barb. (N. Y.) 560. This rule does not help the defendant, as he did not offer himself as a witness, did not testify as to his movements, or as to any statement he had made concerning them, and the state had no occasion to try to impeach him. The statements sought to be proven by the testimony of the wife were simply self-serving declarations, and were too remote in time to be a part of the *res gestæ*.

[7] The witness Good, when he first read of the disappearance of the deceased, went to the sheriff's office and said, in effect, that if the deceased disappeared on Wednesday, there was nothing in what he had to say; but, if he disappeared on Friday, then he knew something which might be of assistance in unraveling the mystery, and further intimated that the knowledge which he possessed might cause those guilty to seek to put him out of the way. He then wrote the defendant's name on a slip of paper, sealed it in an envelope, and gave it to the deputy sheriff, to be opened only if he (Good) disappeared, or when the body of the missing man might be found, saying that if he were killed or disappeared the person named on the slip would be responsible. Nothing regarding the writing of the name or the leaving of the envelope was touched upon in the direct examination of the witness Good, but upon cross-examination all of the facts were brought out, except only the name written upon the slip of paper, and on redirect examination the paper bearing the defendant's name was, on the state's offer, introduced in evidence.

The defendant argues that this was prejudicial. If so, he cannot complain. He took the chance involved in a searching examination of the state's witness, and, having developed the facts of the writing of the name and the depositing of it with the sheriff, and all the details surrounding it, he cannot now complain because, under familiar and well-settled rules of law, the state took advantage of what he had developed and placed before the jury that which he had made proper and material.

We have examined with care each one of appellant's numerous assignments of error, have faithfully read the record, and fail to find any prejudicial error committed by the trial court. To discuss in detail, or even to state, each assignment, so that the point raised can be fully understood, would unduly extend this opinion, and, as each point made is easily solvable by well-settled rules of law, no good purpose could be served by such statement or discussion. Appellant has twice been found guilty by a jury. The trial which we have reviewed was fairly conducted, appellant's rights were ably guarded by competent and eminent counsel, and he must abide the result.

The judgment is affirmed.

HOLCOMB, O. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(112 Wash. 22)

**SCHROCK v. SCHROCK.** (No. 15861.)

(Supreme Court of Washington. July 28, 1920.)

**Compromise and settlement** §23(3) — Evidence held to show full settlement free from mistake.

In an action to recover a portion of the profits of a transaction, evidence of an adjustment made between the parties, which plaintiff, in a suit against defendant by another, testified was a full settlement of the transaction, held to show a mutual settlement not affected by any mistake, which barred recovery by plaintiff.

Department 2.

Appeal from Superior Court, Okanogan County; D. H. Carey, Judge.

Action by Ebb Schrock against E. F. Schrock. Judgment for defendant, and plaintiff appeals. Affirmed.

F. K. P. Baske, of Davenport, for appellant.  
Danson, Williams & Danson, of Spokane, for respondent.

TOLMAN, J. Appellant, who was plaintiff below, is a nephew of the respondent, and sues to recover one-half of the profits which he alleges accrued from certain trades in real estate. From a judgment denying him any recovery, he appeals.

As we see it, the questions involved are of fact only, and the following is either admitted or fairly established by the evidence:

In 1914 respondent owned a large tract of land in Adams county, Wash., subject to a mortgage for \$30,000, which had theretofore been farmed unprofitably by another nephew, W. D. Schrock. In March of that year appellant proposed, and respondent agreed, that

appellant should go upon the land, care for and farm it, out of the proceeds pay the interest on the mortgage, retaining the remainder of the income for himself, and that he should sell or trade the land, when opportunity offered, for as much as possible above the mortgage debt. Appellant contends that in the event of sale it was agreed that the amount realized above the mortgage should be divided equally between them, while respondent denies any such agreement, and contends that while it was understood that appellant should be compensated if he brought about a sale or exchange, no percentage or amount was named or agreed upon.

Appellant purchased from respondent the live stock, machinery, and tools on the place for \$6,400, and paid therefor by executing deeds to certain lands valued at \$3,000 more than the purchase price of the personal property. These deeds do not appear to have been delivered, but were placed in a bank, presumably to be delivered when respondent paid the \$3,000 boot money. Following the making of these arrangements appellant went upon the land and proceeded to put in a crop and to summer fallow, at an expense of approximately \$3,000. Thereafter in May of the same year, with the consent and approval of respondent, appellant traded the equity in the Adams county land, and the personal property used in connection therewith, for an equity in a tract of land in Montana, paying a bonus on the trade of \$5,000 in cash, which was supplied by respondent. Respondent then surrendered to appellant the deeds in escrow of the land which had figured in the purchase of the personal property (never having paid the \$3,000 boot money on that transaction), and thereafter another trade was made through the efforts of appellant by which the Montana land was exchanged for land in Lincoln county, Wash., which was subject to a mortgage of upwards of \$25,000. Title to the Lincoln county land was vested in respondent, who purchased and paid for certain personal property thereon and entered into exclusive possession.

In November, 1914, the parties made some kind of an adjustment, which respondent contends was a final settlement of all of these matters, in which \$6,000 was allowed for appellant's services in making the two exchanges, and \$1,800 was added thereto, as respondent claims, for the \$3,000 expended by appellant in putting in the crop and summer fallowing the Adams county land, before the first trade, less \$1,200, interest on the mortgage on that land, which by agreement appellant should have paid, and a note for \$7,800, the amount thus arrived at, was given by respondent to appellant, which was afterwards admittedly paid.

Appellant made no further claims for some

(191 P.)

years thereafter, during which time the other nephew, W. D. Schrock, waged an unsuccessful action against the mutual uncle for a large sum claimed to be due him in the transaction, upon the trial of which case appellant testified squarely, upon apparently full understanding of all the facts, that the \$7,800 note heretofore referred to was given to him in full and final settlement of all that was due him in this transaction. He now testifies and strenuously contends that the \$6,000 included in the \$7,800 note, for his services, was an advance only; that it was then agreed that the remainder of his half of the profits should be paid when the Lincoln county land was sold; and ingeniously, we think, he attempts to explain away certain matters, and advances the theory that the personal property included in the first trade was his, was traded in at a valuation of \$19,200, although at the time he purchased it two months before it was valued at \$8,400; that certain payments made to him by respondent were for the purpose of equalizing their interests in the Montana land because of such valuation on the personal property; and he here seeks recovery of upwards of \$22,000 as his share of the profits of the sale of the Lincoln county land, plus upwards of \$14,000, his share of the profits derived from farming the land before it was sold, and in the alternative he contends here that, if a final settlement was in fact made, then there was a mutual mistake, in that the parties failed to take into account the personal property and the cash payment which went into the purchase of the Montana land, and therefore the settlement should be disregarded or set aside.

After a careful study of the record, we are abundantly satisfied that the findings of the trial court are supported by a preponderance of the evidence; that a final settlement was made without any element of mistake entering therein, and that both parties are bound thereby.

The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(111 Wash. 677)

COONS et ux. v. OLYMPIA LIGHT & POWER CO. (No. 15798.)

(Supreme Court of Washington. July 24, 1920.)

1. Appeal and error §830(1)—Evidence taken most favorable to respondent in determining sufficiency to go to jury.

In considering whether there was sufficient evidence to go to the jury, on an appeal from a judgment for plaintiff, the evidence must be taken in its most favorable light to plaintiff.

2. Street railroads §117(5, 28)—Negligence as to automobile driver and contributory negligence held questions for jury.

In an action by an automobile driver for damages sustained in a collision with a street car while driving on the track to pass a car standing on a spur track, evidence held to make questions for the jury as to whether the company was negligent in obstructing the highway, whether this was the cause of the injury, and whether plaintiff used ordinary care.

3. Street railroads §117(29) — Automobile driver's negligence in failing to look question for jury.

An automobile driver, colliding with a street car while driving on the track to pass a car standing on a spur track, was not required, as a matter of law, to look for approaching cars when three or four blocks from the point of collision.

4. Street railroads §111(2)—Mode of operation of car admissible, though obstruction of street was primary negligence relied on.

Though, in an action for damages sustained in a collision with a street car while passing a car standing on a spur track, the primary negligence relied on was the leaving of the car on the spur track, evidence of the distance within which the moving car could have been stopped was admissible.

5. Street railroads §111(2)—Speed of car admissible, though obstruction was primary negligence relied on.

Though, in an action for damages in a collision with street car while passing a car standing on a spur track, the primary negligence relied on was the obstruction of the street, and the speed of the car was alleged to have contributed to the injury, evidence of the speed of the car with which plaintiff collided was admissible.

6. Street railroads §99(9)—Automobile driver entitled to assume car would approach obstructed crossing at reasonable speed.

Where a street car was standing on a spur track at a street intersection, partly obstructing the street, an automobile driver, driving on the main track in passing it, had a right to assume that cars would approach the crossing at a reasonable rate of speed.

7. Street railroads §90(2)—Reasonable speed dependent on circumstances.

What was a reasonable rate of speed for a street car to approach a street intersection, partly obstructed by another car standing on a spur track, depended on the surrounding circumstances.

Department 1.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action by Lewis A. Coons and wife against the Olympia Light & Power Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Troy & Sturdevant, of Olympia, and Poe & Falknor, of Seattle, for appellant.

Harry L. Parr and Thos. M. Vance, both of Olympia, for respondents.

**MACKINTOSH, J.** Fourth street, in Olympia, runs in an easterly and westerly direction, and upon it the appellant operates a single track street car line. Easterly from Chestnut street, Fourth street rises for a short distance, then slopes slightly to the east and then for a considerable distance continues on a sharp upward grade. At the intersection of Fourth and Chestnut Streets a spur track extends southerly for a couple of blocks to the appellant's car barns. The track on Fourth street is laid to the north of the center of the street. A collision occurred at the intersection of Fourth street and Chestnut between a car owned by the appellant and the automobile owned by the respondent. An action was begun for the recovery of damages occasioned by this collision, and from a verdict and judgment in favor of the respondents this appeal has been prosecuted.

[1, 2] The appellant claims that there was not sufficient evidence in the case to warrant its submission to the jury, and that the court should have held, as a matter of law, that the injury complained of was occasioned, not by the negligence of the appellant, but by the negligence of the respondent. It therefore becomes necessary to examine the testimony in this case to determine whether there was presented a question of fact for the jury to pass upon.

The evening of November 13, 1918, was a dark and rainy one in Olympia, and somewhere about 6 o'clock the respondents came from the south into Fourth street, a few blocks to the west of Chestnut street, and proceeded in an easterly direction toward their home. Observing the rules of the road and the statutory requirement that he drive his automobile on the south side of the street, respondent kept as near as possible to the curb at his right. At the intersection of Fourth and Chestnut streets the appellant had parked a car, loaded with passengers, upon the spur track. This car was waiting the passage of a west-bound car so that it might then back into the main track and proceed easterly upon its trip. This car was 26 feet 4 inches in length, with a fender which extended in front the further distance of 2½ feet. Upon the rear was a fender which extended 18 inches from the body of the car, thus making the total length of the obstruction 30 feet 4 inches. The distance from the south rail of the street car track to the curb line of Fourth street was 27 feet. The evidence is in dispute as to how far the standing car was in upon the spur track, but, taking the evidence in its most favorable light to the respondent (as we must in considering the question of whether there was sufficient evidence to go to the jury), it shows that

the car was standing in such position that in order to pass to the north of it it was necessary for the left wheel of respondent's automobile to pass over the south rail of appellant's track. The testimony justified the jury in arriving at the conclusion that it was impossible for the respondent to pass to the south of the standing car, as to do so would have necessitated his driving upon the portion of Chestnut street reserved for pedestrians; in other words, to have passed to the south of the curb line of Fourth street.

At the time the street lights of Fourth street were lighted, and as they extended up the hill easterly on Fourth street, it was difficult to distinguish them from the headlight of a down-coming street car. This being a busy portion of the city and a busy time of the day, many automobiles were coming down the Fourth street hill, and their headlights added to the confusion. The presence of the fully lighted street car standing on the spur track increased the difficulty of a clear and accurate vision. As the respondent approached the standing street car, he testified that he looked through the wind shield, which was rain-spattered, and as an extra precaution looked to the left around the wind shield and saw no street car approaching from the east, and then, as he came nearer to the rear of the standing car, he turned his automobile, which was of the width of 5 feet 3 inches, to the north of the car, and was proceeding to pass it when he was struck by appellant's street car west-bound, which prior to that time he had not seen, although it carried the customary headlight, which was lighted. There was testimony in the case that no bell was rung or warning given of the approach of the car.

These facts presented a question for the jury to determine whether the appellant was negligent in obstructing the highway and being the cause of the injury, or whether the respondent had used ordinary care for his own safety. If the standing lighted street car rendered the approach of the east-bound car undiscernible to the respondent, and the entire situation was such, considering the state of the weather and of the lights and obstruction, that a reasonably prudent man would have proceeded as did the respondent, the jury would be justified in concluding that he was guilty of no contributory negligence.

The appellant desires this court to hold that the respondent should have been held guilty of contributory negligence upon the strength of certain decisions of this court, which, however, seem to us to be clearly distinguishable upon their facts.

The case of Herrett v. P. S. T. L. & P. Co., 103 Wash. 101, 173 Pac. 1024, holds that the driver of an automobile cannot deliberately drive upon a street car track and excuse himself by saying that he looked when, if he had looked, he could not have helped seeing the approaching car. In that case there

was no excuse for the driver's failure to see the street car. In the instant case the condition of the lights of the street and of approaching automobiles, and the standing obstruction created by the appellant in the street, all furnished reasons and excuses for the respondent's failure to see the car which ultimately struck him. It will not do to say that the respondent was guilty of contributory negligence because a passenger on the west-bound car witnessed the respondent's approach. *Stueding v. Seattle Electric Co.*, 71 Wash. 476, 128 Pac. 1058, *Bardshar v. Seattle Electric Co.*, 72 Wash. 200, 130 Pac. 101, *McEvilla v. P. S. T. L. & P. Co.*, 95 Wash. 657, 164 Pac. 198, *Devitt v. P. S. T. L. & P. Co.*, 106 Wash. 449, 180 Pac. 483, 185 Pac. 583, may be likewise distinguished from this case in that here the driver of the automobile did not deliberately drive upon a street car track and attempt to say that he looked, but did not see what could have been avoided had he looked. There was sufficient evidence here from which the jury could say that the respondent made reasonable use of his senses "to guard his own safety." *Bowden v. Walla Walla, etc., Ry. Co.*, 79 Wash. 184, 140 Pac. 549.

[3] In the cases relied on by the appellant there were no physical facts or conditions such as disclosed by the record in this case to prevent or render difficult the view to be had of the approaching street car. It is urged that the respondent could have seen the approaching street car had he looked from three or four blocks to the west of the point of collision. As a matter of law, it is not his duty to look from that distance. It is a question for the jury to say whether he should have done so. This case seems to fall squarely within the decision of *West Chicago, etc., Ry. v. O'Connor*, 85 Ill. App. 278, where the street car company had obstructed a portion of the street outside of its tracks by pushing snow from that part of the street upon which its tracks were laid, and had also obstructed one of its tracks with a repair wagon, so that there remained only the other track upon which vehicles might drive. In that case the court held it was incumbent upon the street car company's employes to be more watchful and cautious than they would be if the whole street were open and unobstructed to persons driving along the street, and held the case properly submitted to the jury. The court said:

"Appellee was upon the right-hand track. He could not proceed further upon that track because of the repair wagon. He could not turn to the right because the appellant had so incumbered that portion of the street with snow that he could not pass with his load on that side of the repair wagon. There was but one way for him to pass the repair wagon, and that was to turn to the left onto the west track, which he did. The grip car approaching upon that track was 300 or 400 feet distant on the

top of the viaduct. The tracks at that point were straight, and there was nothing to obstruct the view of the gripman. Appellee had a right to suppose that the gripman would exercise ordinary care under all the circumstances. The evidence would justify a conclusion by the jury that the gripman did not apply the brakes until he was within a short distance of the appellee. If he did not, that certainly was negligence. If he failed to see the high repair wagon and try to prevent any injury to appellee, that was negligence. The gripman must have known that the snow pushed to the side of the tracks obstructed the passage by loaded wagons. He was bound to exercise what would be reasonable care, taking into account all the facts and circumstances as they then existed, and were apparent to him. The jury must have concluded that he did not. At any rate, they would be justified, under the testimony in this case, in so finding. The rights of the street railway company and of the private citizen in the public highways are, in law, mutual. Their duties and obligations are reciprocal. Neither has the right, unreasonably or unnecessarily, to obstruct or interfere with the use of the street by the other in a proper manner. And when a street car company has obstructed that portion of the street outside of its tracks, by snow pushed from that part of the street upon which its tracks are laid, and has obstructed one of its tracks with a repair wagon, so that there remains only the other track upon which a citizen may drive, it is incumbent upon the employes of the car company to be more watchful and cautious to prevent accidents than if the whole street was unobstructed and open to the use of persons driving along such street."

The court was therefore correct in submitting the case to the jury.

[4] Appellant bases another claim of error on the admission of testimony that a motorman, seeing an obstacle on the track 150 or 200 feet away, could stop his car before hitting the object. Although the primary negligence relied on was the leaving of appellant's car upon the spur track, the entire conduct of the appellant was subject to examination, and the question of what was negligence on the part of the appellant is to be determined by all of the circumstances of the case, and it was properly permitted to the respondent to show in what manner the west-bound car was being operated, as the appellant's negligence might have been the failure of the motorman to promptly stop his car, in view of the situation as to the standing car.

[5-7] The statement also answers the other assignment of error complained of, that the court admitted evidence of the alleged excessive speed of the west-bound car. It is true that the complaint did not allege excessive speed, but merely that the speed of appellant's west-bound car contributed to the injury, and the evidence merely went to the extent of showing that it was "coming pretty fast." The respondent was entitled to a proper performance of duty by the street car operators, and had a right to assume that any

street car would approach the crossing, with its obstruction, at a reasonable rate of speed. What was a reasonable rate of speed depends on the surrounding circumstances. *Atherton v. Tacoma, etc., Co.*, 30 Wash. 395, 71 Pac. 39, indicates the principle to be that—

"Safety in the speed is relative, and depends on the facts of the case, and, where they are disputed, it must be submitted to the jury."

Under the allegation that the speed of the west-bound car contributed to the injury, the respondent had a right to produce testimony as to the car's actual speed, and from it the jury might determine whether the appellant was negligent in that regard in approaching the blocked street intersection.

Finding no error in the record, the judgment is affirmed.

HOLCOMB, C. J., and TOLMAN, MAIN, and MITCHELL, JJ., concur.

(58 Mont. 276)

STATE ex rel. RANKIN v. DISTRICT COURT OF FIRST JUDICIAL DIST. IN AND FOR LEWIS AND CLARK COUNTY et al. (No. 4841.)

(Supreme Court of Montana. July 9, 1920.)

1. Contempt  $\S$  63(3) — Order adjudging attorney in contempt held defective for failure to recite facts.

Order adjudging attorney in contempt, stating that the attorney had been "insulting and impudent" to the court in his remarks and conduct, without setting out the facts which occurred and from which court drew its conclusions, as required by Rev. Codes,  $\S$  7311, held fatally defective.

2. Contempt  $\S$  40—Proceedings held criminal. Proceedings to punish both direct and indirect contempts are criminal in their nature.

3. Contempt  $\S$  33 — Courts have inherent power to inflict punishment for contempt.

The power to inflict punishment for both direct and indirect contempt is inherent in the courts, since every court must possess the power to protect its dignity by compelling counsel and litigants, as well as all other persons who are called into its presence or who are there merely as spectators, to observe decorous and respectful conduct, to the end that the proceedings in hand may be conducted in an orderly way.

4. Attorney and client  $\S$  14—Attorneys bound to uphold dignity of court in which they practice.

Attorneys are, in a sense, officers of the court, in that they enjoy the high and exclusive privilege of representing citizens who seek to have their rights determined, and upon attorneys, above all other members of society, rests the duty to uphold and maintain the dignity of the court in which they practice.

5. Contempt  $\S$  39 — Court's power to inflict punishment to be exercised with intelligent discretion.

Court's power to punish for contempt is not an arbitrary power, and is to be exercised only when the necessity arises, and then with an intelligent discretion to serve its purpose, under the rules of procedure established by the usages of the courts or prescribed by the statute.

6. Contempt  $\S$  31 — Legislature cannot abridge court's power to inflict punishment, but may prescribe procedure.

The Legislature may prescribe the modes of procedure in contempt proceedings, but it cannot take away or abridge the court's power to inflict punishment for contempt.

7. Contempt  $\S$  40—Court must observe statutory proceedings.

The courts in inflicting punishment for contempt must observe the modes of procedure prescribed by the statute.

8. Contempt  $\S$  63(4)—Order in direct contempt proceedings must recite facts, under statutes requiring statement of facts "as occurring."

Order adjudging person guilty of a direct contempt, under Rev. Codes,  $\S$  7311, providing that such order must recite "the facts as occurring" in court's immediate view and presence, must recite the facts showing the contemptuous words, acts, or manner, as the case may be, and not merely the court's conclusions, and if the contempt is committed by counsel or by a witness undergoing examination so much of the evidence as is necessary to disclose the contempt must be recited, or if committed by a person not connected with the case the pertinent facts must be disclosed; the words "as occurring" in such statute meaning "which occurred," and such facts being necessary for review of order by Supreme Court, under Const. art. 8,  $\S$  2 and 8, since Supreme Court cannot refer to court's return for such facts.

9. Contempt  $\S$  52—Neither formal charge in writing nor process is required in direct proceeding.

In a case of direct contempt, the contemnor being already present in court, neither formal charge against him in writing nor process is required.

10. Contempt  $\S$  61(4)—Attorney in contempt should be accorded opportunity to explain conduct.

An attorney, before being adjudged in contempt, should be accorded an opportunity to explain or excuse his contempt and thus purge himself or show that no contempt was intended.

Certiorari by the State, on the relation of Wellington D. Rankin, against the District Court of the First Judicial District in and for the County of Lewis and Clark and R. Lee Word, a Judge thereof, to review an order adjudging relator guilty of contempt. Order annulled.



W. T. Pigott, C. A. Spaulding, Henry C. Smith, and A. P. Heywood, all of Helena, for relator.

Day, Mapes & Loble, McIntire & Murphy, James A. Walsh, Galen & Mettler, O. W. McConnell, H. Sol. Hepner, J. R. Wine, George W. Padbury, Jr., and M. S. Gunn, all of Helena, for respondents.

**PER CURIAM.** Certiorari to the district court of Lewis and Clark county to review an order adjudging Wellington D. Rankin, Esq., an attorney at law, guilty of contempt.

On May 23, 1920, during the trial of a cause entitled *The State of Montana v. D. E. Rainville*, in the above-named district court, the court made and entered the following order:

"The trial of this cause was this day resumed; present J. R. Wine, Esq., county attorney, George W. Padbury, Jr., assistant county attorney for the state, and the defendant with his counsel, Wellington D. Rankin, Esq., and A. H. McConnell, Esq., and the jury. Thereupon Dr. E. D. Hitchcock resumed his testimony on behalf of the state. Thereupon Dr. B. V. McCabe was called, duly sworn, and testified on behalf of the state. Thereupon, by reason of remark of Wellington D. Rankin, Esq., counsel for the defendant, the further taking of testimony was deferred and the bailiff instructed to remove the jury from the courtroom. Whereupon the court, upon finding that counsel could not be restrained as to his remarks, the court finds that in the first part of the trial when the question came up as to the position of counsel, Wellington D. Rankin, of counsel for defendant in this case, was insulting and impudent to the court in his remarks in the presence of those in the courtroom and in the presence of the jury.

"The court holds, and so finds, that in the first part of the trial when the question came up as to the position of counsel, Wellington D. Rankin, of counsel in this case, was insulting and impudent to the court in his remarks in the presence of those in the courtroom and in the presence of the jury.

"The court finds, and again declares, that again on yesterday three times the court had to admonish counsel that the question covered by his question had already been ruled upon by the court and it was not further necessary for him to put the questions in order to preserve his record. Three times afterwards he put the same question.

"The court further finds that when a question was put by the counsel Rankin to the witness upon the stand, and the court was not clear from the question as to what he meant and the court made remark with reference to it, counsel was insulting and impudent to the court.

"The court further finds, and so declares, and the record will show, that three times in the course of this trial and while the court was attempting and undertaking to make remarks—remarks pertinent to the case—he was interrupted by Counsel Wellington D. Rankin.

"The court further finds, and so declares, that his manner all through has been insulting and the effect has been to lower the court in

the opinion of those present, to bring the court in contempt, and to interfere with the proper administration of justice.

"Stand up, Wellington D. Rankin. The court finds you guilty of contempt, and it is the order, judgment, and sentence of this court that you be confined for 48 hours in the jail of Lewis and Clark county, and that you pay a fine of \$250, and you are remanded to the custody of the sheriff to see the sentence executed."

Mr. Rankin, having been committed to jail, brought this proceeding to have the order annulled on the ground that it is void on the face, in that it does not recite the facts as they occurred at the time it was made, as required by the statute. On application for habeas corpus at the same time, the relator was admitted to bail pending final hearing.

The orders examined in the cases of *State ex rel. Breen v. District Court*, 34 Mont. 107, 85 Pac. 870, and *In re Mettler*, 50 Mont. 299, 148 Pac. 747, were in form and substance the same as the one here complained of. Both of them inflicted punishment for direct contempts, under section 7811 of the Revised Codes. The one in the *Breen Case* was before this court on certiorari. It was declared void, the court saying of it:

"The conviction here was for a direct contempt. The judgment, however, is wholly insufficient to meet the requirements of the statute. It does not contain, even by appropriate reference to the proceedings before the court, anything to show what the matters referred to as scandalous were, nor any fact tending to show what the manner of the relator was. It states conclusions and inferences only, drawn by the judge from the facts as they actually transpired, thus leaving this court no alternative but to accept these conclusions or to hold the order invalid. The purpose of the statute is to require the court to set forth the jurisdictional facts, so that the propriety of the judgment of conviction may be examined and reviewed. If adjudged sufficient as it stands, the order complained of would be conclusive upon this court, and review of it, as to the sufficiency of the facts to put the power of the court in motion, would be impossible."

[1] The case of *In re Mettler* was an application for habeas corpus. The complainant was held entitled to his release on the ground that the order was void. The court, speaking through Mr. Justice Holloway, quoted with approval the paragraph above from the opinion in the *Breen Case* as embodying the correct construction of the statute. These cases are conclusive of the insufficiency of the order in this case. The following decisions from other jurisdictions fully sustain the conclusion announced in those cases: *Ex parte Rowe*, 7 Cal. 181; *In re Shortridge*, 5 Cal. App. 379, 80 Pac. 478; *Cress v. State*, 14 Okl. Cr. 521, 173 Pac. 854; *Crites v. State*, 74 Neb. 687, 105 N. W. 469; *In re Shull*, 221 Mo. 623, 121 S. W. 10, 133 Am. St. Rep. 496; *Ex parte Hoar*, 146 Cal. 132, 79

Pac. 853; In re Coulter, 25 Wash. 529, 65 Pac. 759; State v. District Court, 124 Iowa, 187, 99 N. W. 712. Relator is therefore entitled to have the order annulled.

Counsel for respondents insist, however: (1) That, though the facts are defectively stated in the order, sufficient are stated to uphold it, and if not (2) that reference may be made to the portions of the evidence in the case of State v. Rainville, certified in the return to the writ, to ascertain what was said and done prior to and at the time the order was made, for the purpose of upholding it. Neither of these contentions can be maintained. In answer to the first, a very brief notice of the order will be sufficient. In the first paragraph preceding the adjudging portion of the order, which does not purport to state any facts, the court "finds" that during the first part of the trial "when the question came up as to the position of counsel" the relator was "insulting and impudent to the court in his remarks," etc. What was the position of counsel referred to? Was it one assumed by him upon some preliminary question then the subject of argument? Or did the court refer to the place in the courtroom relator presumed to occupy? What were the remarks made by him which the court deemed insulting and impudent?

In the second paragraph the court finds and declares that on the previous day during the trial it had admonished counsel three times that "the question covered by his question had been ruled upon by the court and it was not further necessary for him to put the questions in order to preserve his record," and that "three times afterwards he put the same question." What was the question? To whom was it propounded? Was it propounded to a witness who was then being examined, or had it been propounded to a different one? Was it each time expressed in the same language? Did it seek to elicit testimony on the same subject to which the previous one related?

In the third it is found that counsel was "insulting and impudent" to the court while it was making remarks with reference to a question which had been put to a witness on the stand, the meaning of which was not clear. Of what did the insult and impudence consist? Was it manifested by word or act, or both? Or did it consist of the manner of counsel interpreted in the light of the attendant circumstances?

In paragraph 4 it is found that while the court was undertaking to make remarks pertinent to the case on trial it was interrupted by relator. Was the interruption by word or exclamation, or by some noise or movement accidentally or intentionally made by relator? How may it be determined whether the words spoken or act done was really an interruption or not? Or whether, if it was, the relator was not entirely within the limits of his duty to the defendant on trial in call-

ing to the attention of the court some error into which it had fallen?

In the fifth paragraph the finding is that relator's "manner all through has been insulting and the effect has been \* \* \* to bring the court in contempt and to interfere with the proper administration of justice." What was the manner of relator?

Omitting the inquiry whether the court could with propriety, at a given time during the course of the trial, assemble with what then occurred the words, acts, and manner of counsel on previous days and make these combined the basis for a judgment for contempt against him, the findings, either taken separately or together, do not furnish any answer to the several inquiries which we have propounded with reference to them. In other words, as was said in the Breen Case, supra, the findings state "conclusions and inferences only, drawn by the judge from the facts as they actually transpired, thus leaving this court no alternative but to accept these conclusions or to hold the order invalid."

[2, 3] In making the second contention, counsel for respondents have failed to observe the distinction between direct and indirect contempts. Proceedings in both are criminal in their nature. State ex rel. B. & M., etc., Co. v. Judges, 30 Mont. 193, 76 Pac. 10; In re Mettler, supra. The power to inflict punishment in either is inherent in the courts. Every court, in the very nature of things, must possess the power to protect its dignity by compelling counsel and litigants, as well as all other persons who are called into its presence or who are there merely as spectators, to observe decorous and respectful conduct, to the end that the proceedings in hand may be conducted in an orderly way. The power is designated as "inherent" because it is necessary to preserve the dignity of the judicial department of the government, and, whenever the occasion demands, must be exercised to its fullest extent to enable the court to discharge its high duty of administering justice between parties whose rights are put in issue before it, or to enforce these rights after they have been determined. Otherwise, the court is recreant to its duty and becomes an object of ridicule and contempt.

[4] Members of the legal profession are, in a sense, officers of the court, in that they enjoy the high and exclusive privilege of representing citizens who seek to have their rights determined. Upon them, above all other members of society, rests the duty to uphold and maintain the dignity of the court in which they practice. The obligation, if not embodied in express terms, is clearly implied in the oath to which they subscribe upon being granted the right to practice their profession. In consideration of the fact that they are trained in the law and are presumed to be well acquainted with the rules of procedure, as well as the extent of their rights and

duties as representatives of litigants, they are held to a stricter accountability.

[5-7] The power is not an arbitrary one, however. It is to be exercised only when the necessity arises, and then with an intelligent discretion to serve its purpose under the rules of procedure established by the usages of the courts or prescribed by statute. The Legislature may prescribe the modes of procedure, but it cannot take away or abridge the power. Our Legislature has prescribed modes of procedure and it is incumbent upon all the courts to observe them. In *re Mettler*, supra. This is so because there must be such a record made that the convicted contemnor, if he chooses, may submit it to the appellate tribunal for review by appeal from the final judgment, or by other appropriate method. In this state he may do this only by invoking the writ of certiorari (Const. art. 8, § 3), or, in proper cases, the general supervisory power vested in this court over all the inferior courts (Const. art. 8, § 2; *State ex rel. Sutton v. District Court*, 27 Mont. 129, 69 Pac. 988; *State ex rel. Coleman v. District Court*, 51 Mont. 195, 149 Pac. 973; *State ex rel. Zosel v. District Court*, 56 Mont. 578, 185 Pac. 1112). Under our form of government, a citizen may not be imprisoned or subjected to the payment of a fine by the final judgment of any one man, whether his offense is one denounced by the Legislature or one for which he may be brought to the bar by the court itself in the exercise of its inherent power.

[8] The right to exercise this power summarily in cases of direct contempt is recognized by section 7311 of the Revised Codes. The purpose of this section is to prescribe what record must be made to evidence the legality and regularity of the proceeding. It requires that "an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt," etc., in order that the jurisdiction of the court may thus be made to appear. The word "as," employed in the participial clause "as occurring," is defined generally by our lexicographers as an adverb or conjunction. Webster's New International Dictionary; Century Dictionary. According to the same authorities it is sometimes used also in a pronominal sense equivalent to "who" or "which." The cases of *Beasley v. People*, 89 Ill. 571, and *Kelley v. Peterson*, 9 Neb. 76, 2 N. W. 346, furnish illustrative examples. Obviously, this quality must be assigned to it here, the antecedent being the word "facts." The participial expression "as occurring" is therefore equivalent to "which occurred." If there were any doubt that this is the sense to be attributed to it, it is removed by the later use of the term "thereby," which has reference to the word "facts"; that is, the words, or acts, or manner, any one or all of these, which form the basis of the

judgment. The purpose and meaning of the provision is thus made clear. This may be illustrated further, however, by this consideration: A proceeding for an indirect contempt, as provided in the same section, must be instituted by the presentation of an affidavit setting forth the facts constituting the contempt, or by a statement of them by a referee or arbitrator or other judicial officer. The contemnor must then be brought before the court by process, and held for trial or be admitted to bail, as provided in section 7312 et seq. A hearing must then be had upon the answer of the contemnor, which must be conducted with all the incidents of an ordinary criminal case, except that a jury is not required. If the contemnor is found guilty the court pronounces judgment as in ordinary criminal cases, sentencing him to pay a fine or to undergo imprisonment, or both fine and imprisonment may be imposed. The judgment is then executed as in other cases. The affidavit, the process, the answer of the contemnor, and the evidence, when properly preserved, together with the judgment, constitute the record.

[9] In a case of direct contempt, the contemnor being already present in court, neither formal charge against him in writing nor process is required. The court stops the proceeding during the course of which the contempt has occurred and summarily renders judgment, imposing such punishment as it may deem proper within the limits prescribed by the Legislature. No record is made other than the judgment. This, as the statute prescribes, must recite the facts showing the contemptuous words, acts, or manner, as the case may be. It is then entered under its appropriate title to indicate the character of the proceeding, and this constitutes the record. If the court fails to formulate the judgment as section 7311, supra, prescribes, there is no record to which the appellate court may look to ascertain whether the facts "as occurring" in its immediate view and presence are sufficient to form the basis of a judgment. If the contempt is committed by counsel employed in the trial of a case, or by a witness undergoing examination, so much of the evidence introduced in that case as is necessary to disclose the contempt must be recited in the judgment. If it is committed by a person not connected with the case then in hand, the facts pertinent to that case may or may not tend in any way to disclose any misconduct or breach of propriety. In other words, the pertinent facts are not disclosed by the presiding judge through the medium of witnesses, but are such as are observed by the judge himself. By his recital of them as they are known to him the record is made. The validity of the judgment is to be tested by the recital thus made and cannot be supplemented by evidence or by facts certified up in the return by the judge. The proceeding, therefore, though tak-

en and determined during the course of other proceedings then before the court, is distinct from the latter, and the record in the latter is no part of the record in the former. Upon certiorari, the judgment itself is the only record, and a certified copy of it constitutes the full return to be made to the appellate court in obedience to the writ, as prescribed by section 7206 of the Revised Codes.

In support of their contention, counsel have made an elaborate argument in their brief and cite authorities which hold that the facts upon which the contemnor has been adjudged guilty may be certified to the appellate court to supplement the order. These authorities apply, however, to cases of indirect contempts, and are not in point here.

[10] In their brief, counsel for the relator make the point that he was not accorded an opportunity to explain or excuse his contempt and thus purge himself or show that no contempt was intended. This seems to be the better practice even in flagrant cases. 4 Ency. Pl. & Pr. 789. No one should be condemned without a hearing. We cannot ascertain in this case what the facts were, and therefore express no opinion as to whether the relator was guilty. So far as we can judge, he may have been able to satisfy the presiding judge that his conduct and manner, though apparently contemptuous, were in fact not so.

The order is annulled, and the bail bond furnished by the relator is discharged and his sureties exonerated.

(97 Or. 253)

**SALEM SAND & GRAVEL CO. v. OLCOTT, Governor, et al.**

(Supreme Court of Oregon. July 31, 1920.)

**1. Mandamus ¶72—Will not control exercise of discretion.**

Where public officers have discretionary power as to performance of an official duty, writ of mandamus will not issue to control their discretion.

**2. Mandamus ¶165—Demurrer to answer admits averments.**

A demurrer to the answer to a petition for mandamus admits the averments thereof.

**3. Navigable waters ¶37(6)—Land board has discretion in leasing for taking gravel, and could reject only bid made.**

Under Laws 1920 (Sp. Sess.) c. 32, §§ 1-3, authorizing the state land board to lease the beds of navigable streams for the purpose of removing gravel, leases to be made after notice of competitive bidding, fixing the formalities as to the bids and providing that the board on leasing may fix stipulations protecting the rights of the state, the board has a discretionary power, and it may reject the only bid made, which was for a long time lease at a very low

price, where it had given notice that any and all bids might be rejected, for to allow a lease on the terms would not have been advantageous to the state.

**Department 2.**

Petition by the Salem Sand & Gravel Company for writ of mandamus against Ben W. Olcott, Governor, and others, constituting the State Land Board and Clerk thereof. Petition dismissed.

This is an original proceeding in mandamus. The plaintiff is an Oregon corporation engaged in buying and selling sand and gravel, with its principal office and place of business in the city of Salem. The defendants are the members and the clerk of the state land board of Oregon.

The petition for an alternative writ alleges that the Willamette river is a navigable stream within the boundaries of the state, and that pursuant to statute the state land board adopted and promulgated certain rules and regulations relating to the sale and leasing of sand and gravel, prescribing the notice necessary to be given of the receipt of competitive bids for such sale and leasing, the stipulations to be contained in such leases necessary to protect the interests of the state, the requiring of a bond and the forfeiture thereof for failure to operate under the lease. It is charged that thereafter the board duly caused to be published a notice to the effect that it would receive bids up to 11 a. m. May 18, 1920, for a lease and permit to take, remove, and sell sand and gravel from that portion of the bed of Willamette river within Marion county, specifically described in the petition; and that the bids should specify the amount offered per cubic yard, the minimum yardage for each year, and the term for which the lease was desired, and should be accompanied by a certified check for 10 per cent. of the amount of the bid for one year and a map showing the premises and owners of abutting property with the residence and post office address of such owners.

The plaintiff alleges that on May 17, 1920, it submitted its bid in the amount of three cents per cubic yard for a lease of the described portions of the river bed for a term of five years, and offered to remove a minimum of 5,000 cubic yards each year, forwarding with the bid a certified check for \$15, which was 10 per cent. of the amount of the bid for one year; that attached to such bid was a map in triplicate, showing the premises; that the bid complied in all respects with the notice, rules, and regulations of the state land board, and was the highest received; that on May 28, 1920, the defendants considered the application, and, "contrary to law, rejected the same, and refused to enter into a contract with the plaintiff herein for the leasing and sale of gravel, rock and sand

in the bed of that portion of the Willamette river above described, and do now refuse to enter into such lease or contract"; that the plaintiff has no plain, speedy, or adequate remedy at law; that the right to the performance of the act sought to be required is clear; and that the defendants can give no valid excuse for their refusal.

Answering, the defendants admit the advertisement for bids under the rules and regulations of the statute, a copy of which is attached as an exhibit, and the receipt of the bid and bond of the plaintiff as alleged. As a further and separate defense it is alleged that the application of the plaintiff came on for hearing before the board on May 28, 1920, and was duly considered; that because it appeared to the board that it was not expedient or for the best interests of the state of Oregon to accept any bid for less than a minimum charge of 10 cents per cubic yard, and was not advisable to grant a lease for the yardage desired, for the price offered for five years, the application was rejected; and that the defendants then declined and still refuse to enter into a contract with the plaintiff for less than a minimum price of 10 cents per cubic yard. They deny that such refusal is contrary to law.

Among other things, the published notice recited that "the board reserves the right to reject any and all bids, whether before or after the award, \* \* \* and reserves the right to lease the whole of the described premises or any portion thereof," and that "all bids shall be made subject to the terms, provisions and conditions of the rules and regulations adopted and promulgated by the state land board of the state of Oregon, for the purpose of carrying out and making effective the provisions of chapter 32 of the General Laws of Oregon, adopted at the special legislative session of 1920, and on file with the undersigned and open to public inspection." The rules and regulations to which reference is made provide in part that "the state may lease beds of navigable portions of navigable streams for the purpose of removing gravel, rock and sand therefrom," that "leases will be executed in the discretion of the state land board, upon competitive bidding after notice," and that "any lease shall be given for such a period of time as may be determined by the board."

The plaintiff demurred to the further and separate answer on the ground that it did not state facts sufficient to constitute a defense. It contends that because it has complied with all required formalities and submitted the highest and only bid, it is the legal duty of the defendants to award it the desired lease for the period of five years at the price stipulated in the bid. The defendants claim that their authority is discretionary, and that they rejected the plaintiff's bid in the exercise of that discretion, for the best interests of the state.

John H. McNary and Walter E. Keyes, both of Salem (McNary, McNary & Keyes and E. M. Page, all of Salem, on the brief), for plaintiff.

George M. Brown, Atty. Gen., and L. A. Liljeqvist, of Portland (George M. Brown, Atty. Gen., on the brief), for defendants.

JOHNS, J. (after stating the facts as above). The question presented involves the construction of chapter 32, Laws 1920, entitled "An act relating to the use, leasing and sale of gravel, rock and sand in the beds of navigable streams, and under navigable waters, by the state land board; relating to and providing penalties for the violation of this act, and declaring an emergency," and the powers and duties of the state land board thereunder. The material provisions of the enactment are as follows:

"Section 1. The state land board is hereby authorized to lease the beds of navigable portions of navigable streams for the purpose of removing gravel, rock and sand therefrom. Such lease shall not be made except after notice of competitive bidding. \* \* \*

"Sec. 2. Any person desiring to take gravel, rock or sand from state properties may apply to the state land board for a lease, and such application shall be accompanied by a map showing the premises and the ownership of the abutting property. After such notice as may be prescribed by the state land board, it shall receive sealed bids on the lease and thereafter award the lease to the highest bidder. \* \* \*

"Sec. 3. The state land board may thereafter enter into contract of lease with such stipulations protecting the interest of the state, as the land board may require, and require a bond to be given by the lessee for performance of such stipulations, and providing for forfeiture for nonpayment or failure to operate under said contract. \* \* \*

Section 4 permits the employment of assistance to carry out the terms of the act, and requires the services of the Attorney General and state engineer when needed. It specifies also that after the payment of all incidental expenses the proceeds of sales and leases under the act are to be turned over to the Irreducible school fund. Subject to the exceptions therein stated, section 5 makes it unlawful for any one to remove gravel, rock, or sand from the bed of any navigable stream without the consent of the state land board, and specifies a jail sentence or a fine for violation of the act.

The answer states and the demurrer admits that the rules and regulations were adopted by the board "for the purpose of carrying out and making effective the provisions of chapter 32," Laws 1920, and that they specify:

"Leases will be executed in the discretion of the state land board \* \* \* for such a period of time as may be determined by the board."

The demurrer also admits that in the published notice for bids the board reserved "the right to reject any and all bids, whether before or after the award," and that "all bids shall be made subject to the terms, provisions and conditions of the rules and regulations adopted and promulgated by the state land board."

[1-3] The defendants are public officers of the state. The rule in such cases is well stated in High's Extraordinary Legal Remedies (3d Ed.) § 42, as follows:

"In all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be finally given. And whenever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action upon all matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given."

3 McQuillin on Municipal Corporations, § 1229, says:

"Where discretion is conferred to reject 'any and all bids,' it is held that the courts will not interfere with the discretion unless exercised with a fraudulent intent, to the injury of the party complaining, and where the injury is to a vested right. \* \* \*

"Although it is a rule of the board empowered to let certain contracts to award the contract to the lowest and best bidder, yet if it reserves the right to reject any and all bids, no bidder can claim any contractual rights until he has been awarded the contract."

In *Molloy v. City of New Rochelle*, 198 N. Y. 402, 92 N. E. 94, 30 L. R. A. (N. S.) 126, the opinion by Mr. Justice Chase states the rule thus:

"No contractual relation can arise merely from a bid unless by the terms of the statute and the advertisement a bid in pursuance thereof is, as a matter of law, an acceptance of an offer wholly apart from any action on the part of the municipality or any of its officers."

We quote the following from 28 Cyc. p. 1030:

"The right to reject all bids is often expressly secured to the municipality by charter; but, even in the absence of such express grant, it is very generally held that the proper municipal authorities may, at their discretion, reject all bids, especially if the right to do so has been reserved in the advertisement."

It is true that in *Springfield Milling Co. v. Lane County*, 5 Or. 265, under the facts there shown to exist, this court held:

"When a public body or officer has been clothed by statute with power to do an act which concerns the public interest, the execution of the power is a duty, and, though the phraseology of the statute be permissive, it is nevertheless to be held peremptory. \* \* \*

"When a statute confers upon an inferior tribunal a power, and at the same time prescribes a mode of exercising that power, the mode becomes the measure of the power, and such mode must be substantially, if not strictly, followed."

But in the same opinion it is said:

"There can be no question but that the county court had been invested with this power of providing for the construction and repair of bridges, and of appointing a superintendent in such a case, for the public good, and that the construction and repair of bridges concerns the public interests."

It will be noted that the court there found that the power vested in the county court was for the public good, and that the repair and construction of county bridges were matters of public interest. In the instant case there is nothing in the statute or the pleadings from which this court could hold that it would be for the public good or in the interest of the state to award the lease to the plaintiff according to its bid. The answer here alleges, and the demurrer admits the defendants' claim, that:

"It is not expedient or for the best interests of the state of Oregon, or the irreducible school fund thereof, to enter into a lease or contract for less than such minimum yardage of 10 cents per cubic yard or upon the terms applied for by plaintiff."

The law was enacted for the use and benefit of the state in its sovereign capacity.

In *State ex rel. v. Malheur County Court*, 54 Or. 255, 101 Pac. 907, this court held:

"If the making of an order is a mere ministerial act, involving no exercise of judgment or judicial power, mandamus is the proper remedy to compel it; but where an act is judicial or involves the exercise of judgment or discretion, and such judgment has been exercised, mandamus will not lie to compel amendment or correction thereof, though the action was erroneous."

Analyzing chapter 32, Laws 1920, we note in section 1, "the state land board is hereby authorized." The word "authorized" is synonymous with "empowered." In the sense here used it implies discretion. In *Armstrong v. Murphy*, 65 App. Div. 123, 125, 72 N. Y. Supp. 473, 474, it is said:

"The rule undoubtedly is that where public bodies or officers are empowered to do that which the public interests require to be done, and adequate means are placed at their disposal, the proper execution of the power may be insisted upon, though the statute conferring it be only permissive in its terms. \* \* \* The word 'may' is thus construed at times to mean 'must.' But why, it may be asked, should

this construction be given to the act under consideration? What public interest demands that the mayor should be required, under all circumstances, to accept the fee and grant the license? It seems to me that it is quite the other way. The public good \* \* \* requires that the permissive words in question should be read in their natural and ordinary sense."

It is true that section 2 of the act says that upon the receipt of bids the defendant "shall" thereafter award the lease to the highest bidder. Standing alone, this might support the contention of the petitioner, but section 3 provides that the board shall enter into contracts, "with such stipulations protecting the interests of the state, as the land board may require." 2 Lewis' Sutherland on Statutory Construction (2d Ed.) p. 1116, announces the following rule:

"Unless a fair consideration of a statute, directing the mode of proceeding of public officers, shows that the legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceeding, it is to be regarded as directory merely. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory."

Considering the purpose and language of the act, it was never the intent of the Legislature that the defendants should be required to sell or lease sand or gravel belonging to the state at anything but a fair and reasonable price. When the petitioner submitted its bid, it knew of the existence of the rules and regulations, and that under the terms of the published notice the defendants reserved the right to reject any and all bids. Its offer to contract was based upon and subject to the published notice and such rules and regulations. If the defendants could now be compelled to execute a lease for five years at a stipulated price of three cents per cubic yard, for like reasons and under similar conditions they could be required to execute a lease for 25 or 50 years at a price of 2 cents or even 1 cent per cubic yard. That was never the intent of the Legislature.

The petition is dismissed.

McBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

(97 Or. 310)

SEAVEY v. WILLIAMS et al.

(Supreme Court of Oregon. July 31, 1920.)

I. Deeds §139 — Exception void for uncertainty.

An exception of about 12 acres in a section lying south of a river is void for uncer-

tainty, where there were more than 100 acres lying south of the river, and, the exception not being described to a certainty, the title to the whole tract passes, the exception alone being void.

2. Adverse possession §80(1)—Where exception void, grantee had "color of title" to entire tract.

Where an exception of part of a parcel of land conveyed was void, the grantee has color of title to the entire parcel described; "color of title" being that which in appearance is title but which is no title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Color of Title.]

3. Adverse possession §19—Where banks of river were steep, they will be treated as "fence."

Under L. O. L. § 5770, subd. 7, providing that all precipices, embankments, streams, lakes, and other natural obstruction, if equally secured against the trespass of domestic animals, shall be treated as lawful fences, a river on which the land claimed adversely abutted will be treated as a lawful "fence" for the purpose of determining whether plaintiff who inclosed the other sides fully inclosed it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fence.]

4. Adverse possession §19—Plaintiff held to have acquired title to land by adverse possession.

Where plaintiff, who owned land bounded by a river and had color of title to land on the opposite side, built a bridge so as to enable his stock to cross over and pasture on such land, which was the only use for which it was fit, such possession for the statutory period will ripen into an adverse title, notwithstanding that, after some years' possession, a road was cut through plaintiff's fence and other stock occasionally strayed on the land.

Department 2.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Suit by John H. Seavey against Clara Bell Williams and others. From a decree for defendants, plaintiff appeals. Reversed, and decree entered for plaintiff.

This is a suit to quiet title to about 30 acres of land in Lane county, described in the complaint as follows:

"Beginning at a point on the south line of section 12 in township 18 south of range 3 west of the Willamette Meridian 6.25 chains north 88 degrees 51 min. west of the southeast corner of said section, thence north 88 degrees 51 min., west 23 chains to the center of the old channel of the Coast Fork river; thence along the said center north 30 deg. 22 min. east 7.49 chains; thence north 49 deg. 21 min. east 25 chains more or less to the center of the present channel of the Coast Fork river; thence south 0 deg. 44 min. east 23.30 chains to the place of beginning, containing 30 acres of land in section 12, township 18, S. R. 3 W. W. M."

The plaintiff alleges that he and his predecessors in interest, through whom he de-claims title, have been in the visible, open, notorious, hostile, continuous, and adverse possession of the premises, under a claim of ownership and title, for more than 20 years. The complaint is in the usual form.

The defendants admit that they claim an interest or estate in and to about 20 acres of the land described in the complaint, a particular description of which is contained in the answer, and plead title to and ownership of that portion. They deny all other material allegations of the complaint. The answer is traversed by the reply.

Testimony was taken, and the court found that in 1904 the plaintiff and James and Jesse Seavey purchased the land described in the complaint from George C. Simon, and that in January, 1908, the plaintiff acquired the interest of James and Jesse Seavey. Other findings were to the effect that in June, 1904, the plaintiff built a fence around a portion of the land, inclosing it with about 2,000 acres of other property which he owned; that there was no fence inclosing the land in dispute, along the Coast fork of the Willamette river; that during the dry season plaintiff's stock could pass across the river from his other premises to the land in controversy; that the tract in question was entirely covered with brush and timber up to and including the year 1913, when there was some wood cut on the premises; that the land was used by the plaintiff for pasturing stock from time to time; that in 1912 there was a county road located through a portion of it, which in 1913 was opened for travel; that in the location of the road a portion of the fence was torn down; that in June, 1913, stock belonging to Johnson, Chapman, and Hayes passed through such opening to and upon the land claimed by the plaintiff; that there was no obstruction to prevent their stock from going upon the land from the road; and that by reason thereof the land remained open from June, 1913, until January, 1915, at which time Barr built a fence along the road, inclosing the land claimed by plaintiff. It was further found that the plaintiff used the land in dispute from 1904 until June, 1913, for pasturing his stock; that after the fence was torn down he continued to pasture his stock upon the property from time to time; that it was so used by other owners of stock from June, 1913, to January, 1915; that the plaintiff did not have any title or color of title to the land described in the answer; that his possession was from January, 1904, until June, 1913, only; and that he was not in continuous, open, notorious, and exclusive possession of the premises described in the complaint, under a claim of right, for the period of 10 years.

Based upon these findings, the court rendered a decree declaring the defendants to be the owners of the land described in their

answer and quieting the plaintiff's title to the remainder of the 30-acre tract only. The plaintiff appeals.

O. H. Foster and E. O. Potter, both of Eugene (O. H. Foster, of Eugene, on the brief), for appellant.

C. A. Hardy, of Eugene, and J. M. Devera, of Salem, for respondents.

JOHNS, J. (after stating the facts as above). The 30-acre tract claimed by the plaintiff is in the form of a triangle, and the 20 acres to which the defendants claim title form substantially another triangle. Although the boundaries are not identical, all of the latter tract, except very small fractions on the south and east, lies within the 30 acres.

[1] The plaintiff's record title was acquired in January, 1904, by a warranty deed from George C. Simon, which conveyed, among other lands, all of the east half of section 12, "except about twelve acres lying south of the Coast Fork river." It appears that Simon obtained his title from Elizabeth Shannon by a conveyance on October 15, 1890, in which the 12-acre exception is in the same words used in the deed to the Seaveys. It is shown by the defendants' map that there are more than 100 acres in the east half of section 12 which lie "south of the Coast Fork river." Under such a state of facts and in the absence of allegation or proof as to which particular 12 acres were meant or understood to be excepted, as between the grantor and the grantee in particular, the exception would be void for uncertainty. The rule is thus stated in 8 R. C. L.:

"In short, by an exception some part is excluded from the conveyance and remains in the grantor by virtue of his original title, while a reservation creates a new right out of the subject of the grant and is originated by the conveyance." Page 1090.

"The rules of construction applicable to grants apply also to an exception therefrom, from which it follows that the words of exception must be as definite as those necessary to convey a title." Page 1096.

"If an exception is not described to a certainty, the grantee shall have the benefit of the defect. \* \* \* If the description of the exception is void for uncertainty, the title to the whole tract passes, the exception alone being void." Page 1097.

Under the last-quoted excerpt, the text cites *Loyd v. Oates*, 143 Ala. 231, 38 South. 1022, 111 Am. St. Rep. 39; *Lange v. Waters*, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207; *Attebery v. Blair*, 244 Ill. 368, 91 N. E. 475, 135 Am. St. Rep. 342. Those authorities sustain the rule stated.

[2] As the 12-acre exception is void for uncertainty, it must follow that on January 30, 1904, the plaintiff received a warranty deed which purported to convey the property described in the complaint; that it was based



upon a like conveyance previously executed to his grantor by Elizabeth Shannon; and that such deeds were sufficient to give the plaintiff and his grantor color of title to the lands described in the complaint, from and after October 15, 1899. In *Swift v. Mulkey*, 17 Or. 532, 21 Pac. 871, this court held:

"Color of title is that which in appearance is title, but which in reality is no title. A claim to property under a conveyance, however inadequate to carry the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass title to the subject thereof, yet a claim asserted under the provisions of such a deed is strictly a claim under color of title, and one which will draw to the possession of the grantee the protection of the statutes of limitations, other requisites of those statutes being complied with."

The facts tend to show that the 12-acre exception is not a part of the land described in the complaint. On April 24, 1861, Lewis S. Coryell and Mahala Coryell deeded a tract of land containing 37.72 acres to Andrew J. Keeney, through whom the defendants claim title, and in 1889 Keeney and his wife conveyed to Harms a portion of that tract, consisting of 21.53 acres. By reference to the plats introduced in evidence, it will be found that about 12 acres of the land deeded to Harms are in the east half of section 12, south of the Coast fork of Willamette river; and it is possible, even probable, that the 12-acre exception refers to that portion of the Harms tract. The plats also show that exclusive of the tract in dispute the plaintiff owned much more land on the south side of the river, all of which was fenced in with the 30-acre tract in June, 1904. Again, outside of any record title which they may have as heirs of Keeney, there is no evidence which tends to show that the defendants or their ancestors ever owned or claimed to own any portion of the land here in dispute, after Keeney executed his deed to Harms, that it was ever assessed to them, or that they ever paid any taxes on it.

[3, 4] The property in controversy was wild, unimproved land remaining in its original state, covered with brush and timber. In June, 1904, the plaintiff constructed a substantial fence around all of that portion thereof not bounded by the river channel, and since that time he has used it for pasturing stock, the only purpose to which it is suited. The testimony shows that during all of this time the plaintiff owned about 2,000 acres of land; that a large portion of it, on which he resided and had his improvements, lay along the other side of the river, away from the tract in dispute; and that he constructed a bridge across the river, which he used for transferring his stock from one side to the other. During high water, for safety, it was necessary to remove the stock from the south side of the river to the north side, and,

among other things, the bridge was used for that purpose. It also appears that when the river was low there were places in it where plaintiff's cattle and other stock could cross without using the bridge, but there is no testimony that they ever did so. Along most of plaintiff's property the river banks were high and steep and formed a barrier sufficient to prevent stock from entering from the river, for which purpose they served as a fence. Subdivision 7 of section 5770, L. O. L., provides:

"That all precipices, embankments, streams, lakes, ponds, or other natural obstruction, if equally secure against the trespass of any domestic animals, or shall be made so by artificial means, shall be deemed lawful fences."

On this subject, we quote the following from 1 R. C. L. p. 699:

"It is no objection that natural barriers are taken advantage of in constructing the inclosures, providing they are not out of proportion to the artificial barriers erected. If the natural, together with the artificial, barriers used, are sufficient clearly to indicate dominion over the premises, and to give notoriety to the claim of possession, it is sufficient to put the statute of limitations in motion."

As the plaintiff owned lands on both sides of the river for a considerable distance up and down the stream, it must follow that the only means of access to his premises from the river by outside stock would be at the upper and lower points where plaintiff's lands were crossed by the stream. Under the facts shown to exist here, we hold that the banks of the river were "fences" within the meaning of subdivision 7 of section 5770.

It is manifest that any one going upon the lands would see that they were all inclosed in one large tract; that the property on the south side of the river was connected with that on the north by means of a bridge; and that along with his other property the disputed tract was used by the plaintiff for pasturing stock whenever weather conditions would permit.

There was no real controversy over these matters up to the time the county road was laid out and opened on the south side of the tract in question, some time in 1913. A map introduced in evidence shows that this road enters the lands described in the answer at a point below the southwest corner of the 30-acre tract; that it crosses the south boundary of that tract about the middle thereof; and that the southeast corners of the two pieces of land are practically identical. The map shows that about three-fourths of the county road is upon the south boundary of the lands of the defendants in which the plaintiff does not have or claim any interest, outside of the boundaries of the 30-acre tract, and that about one-fourth of the road only is upon that tract and within the boundaries of the lands which both parties claim. There

is evidence that in the opening of the road the plaintiff's fence was cut and partly removed, that by reason thereof some stock entered upon his premises, but that all other parts of the fence remained intact as constructed. The testimony is conclusive, and the court found, that the plaintiff continued to use the disputed land for pasturing stock after the county road was opened, in the same manner as before it was located.

J. C. Johnson, as a witness for the defendants, testified that after the county road was opened in 1913, at intervals a cow and a pony of his pastured on the disputed land; that at different times two cows belonging to Hayes pastured there; and that a man named Chapman may have had some stock there, although Johnson did not know how many head. Asked, "All there was to it, there were just two holes in that fence?" the witness answered, "There were two holes where they could get through." Assuming all that to be true, the few cattle and horses which ran there were nothing more than roaming stock. Their pasturing on the land and the cutting of the fence form the only evidence tending to show that the plaintiff did not have continuity of possession for more than 10 years, the length of time required to perfect title by adverse possession.

In *Joy v. Stump*, 14 Or. 361, 364, 12 Pac. 929, 930, this court said:

"When a person goes into the possession of land under color of title duly recorded, in which the boundaries of the lot or tract are defined, this operates as constructive notice to all the world of his claim, and also of its extent, so that a sufficient occupancy of a part of the lot carries with it, by construction, the possession of the entire premises described by his conveyance, when the boundaries are well defined. \* \* \*

"It is equally well settled that, when a person relies upon naked possession as the foundation for an adverse claim, there must be an actual occupancy, and the possession cannot be extended \* \* \* beyond the limits of the actual occupation, and such possession must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to indicate exclusive ownership in the occupant."

This decision was approved in *Ambrose v. Huntington*, 34 Or. 484, 488, 56 Pac. 513, 514, where it is held:

"The maintenance of a substantial inclosure, and the continued use and occupation of the land for pasturage of stock (the only purpose for which it was adapted), under claim of right and title, constituted such a visible, open, notorious, distinct, exclusive, and hostile possession as to set the statute of limitations running, and, if continuous during the full period contemplated by the statute, would operate to confer title, at least as between individuals, where the state is not concerned."

We conclude, therefore, that the plaintiff's color of title, considered with his fencing of the land and use of it in connection with his other property in the manner which he used and had possession of it, is sufficient to give him title by adverse possession.

The decree of the circuit court is reversed, and one will be entered here in favor of the plaintiff, quieting his title to the lands described in the complaint and quieting the title of the defendants to all that portion of the real property described in their answer which is not a part of or included within the boundaries of the premises described in the complaint. Neither party shall recover costs in this or the circuit court.

MCCBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

(97 Or. 471)

# BAILEY et al. v. OREGON-WASHINGTON R. & NAV. CO. et al.\*

(Supreme Court of Oregon. July 27, 1920.)

## 1. Public lands §44—Donation land claimant who failed to file claim held to obtain no title.

Settler on donation land who remained thereon for four or five months prior to his death without designating his claim or filing upon the land, and without making any notification thereof with the proper land officers, as required by the Donation Act, had no title to the land which would pass to his heirs by descent.

## 2. Public lands §44—Donation land claimant's heirs could not take land as purchasers without filing claim designating boundaries or proving settlement.

Where plaintiff's ancestor settled on donation land and remained thereon for four or five months prior to his death, without filing claim or notifying proper land officers thereof, claimants could not take the land by purchase under the Donation Act without notifying the Land Department of claim or designating its boundaries, or making proof of his settlement as required by the act.

## Department 2.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

Suit by Virginia Bailey and others against the Oregon-Washington Railroad & Navigation Company and others. Judgment sustaining demurrer to complaint, and plaintiffs appeal. Affirmed.

This is a suit brought by the plaintiffs, as heirs of one Henry Ploch, to have the defendants declared to be trustees of certain lots situated in the city of Portland, Or., which it is claimed were part of a donation land claim settled upon by the said Henry Ploch in 1852.

It is alleged that Ploch was a qualified donation land claimant, and that he came to

Oregon in the spring of the year 1852, and settled upon 160 acres of land lying along the Willamette river in what is now North Portland, on the 1st day of November, 1852; and that he remained upon the land between four and five months until he died on the 21st day of March of the succeeding year.

At the time of the alleged settlement, the land had not been surveyed, and it was not surveyed until August after the death of Ploch. It is not claimed that Ploch ever filed any notification on the claim with the Surveyor General before his death, or that any notification was filed afterward, or that Ploch or his heirs ever made proof of settlement, as required by the Donation Act.

The plaintiffs allege, however, that the reason why these things were not done was because the land had not been surveyed at the time of the death of Ploch, and could not therefore be designated; and that after his death the heirs had no knowledge of the fact that he had settled upon the claim, or that he had any rights under the donation law (Act Cong. Sept. 27, 1850, c. 76, § 9 Stat. 496), until shortly before the beginning of this suit.

After the death of Ploch, one Elizabeth Thomas filed on the land in question as a donation claim, and finally made proof upon the same, and the land was patented to her.

The defendants hold by mesne conveyances from said Elizabeth Thomas, and it is alleged that she took the land with knowledge of Ploch's prior claim, and that the defendants also took conveyance with such knowledge. The complaint alleges fraud on the part of Mrs. Thomas in securing her patent, and asks that the defendants be declared trustees of the property in favor of the plaintiffs, and that plaintiffs be decreed to be the equitable owners of the land.

The defendants filed a demurrer to the complaint, which was sustained by the court. From a judgment on the demurrer, plaintiffs appeal to this court.

Geo. Arthur Brown, of Portland (Thomas Mannix, of Portland, on the brief), for appellants.

John F. Reilly, of Portland (A. O. Spencer, of Portland, on the brief), for respondents.

BENNETT, J. (after stating the facts as above). There are many grounds upon which, as it seems to us, the demurrer of the defendants was properly sustained. We shall notice only one, which, as it seems to us, is conclusive of the case. There is no allegation in the complaint that Henry Ploch, before his death, had ever filed upon the land, or put his claim upon record with the Surveyor General, or in the United States Land Office, and although more than 65 years had elapsed after his death, before the bringing of this suit, there is no allegation that his heirs had in any way complied with the provisions of the Donation Act, or made any notification to the

proper land officers, of the claim of their deceased ancestor.

At the time the land was surveyed, and up to the time of the filing by Mrs. Thomas, the land appeared upon the government records as public land of the United States, subject to claim by any person under its land laws. Save and except, the claim of Mrs. Thomas, it would either have been taken, by some one else or would still have appeared as public land, up to the beginning of this suit.

[1] We do not think that Henry Ploch by merely settling upon the land, without designating his claim in any way, or making any notification thereof, obtained any title to the land, which would pass to his heirs by descent.

[2] Neither do we think his heirs could take the land by purchase, under the Donation Act, without notifying the Land Department of his claim, or pointing out or designating its boundaries in any way, or making proof of his settlement, as required by that act.

It would be a dangerous holding indeed, and fraught with evil consequences, to say that a man, under the Donation Act, could, by simply building a cabin upon an unmarked and undesignated tract of land, and without notifying the government in any way of his claim, secure such right to the land that the government could not accept other filings upon or effectually convey the same; and that his heirs could come in many years afterwards, as in this case, and assert his title, and disturb the title of the grantees of other claimants, who had settled upon the land as government land, and obtained patent thereto from the government, and transferred their rights and title to their successors.

Up to the time of the survey by the government the donation claimant could not, in the nature of things, ordinarily, know the definite boundaries of the tract upon which he was settling—certainly he could not unless these boundaries were marked out upon the land in some way, and it is not alleged or claimed that anything of the kind was done by Ploch. Up to the time that the claim was marked out and designated by survey, the settlers' rights were necessarily inchoate and more or less in the nature of a float.

It is alleged in the complaint that Ploch's claim was bounded by the Finice Caruthers donation land claim on the north, the meander line of the west shore of the Willamette river on the east, the James Terwilliger donation land claim on the south, and on the west by a line 3,937.28 links from the said meander line of the said west shore of the Willamette river, and running parallel with the said meander line between the north boundary of the said James Terwilliger donation land claim and the south boundary of the said Finice Caruthers donation land claim.

But it is clear that this description is an

afterthought, and could not have been the definite boundaries of the claim of Ploch at the time he settled upon the land, for at that time the Caruthers donation claim on the north, and the James Terwilliger donation claim on the south, were themselves unsurveyed and undefined. Indeed, it is alleged in the complaint that the line of the Caruthers claim was afterwards run by the government surveyor, in such a way as to run through the Caruthers house.

The meander line designated in the complaint along the Willamette river had not at that time been located, and of course it was impossible to know just where it would be located by the government; and the opposite line, which is now alleged to have run parallel with the meander line, was, of course, equally uncertain.

It is now well settled that a donation land claimant under such circumstances obtains no definite right to the land until his notification has been filed, and until he has otherwise complied with the law, and that the settler acquired no right to the land which would pass to his heirs upon his death, until he had completed his four years of residence.

In *Hall v. Russell*, 101 U. S. 503, 518 (25 L. Ed. 829), it is said:

"The object of Congress undoubtedly was to allow a settler's heirs to succeed to his possession, and *thus keep his rights alive*. But for some such provision all rights of the settler would have been lost by his death. As the law required full four years' residence by the person who claimed the grant, if no provision had been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence it was provided that the possessory rights of a deceased settler should go to his heirs, and that they might get the land *on making the requisite proof*, without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestors, but from the United States."

In *Brazee v. Schofield*, 124 U. S. 495, 8 Sup. Ct. 604, 31 L. Ed. 484, it is said by Mr. Justice Field:

"It is undoubtedly true that the Donation Act requires for the completion of the settler's right to a patent, not only that he should reside upon the land and cultivate it for four years, but that *he should notify the Surveyor General of the precise land he claims*. The object of the law was to give title to the party who had resided upon and cultivated the land, and who was therefore in equity and justice better entitled to the property than others who had neither resided upon nor cultivated it. *But it was also of importance to the government to know the precise extent and location of the land thus resided upon and cultivated*. It was necessary to enable the government to ascertain

what lands were free from claims of settlers, and thus subject to sale or other disposition." (Italicizing above interpolated.)

In *Fitzpatrick v. Du Bois*, 2 Sawy. 434, Fed. Cas. No. 4842, it is said:

"This notification by the occupant was what constituted him a 'settler,' and his occupation thereby became 'a settlement' under the act, as well as in fact. Doubtless it should be held to relate back to the beginning of his occupation, or to the passage of the act, when the occupation commenced prior thereto. But without this notification the occupant could never acquire any legal relation to the land, or the government be deprived of its ownership thereof."

We think the reasoning of these cases in relation to the necessity of notification and of proof of claim applies to the heirs as well as to the original claimant.

The plaintiffs offer as an excuse for their failure to comply with the law the death of the claimant and their lack of knowledge of his claim. This may be a moral excuse which would relieve them from a charge of negligence, but it is not a compliance with the law, which would give them title to the land.

In this regard, the language of the United States Supreme Court in *Frisbie v. Whitney*, 76 U. S. (9 Wall.) 196, 19 L. Ed. 669, is pertinent:

"The argument is urged with much zeal that because complainant did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done.

"To this we reply, as we did in the case of *Rector v. Ashley* [6 Wall. 142], that the rights of a claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

At the time of Ploch's settlement and death, this land was no doubt of little value; but in the long interval since then it has become part of a great city—has been laid off into lots and blocks; streets have been laid out and improved—and we may assume that it has become valuable, and that portions of it have passed into many different hands.

To permit these heirs of his to come in now, at the end of 65 years, and disturb all these titles, upon the ground that they did not know before that their ancestor had ever claimed the land, would be intolerable.

The judgment of the court below is affirmed.

MCBRIDE, C. J., and BEAN and JOHNS, JJ., concur.

(112 Wash. 286)

**PACIFIC GROCERY CO. v. JAMES GRIFFITHS & SONS et al. (No. 15755.)**

(Supreme Court of Washington. Aug. 24, 1920.)

**Wharves &—Evidence held not to warrant recovery for injury to business and property of lessee of dock.**

In an action by a lessee of part of a dock for a wholesale grocery business against the lessee of the remainder of the premises for an oil dock, evidence held insufficient to show that plaintiff's business was damaged by the maintenance of a gate closed at night and on Sundays, or by the laying of an oil pipe line so as to hinder loading of boats, or that a steam pipe caused damage to merchandise; it appearing that plaintiff acquiesced in such acts, and that its employees removed the plug from the steam pipe, which allowed the steam to escape.

**Department 1.**

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by the Pacific Grocery Company against James Griffiths & Sons and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Cooley, Horan & Mulvihill and W. P. Bell, all of Everett, for appellants.

Trefethen & Findley, of Seattle, for respondents.

**MITCHELL, J.** The Great Northern Railway Company is the owner of a dock and warehouse about 800 feet long, running east and west, in the city of Everett. The Pacific Grocery Company, under a lease from the Great Northern Railway Company, at one time occupied the east 305 feet of the warehouse, and conducted therein a wholesale grocery business, receiving much of its merchandise by boats and steamers. The dock on its southerly side extends about 16 feet beyond the exterior wall of the warehouse. The Seattle-Everett Dock & Warehouse Company leased from the railway company, and occupied the westerly 500 feet of the warehouse, for an oil dock. The Pacific Grocery Company orally sublet to the Seattle-Everett Dock & Warehouse Company, and put it into possession of the westerly 200 feet of the easterly 305 feet of the warehouse. The approach from the street, several hundred feet distant, was over a drive and walkway to the eastern end of the dock and warehouse. The Seattle-Everett Dock & Warehouse Company maintained a gate, under guard, during business hours and locked at night and on Sundays, across the drive and walkway, several months prior to the Pacific Grocery Company's finally quitting possession of the warehouse. To facilitate its business as an oil dealer the Seattle-Everett

Dock & Warehouse Company, with the consent of the railway company, placed an oil pipe line along the top and near the south edge of the dock. Expecting to later occupy the remaining 105 feet of the warehouse in possession of the Pacific Grocery Company (which occupancy had taken place at the time of the trial of this case) the Seattle-Everett Dock & Warehouse Company extended a steam pipe through that portion of the warehouse (the east 105 feet) occupied by the grocery company. Upon making a test of the steam pipe, upon its being put in place, steam and vapor escaped through an open plug of the pipe into the room containing the merchandise of the Pacific Grocery Company.

This action was brought to recover for damage to the grocery company's business on account of the maintenance of the guarded gate in front of the premises; damage to the grocery company's business by placing and maintaining the oil pipe near the edge of the dock, interfering with loading and unloading boats; and damage to the stock of merchandise caused by steam that escaped from the steam pipe. The case was tried without a jury, resulting in findings, conclusions, and a judgment against the plaintiff. The plaintiff has appealed.

As to the first claim of damage, it satisfactorily appears that prior to building the gate the Seattle-Everett Dock & Warehouse Company was advised by the Secretary of War that it would be necessary to erect gates at the entrance to the dock. The matter was taken up with the railway company, which gave its consent. Then the matter was taken up with appellant, through its president, and a sketch of the proposed location of the gates was submitted to him in a letter from Seattle-Everett Dock & Warehouse Company, dated March 19, 1918. On March 21, 1918, appellant's president replied by letter in which he said:

"We are in receipt of your letter of March 19. I think the gate idea is a good one, provided they are not locked so as to lock our customers out when they want to come in and buy goods, but it is a good plan to lock them at night and Sundays, and I think we can arrange a plan that will be mutually agreeable."

The gates were erected according to the sketch submitted without any protest, and thereafter kept locked at night and on Sundays. During business hours the gates were guarded at the expense of the respondents, and no objection was ever made thereto by the appellant as to either the maintenance or method of operating the gates until about November 2, 1918, a day or two after appellant had received written notice from the railway company to vacate the premises.

Appellant failed to show or name any customer or person who was either annoyed or kept away from its place of business on account of the gates. The watchman testified that all persons who had any business with appellant passed without the slightest hindrance, and that during all the time only four persons were refused, neither of whom claimed to have any business with the appellant.

As to the second claim of damage the trial court found that the laying and maintenance of the oil pipe line did not interfere with the appellant's necessary ingress or egress, nor was any damage suffered by it on account of the existence and presence of the pipe line as placed. The finding is supported by a preponderance of the evidence. The president of appellant, on cross-examination, testified:

"The pipe in front of the warehouse was objectionable, but did not seriously interfere with our daily routine of work."

When the oil pipe was being constructed, the president of appellant company and the superintendent of the respondent, Seattle-Everett Dock & Warehouse Company, discussed the question as to whether or not the pipe would interfere with loading and unloading boats. Upon being informed by the superintendent that the pipe could be elevated to any height desired, the president of the appellant company replied, "He guessed it would be all right," and the pipe was laid as heretofore indicated.

As to the third claim of damage there is a dispute as to whether or not any objection was made by the appellant to the putting of a steam pipe through its premises, until after the work was done. The evidence satisfies us more favorably against the appellant. The pipe was installed in the daytime during the hours appellant's agents and employees were engaged at their business in the room through which the pipe was run, without any objection being made to the plumbers or any one else while the work was being done; and it is undisputed that the appellant removed the plug through which the steam escaped for just a few minutes. We are also satisfied by the evidence that the appellant did not notify respondents it had removed the plug prior to the making of the test that caused steam to escape. In this respect the trial court found the steam did not cause any damage, and we are convinced the finding is correct.

Another error assigned, relating to alleged increased cost of insurance, we understand has been abandoned by the appellant on its appeal.

Judgment affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and BRIDGES, JJ., concur.

(111 Wash. 646)

**BULGER v. OLATAKA YAMAOKA.**  
(No. 15877.)

(Supreme Court of Washington. July 21, 1920.)

**1. Municipal corporations ⇐706(5)—Evidence held to justify finding of auto driver's negligence.**

In an action against an automobile owner for injuries to a boy riding on a roller coaster, evidence held sufficient to justify finding that defendant's minor son driving the car was negligent.

**2. Municipal corporations ⇐705(3) — Driver of automobile in residential section may not limit view to roadway.**

A driver of an automobile in a residential section where children are constantly playing about the streets may not, between street intersections, limit his view to the roadway immediately in front of him, relying on his having the right of way solely, and stop only when some one appears directly in front, ignoring the possibility of a child coming out of an alleyway.

**3. Municipal corporations ⇐706(8)—Instruction as to liability for injuries to child struck by automobile held proper.**

In an action against an automobile owner for injuries to a child using a roller coaster, instruction that if the driver of the car before collision saw, or should have seen, the child approaching and crossing the street, and could have turned aside or stopped and avoided collision, the jury should find for the child, held not erroneous for failing to include words that when the driver saw he appreciated the danger of the situation.

Department 2.

Appeal from Superior Court, King County; Samuel H. Steele, Judge, pro tem.

Action by Frederick N. Bulger, by F. W. Bulger, as guardian ad litem, against Olataka Yamaoka. From judgment for plaintiff, defendant appeals. Affirmed.

Shank, Belt & Fairbrook, of Seattle, for appellant.

Tucker & Hyland, of Seattle, for respondent.

TOLMAN, J. The respondent, by his guardian ad litem, brought this action to recover for personal injuries occasioned by an automobile operated by appellant's minor son coming into collision with respondent, while he was riding upon a roller or skate coaster. The cause was tried to a jury, which rendered a verdict for \$500 in respondent's favor, and this appeal is from a judgment upon the verdict.

So far as necessary for an understanding of the points raised here, the facts may be briefly stated as follows: At the time in question appellant's automobile, a Stutz right-

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hand drive, was being operated by his 15-year old son on Highland drive, a street in one of the residence sections of the city of Seattle. The car was proceeding westerly along the right-hand side of the street, and as it approached the intersecting alley between Seventeenth and Eighteenth avenues some children were observed to be playing upon the street. Whether or not the driver sounded his horn is one of the disputed facts in the case, but it is admitted that the car slowed down and the children moved to the left and out of its pathway, and thereupon the driver increased the speed of the car, which speed was variously estimated at the instant of the collision to have been from 12 to 20 miles per hour. Respondent, a child of 4 years of age, upon his coaster which was impelled by pushing with his left foot upon the ground, emerged from the alley on the south side of the street at about the time the children in the street stepped aside, and proceeded across the street on such a course as to bring him into collision with the automobile.

[1] In order to establish negligence upon the part of the driver of the automobile, the jury had to find that in the exercise of ordinary care he could or should have seen the respondent in time to avoid the collision. We have carefully examined the evidence upon this point, and are thoroughly satisfied that there was abundant evidence in the case from which the jury could so find. While it is true that there was a garage at the corner of the alley, built out to the property line, thus preventing any extended view up the alley until the driver approached very closely to the alley line projected, and there was a telephone pole at each side of the alley in line with the parking strip, and there were children playing in the street, yet it is also shown that there was an inner parking strip 3 feet wide, the width of the sidewalk, 6 feet, and an outer parking strip of 8½ feet, or the space of 17½ feet over which respondent passed after emerging from the alley and before entering the paved driveway, which was 25 feet wide from curb to curb, and the jury might well have found from the evidence that the children were not in a position to obstruct the driver's view, that the telephone pole could not obscure respondent for a single instant, and that had he exercised ordinary care the driver must have seen the respondent in ample time to have avoided the accident.

This view of the evidence disposes of all of the assignments of error based on the supposition that the case should not have been submitted to the jury. The remaining assignments are based upon the instructions given and refused.

[2] Appellant complains because the trial

court did not instruct that the driver is not bound to use the same degree of care in looking out for pedestrians at alley intersections as he is at street intersections, and while no direct authority to that effect is produced, it is argued that, while an alley is in a sense a public thoroughfare, yet it is intended as a convenience to the occupiers of abutting property, and that the crossing of a street at an alley intersection by a pedestrian is comparatively rare. We do not find it necessary under the facts in this case to lay down any rule on this subject. This automobile was being driven through a residential section of the city where children were admittedly playing on the street, and whether respondent came from the alley, the sidewalk, or some portion of the street, is important only as evidencing the opportunity the driver had to see him in time to avoid the collision. It is not contended that a driver, under the conditions here shown, may, between street intersections, limit his view to the roadway immediately in front of him, relying upon his having the right of way, solely, and stop only when some one appears directly in his pathway. Since such is not the rule, the several instructions asked for upon this subject would have been of no assistance to the jury, and might have been confusing.

[3] An instruction was given to the following effect: If you find from the evidence that the driver before the collision saw, or acting as a reasonably prudent person should have seen, the plaintiff approaching and crossing the street, and if you further find that the driver, after observing the plaintiff approaching, or after he should have seen him so approaching, in the exercise of ordinary care should have slowed down, turned aside, or stopped, and thereby avoided the collision, and that the plaintiff was injured by reason of the driver's failure so to do, then and in that case you should find for the plaintiff. Complaint is made that there should have been included in this instruction words to the effect that, when the driver saw, he appreciated the danger of the situation. That might be a proper element to include in some situations, but we think here if the driver saw a four year old child impelling a coaster swiftly towards an oncoming automobile, apparently unaware of its approach, he would be guilty of a want of ordinary care if he did not appreciate the danger; hence the instruction was proper as given.

We have examined the instructions given, and are satisfied that they clearly and fairly gave to the jury the law applicable.

The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(111 Wash. 636)

**ZIMMERLI v. NORTHERN BANK & TRUST CO. et al. (No. 15713.)**

(Supreme Court of Washington. July 21, 1920.)

1. Banks and banking  $\Rightarrow$  80(4)—Depositor of check, drawn on bank where he deposited it, not entitled to preference claim on bank's insolvency.

Owner of bonds sold to him by bank was not entitled to preference claim over general creditors to funds of bank, which had become insolvent, because check drawn in payment of the bonds by a party which had acquired the property, a depositor in the bank, was not paid to plaintiff, because insolvency of the bank supervened after its deposit there by him to his own credit; there having been no augmentation of the funds of the bank through the deposit of the check drawn on itself.

2. Fraud  $\Rightarrow$  58(1)—Evidence held to sustain finding bank not liable on representations as to bonds.

In an action by the buyer of bonds from officers of a bank become insolvent, against the bank and the bank commissioner, on account of representations of the bank officers that the bonds purchased were good, evidence held to sustain the trial court's finding in favor of the bank and commissioner on such cause of action.

**Department 2.**

Appeal from Superior Court, King County; King Dykeman, Judge.

Action by F. Zimmerli against the Northern Bank & Trust Company, a corporation, and Louis H. Moore, as Bank Commissioner of the State of Washington. From a judgment granting relief in part, and denying it in part, both parties appeal. Affirmed.

F. W. Moore, of Bremerton, and Chas. H. Miller, of Seattle, for plaintiff.

Bausman, Oldham, Bullitt & Eggerman and Walter L. Nossaman, all of Seattle, for defendants.

**MOUNT, J.** The plaintiff brought this action against the Northern Bank & Trust Company (now insolvent) and the state bank examiner (now commissioner) liquidating that bank to recover a preferred claim of \$1,000 upon a first cause of action, and to recover a preferred claim for \$2,000 upon a second cause of action. The case was tried to the court without a jury, and resulted in a judgment establishing the claim upon the first cause of action as a preferred claim and denying any relief upon the second cause of action. The defendant has appealed from that part of the judgment establishing the \$1,000 claim as a preferred claim, and the plaintiff has appealed from that part of the judgment denying any relief upon the second cause of action. We shall therefore refer to the parties as plaintiff and defendant.

The facts upon the first cause of action may be briefly stated as follows: In January of 1913 one H. Ryan and his wife executed and delivered to the Northern Bank & Trust Company four promissory notes, in the form of bonds, for \$500 each. These bonds were made payable to the Northern Bank & Trust Company, or bearer. They were secured by a mortgage upon certain real estate. Thereafter the Northern Bank & Trust Company sold two of these bonds to the plaintiff. Afterwards the Northern Bond & Mortgage Company acquired the interest of Ryan and wife in the mortgaged property. The Northern Bond & Mortgage Company was a depositor in the Northern Bank & Trust Company. The plaintiff was also a depositor in that bank. After the Northern Bond & Mortgage Company had acquired the interest of Mr. Ryan in the real estate, that company deposited its check with the Northern Bank & Trust Company in satisfaction of the mortgage which had been executed by Ryan and wife. The officers of the bank thereupon satisfied the mortgage. The plaintiff was not notified that the bonds had been paid and the mortgage released. The check drawn in payment of the bonds was drawn upon funds on deposit in the Northern Bank & Trust Company. Thereafter, and before the plaintiff was notified that the bonds had been paid, the bank examiner (now commissioner) took charge of the bank as an insolvent institution and proceeded to its liquidation. The plaintiff seeks upon these facts to have his claim for \$1,000 declared a preferred claim, upon the theory that the check for the payment of his bonds was a trust fund to be paid to him, and because it was not paid to him that he is entitled to a preferred claim for that amount. It is stipulated that the bank commissioner has on hand more than \$1,000 of the bank's assets. The trial court was evidently of the opinion that the check deposited in payment of the bonds was a trust fund, and for that reason ordered that the plaintiff have a preference right to his money.

The counsel for the defendant make the contention here that, because the assets of the bank were not augmented by the transaction, there could be no preference right on the part of the plaintiff, and cite a number of cases to that effect. The rule seems to be as stated in 14 R. O. L. at page 668:

"But where a trustee has mingled the trust funds with his individual money, the cestui que trust is not generally allowed to follow and hold it as against the creditors of the trustee, unless he can trace it and show that the estate has been increased by the misappropriation."

In the case of Empire State Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435, it was said:

"It is indispensable to the maintenance by a cestui que trust of a claim to preferential pay-



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ment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only, and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate, and increased the amount and the value thereof which came to the hands of the receiver."

On page 606 of 194 Fed., on page 448 of 114 C. O. A., the court said:

"Proof that these checks augmented the cash that went into the hands of the receiver, or that they produced cash which he obtained, was indispensable to any preference on their account. But checks of third persons on the bank with which they are deposited, which are paid by crediting the bank and charging the drawers on its books, fail to increase the cash in its possession, and form no basis for a preferential payment to the depositor. *Beard v. Independent District of Pella City*, 88 Fed. 375, 382, 31 C. O. A. 562. Moreover, the deposit of checks of third persons, which are credited to the depositor and used by the bank to pay its debts, bring no money into its fund of cash, and form no foundation for preferential payment to the depositor. *City Bank v. Blackmore*, 75 Fed. 771, 773, 21 C. O. A. 514."

In *Beard v. Independent District of Pella City*, 88 Fed. 375, 31 C. O. A. 562, it was said:

"The foundation of the right on part of the owner of a trust fund to a preference over general creditors in payment out of a fund or estate that has passed to the assignee or receiver of an insolvent person or corporation is that the trust fund has been wrongfully confused or intermingled with the property of the insolvent, or has been used to increase the value of property, thereby increasing the amount or value of the funds or estate passing into possession of the assignee or receiver; that, if this intermingling had not taken place, the fund passing to the receiver would have been so much less; that the creditors have only the right to subject the property of the debtor to the payment of their claims, and therefore the creditors cannot complain if the total fund coming into the hands of the receiver is reduced by the amount necessary to make good to the owner of the trust fund the sum which was wrongfully used in augmenting the fund or property passing to the receiver. Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors, and this we understand to be the doctrine recognized by the Supreme Court of Iowa and the Supreme Court of the United States alike."

The evidence in this case fails to show that there was any augmentation of the funds of the bank by the payment of the bonds in this case. The payment was made by a

check drawn upon funds already in the bank. Both the drawer and the payee of the check were customers at the bank. The utmost duty of the officers of the bank, on receiving the check in satisfaction of the bonds and mortgage, was to pass the amount of the check to the credit of the plaintiff. This was not done. If it had been done, the plaintiff would have been a general creditor and nothing more. The fact that it was not done did not place him in any better position than if the officers of the bank had done their duty and placed the amount of the check to his credit.

The defendant relies upon the case of *Carlson v. Kies*, 75 Wash. 171, 134 Pac. 808, 47 L. R. A. (N. S.) 317. That was a case where there was a special deposit of \$3,070 in the bank to be held for a stated purpose. The deposit in that case clearly augmented the assets of the bank. The point made here was not in that case. Counsel also cite the case of *State ex rel. Titlow v. City of Centralia*, 93 Wash. 401, 161 Pac. 74. That was also a case where the funds were augmented by the receipt of money. The case of *Rugger v. Hammond*, 95 Wash. 85, 163 Pac. 408, is also cited by the defendant. That was a case where certain rugs had been intrusted to the insolvent corporation to be sold. Part of the rugs were sold, and the money received therefor was mingled with the assets of the insolvent corporation. It was held in that case that there was no preferential right of the creditor. In none of these cases was the point now under consideration discussed.

We think it is clear that there could be no preferential claim of the plaintiff upon the funds of the insolvent bank, even if the deposit of the check by or on behalf of the maker of the bonds might be held to be a trust deposit, because the deposit of this check did not increase or augment the funds of the bank, and we see no good reason for giving the plaintiff a preference over general creditors. Furthermore, we are of the opinion that if the officers of the bank had performed their whole duty they would have deposited the check to the credit of the plaintiff when the check was received, and if they had done their duty in this respect the plaintiff would have been merely a general creditor of the bank and entitled to no preference right. The mere fact that the bank officers did not do their duty gave him no greater rights than he would have had, if they had performed their duty fully. We are of the opinion, therefore, that the trial court erred in establishing this claim as a preference claim over general creditors.

[1] The second cause of action, upon which the plaintiff has appealed, was one where one Hunter, who was at that time an officer of the bank, executed certain bonds, and secured them by mortgage upon real estate. Four of these bonds were purchased by the plaintiff. The bonds have not been paid.

Plaintiff is seeking to hold the bank therefor. It is claimed that the officers of the bank represented to the plaintiff at the time they purchased these bonds that they were A-1, secured by a mortgage double the value of the bonds without any other liens thereon. The evidence of the plaintiff upon this question was to the effect that he asked the manager of the bank, at the time he bought the bonds, as to the value thereof and as to the security, and was informed that the bonds and security were A-1. There was evidence to the effect that at that time the security was in fact good. There was evidence, also, that there were improvement liens against the property, which is not now worth the amount of the bonds. The trial court, after hearing the evidence on this question, evidently concluded that there was no fraudulent representation; that the expressions made by the bank officers at the time plaintiff purchased these bonds were in effect expressions of opinion merely. The bank did not indorse the bonds. They were simply agents for the purpose of collecting the interest and principal and paying it to the bondholders.

[2] We are satisfied from the record here that the trial court properly found upon this cause of action, and the judgment of the trial court thereupon is affirmed.

The defendant, being successful in this court, is entitled to costs.

HOLCOMB, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

(111 Wash. 571)

LOVEJOY et ux. v. AMERICUS et al.  
(No. 15735.)

(Supreme Court of Washington. July 15, 1920.)

1. Appeal and error  $\S$ 770(2) — Appellant's motion to strike respondent's brief made too late.

Appellant's motion to strike respondent's brief as not served within 30 days after appellant's opening brief had been served, made in appellant's reply brief, served nearly 5 months after service of respondent's brief, must be denied.

2. Execution  $\S$ 251(1) — Judgment debtors warranted in appeal to equity for relief against sale.

In view of studied course of judgment creditor in refusing or failing to pursue plain, simple, and adequate ways to collect the judgment, under Rem. Code 1915,  $\S$  602, coupled with the grossly inadequate price for which property was sold, judgment debtors held entitled to appeal to equity for relief against sale on execution.

Department 1.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Frank L. Lovejoy and wife against S. L. Americus and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

S. L. Americus, of Hillyard, and F. W. Ghrand, Cordiner & Cordiner, and Ripley & Quakenbush, all of Spokane, for appellants.  
C. C. Upton, of Hillyard, for respondents.

MITCHELL, J. On August 9, 1917, the defendant S. L. Americus had an unsatisfied judgment against these plaintiffs in the sum of \$63.15, with interest from September 3, 1915, and costs, \$7.25, upon which he took out an execution and caused the sheriff to levy upon some six or seven detached parcels of real property of plaintiffs, situated in Spokane county. All the property was sold in bulk to the judgment creditor at sheriff's sale, for \$87.92, the amount of the judgment, costs, and increased costs. The sale was confirmed by the superior court, and in due time, September 17, 1918, a sheriff's deed was issued to the purchaser. Under date of January 25, 1919, Americus and wife made a quitclaim deed to the property to the defendant Samuel D. Rodibaugh, of Westmorland county, Pa., and on the same day caused the deed to be recorded in the office of the auditor of Spokane county. Four days later this action was commenced against Americus and wife and Rodibaugh to set aside the sheriff's sale, certificate of sale, and deed, and also the deed to Rodibaugh, upon the grounds of inadequacy of price, together with fraud in procuring the sheriff's sale and deed, and that the deed to Rodibaugh was without consideration and fraudulent. There was judgment for the plaintiffs, from which the defendants have appealed.

[1] In their reply brief, which was served nearly 5 months after the service of respondents' brief, appellants moved, for the first time, to strike respondents' brief, because it was not served within 30 days after appellants' opening brief had been served. The situation is similar to that in *Magnuson v. MacAdam*, 77 Wash. 289, 137 Pac. 485, upon which authority the motion is denied.

Upon the merits, in addition to what has been stated, from the pleadings and proof it very clearly appears that respondents and Americus and wife have been well acquainted and residents of Hillyard, Wash., some 8 or 10 years. Persistently, orally, and by letters, respondents were requested to pay the judgment, down until the issuance of execution, after which nothing was said to them about payment. Respondents had no actual notice of the sheriff's levy and sale until the latter part of December, 1918, more than 3 months

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after the expiration of the redemption period. Upon learning of the situation, on more than one occasion, and as late as January 24, 1919, they offered to pay and tendered cash sufficient to satisfy the judgment, interest, costs, and increased costs, and even offered to pay a reasonable amount to satisfy appellants for any trouble they had been put to. The tender was finally rejected on January 24, 1919, and the next day Americus and wife made and filed their deed to Rodibaugh. The tender made was kept good by respondent by a deposit in court upon commencing this suit 5 days later. There was an outstanding mortgage of \$1,000 on one piece of the property, but over and above that the reasonable value of all the property included in the sheriff's sale and deed was in excess of \$4,000. One piece of the property was and still is the residence of respondents. Another piece of the property, of the value of \$2,500, and not used as a homestead, nor for farming purposes, was regularly occupied by a tenant of respondents, yielding \$16 per month. Subsequent to the sheriff's sale and for months after the statutory period of redemption, Americus and wife stood silently by, without making any demand or giving any actual notice, and permitted respondents to pay taxes, special assessments for municipal water mains, and for improving the buildings on the property in considerable sums.

A case very much like this in principle was considered in *Triplett v. Bergman*, 82 Wash. 639, 144 Pac. 899, wherein it was said:

"While the courts have expressed themselves in various language, we are of opinion that the sum and essence of the law upon the question involved in this case is that there is a discretionary power vested in the trial judge, and where it is made to appear that the sale would outrage the right of a judgment debtor, if allowed to stand, his discretion will not be controlled, for, as is said in *Howell v. McCreery*, 7 Dana (Ky.) 388, where a judicial sale was challenged for inadequacy of the sum bid, 'public policy and the analogies of the law require that they should be considered per se as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts.' This case is quoted in *Shroeder v. Young*, 161 U. S. 334, a case following *Graffam v. Burgess*, 117 U. S. 180, where the rule is stated thus: 'Great inadequacy requires only

slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud.'"

The judgment in the present case is entirely justified. The respondents acted promptly upon receiving notice that their property had been sold. Mr. Lovejoy was a teamster in the town of Hillyard, and trusted nearly all his other business to his wife, who was, much of the time, almost an invalid. After the issuance of the execution, followed by the sheriff's sale, and while the rights of respondents were passing away by the lapse of time into the hands of appellant Americus, the continuous dunning theretofore engaged in was changed into an apparently wary and crafty silence, highly calculated to and actually succeeded in lulling the respondents into a sense of security until the year for redemption passed by. *Graffam v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839. The judgment, with interest and costs, could have been satisfied, prior to the execution, by garnishment proceedings against the tenant of respondents for less than 5 months' rental, while during the period of redemption from the sheriff's sale the amount of the judgment, interest, and costs, and increased costs, of \$87.92, could have been satisfied by less than 6 months' rental from the same tenant, to which appellants, as purchasers at the sheriff's sale, were entitled under the provisions of section 602, Rem. Code.

[2] The obviously studied course of the judgment creditor in refusing or failing to pursue those plain, simple, and adequate ways to collect constitute in part that unfairness which, coupled with the shockingly inadequate price for which they purchased at the execution sale, fully warranted respondents in their appeal to a court of equity for relief, under the rule stated in *Triplett v. Bergman*, supra. The findings and conclusion of the trial court that the quitclaim deed to Rodibaugh was not made in good faith and should be canceled were fully warranted by the pleadings and other portions of the record, which require no recital or analysis in this opinion.

Judgment affirmed.

HOLCOMB, C. J., and PARKER, MACK-INTOSH, and MAIN, JJ., concur.

(112 Wash. 31)

**ANDERSON v. GLENN et al.** (No. 15661.)

(Supreme Court of Washington. July 28, 1920.)

**1. Execution  $\Leftrightarrow$  267—Execution sale of ferryboat does not transfer debtor's license.**

Execution sale of ferryboat and apparatus does not transfer to purchaser the exclusive privilege of operating under authority of judgment debtor's license, under Rem. Code 1915, § 5009, the license being issued to person operating the ferry, and not to the ferryboat and apparatus.

**2. Ferries  $\Leftrightarrow$  19—Operation in close proximity to other ferry held an infringement of exclusive privilege of the latter.**

The operation of ferryboat a distance from place where ferry was being operated by licensee under Rem. Code 1915, § 5009, was an infringement on the exclusive privilege owned by operator under such license, though operation of other ferry did not interfere with his boat.

**Department 2.**

Appeal from Superior Court, Okanogan County; John B. Davidson, Judge.

Action by A. Anderson against J. E. Glenn and others. Judgment for plaintiff, and defendants appeal. Reversed and dismissed.

J. Henry Smith, P. D. Smith, and W. C. Brown, all of Okanogan, for appellants.

Wm. O'Connor and W. C. Gresham, both of Okanogan, for respondent.

**HOLCOMB, C. J.** In June, 1917, two ferries were being operated across the Okanogan river at the town of Monse, Wash., when plaintiff, the operator of one of the ferries, instituted this proceeding to restrain defendants, the operators of the other, from interfering with the one he was operating, and to recover damages for such alleged interference. This appeal is from a judgment of the trial court awarding damages and the injunctive relief prayed.

One R. M. Acord originally owned the ferry now being operated by respondent, and in 1916 the sheriff of Okanogan county levied upon and sold this ferry to satisfy a judgment held against Acord by the Spokane Merchants' Association. It seems that this concern purchased the ferry at the execution sale, and in March, 1917, sold it to respondent, Anderson, who undertook to operate it. He did not, however, procure a license to do this until May 8, 1917, at which time, under an order of the county commissioners of Okanogan county, the county auditor issued to him a license to operate and maintain the ferry at Monse. At this time appellants were

already operating their ferry at the same place under a license therefor, issued to appellant Glenn under date of February 7, 1917; he having complied with the requirements of the statute relating to the giving of notice of intention to apply for a license. There is testimony by two of the county commissioners and by the deputy county attorney to the effect that, at the time of the hearing upon Glenn's application for a license, attention was called to the fact that a ferry (the old Acord ferry) was already being operated by Anderson at the place in question; that they understood that the license issued to Glenn was not to interfere with the operation of a ferry by any one else at this point; and that the license was not given to Glenn to the exclusion of any other person. But the statute (Rem. Code, § 5009) provides that—

"Every person licensed to keep a ferry, according to the provisions of this article, shall have the exclusive privilege of transporting all persons and property over and across the stream where such ferry is established.  
\* \* \*

[1] The operation by Anderson of his ferry before this time was not under authority of a license issued to him. The license was not to the ferryboat and apparatus, but to the person operating. The execution sale transferred the personal property, but not the personal privilege. After the county commissioners had issued a license to Glenn in February, they could not properly issue one to Anderson in May. Glenn's right was exclusive, under the section of the statute quoted, the provision of law to that effect becoming an effective provision of his license the same as if incorporated therein.

[2] Respondent says he is not attempting to enjoin appellants from operating their ferry at some other place, and claims that by moving their cable and other appliances a short distance away from his on both banks of the river appellants can operate their ferry without interfering with his boat. But, under the statute, as we have seen, there was an exclusive privilege to maintain a ferry at this place, and this privilege belonged to appellants. Even were the cable and other appurtenances of either party to the controversy moved so as to permit the operation of both ferryboats without either one interfering with the other, still the proximity of the two ferries would be such as to infringe upon the exclusive privilege assured by the statute to the person rightfully operating his ferry.

It follows that the judgment of the trial court must be, and it is, reversed, and the cause dismissed.

**BRIDGES, FULLERTON, MOUNT, and TOLMAN, JJ., concur.**

(112 Wash. 14)

**WALLACE et ux. v. WALLACE et al.**  
(No. 15727.)(Supreme Court of Washington. July 26,  
1920.)**Improvements — (4) — No right to lien for improvements by licensees.**

Where plaintiff allowed his parents and their family to go on his land, and they constructed improvements, and plaintiff thereafter brought an action to quiet title and to recover possession, the parents are not entitled to a lien on the property for the value of the improvements under Rem. Code 1915, § 797, on the theory that they had held under color of title or adversely, though the family and surviving parent are entitled to a reasonable time within which to remove the improvements, as they were made with plaintiff's consent.

**Department 2.**

Appeal from Superior Court, Yakima County; George B. Holden, Judge.

Action by John H. Wallace and Josephine Wallace, his wife, against Ellen Wallace, a widow, and Walter Wallace and others. From that part of the judgment quieting plaintiffs' title, etc., and which subjected the land to a lien for improvements, plaintiffs appeal. Reversed and remanded, with directions.

W. A. Funk, of Sunnyside, and Geo. H. Rummens, of Seattle, for appellants.

O. L. Boose, of Sunnyside, for respondents.

**MOUNT, J.** This action was brought by the appellants to quiet title and recover possession of a certain tract of land in Yakima county. The complaint is in the usual form. The defendants answered, denying title and right of possession in the plaintiff, claiming an undivided one-half interest in themselves. On these issues the case was tried to the court without a jury, and resulted in findings to the effect that the plaintiff was the owner and entitled to the possession. Thereafter the defendants applied to the court for leave to reopen the case and introduce further evidence. This motion was granted, and the court received further evidence relating to the value of improvements which had been placed upon the property, and finally entered a decree, adjudging that the plaintiff was the owner of the property and entitled to the possession thereof, but that the defendants were entitled to a lien upon the property for \$1,500, the value of improvements placed thereon by the defendants. The plaintiff has appealed from that part of the decree which adjudged that the defendants were entitled to a lien of \$1,500 on account of improvements placed upon the land.

The facts in the case, as shown by the evidence, are substantially as follows: The

plaintiff is the son of Ellen Wallace and John A. Wallace, now deceased. He is the brother of the other defendants. In the year 1903 the plaintiff John H. Wallace and one Richard Griffiths purchased the land in controversy. John H. Wallace at that time was a single man, living with his parents in the town of Cle Elum. He afterwards purchased the interest of Mr. Griffiths. John H. Wallace and his father were both working in the coal mines at that place. The father was injured and was unable to work. John H. Wallace then told his father and mother that they might move upon this tract of land and occupy it as a home until the family was grown up. His father and mother and family in 1904 moved upon the property. This property at that time was in a raw state, except six acres which had been planted to alfalfa. There were no buildings of any consequence upon the land. When the family moved upon the land they built a dwelling and some small buildings, and afterwards improved all the land by putting it into cultivation. After they had lived there for a short time John A. Wallace, the father of the appellant, died. The family continued to reside upon the land, and improved and cultivated it without paying rent until the year 1914. After that time the appellant received one-half the crop as the rental value of the property. In the year 1918, when all the children were of age except one, who was yet a minor, some disagreement arose between the appellant and his mother and brothers in regard to the manner in which the farm was cultivated. Thereupon the appellant leased the land to another party, and the respondents refused to give possession to the other party, and this action was brought, with the result as hereinbefore stated.

The single question in the case is, Are the respondents entitled to recover the value of the improvements placed upon the property during the time they were in possession? It is plain from the evidence that not until this action was brought did the respondents claim title thereto. Their sole defense to the complaint was that they were owners of an undivided one-half interest. When the court found that they were not owners, then they sought to subject the property to a lien for alleged improvements. The statute, Rem. Code 1915, at section 797, provides that, in an action for the recovery of real property upon which permanent improvements have been made by those holding in good faith under color or claim of title adversely to the plaintiff, the value of such improvements must be allowed as a counterclaim to the defendants. While it was claimed upon the original trial that the respondents owned an undivided one-half interest, it is plain from the evidence that such claim was not made in good faith under color or claim of title

adversely to appellant. They knew, from the time they went into possession of the property until this action was brought, that they were there by the kindness of the appellant. They knew the condition of the property at the time they went upon it. They knew it would require improvements to be made before the property could produce a living for them. They made improvements for their own use, and occupied the property for a period of about 12 years without paying any rent therefor. It is conceded that the appellant paid all the taxes, and at least paid something toward the improvements. The improvements which were placed upon the property were for the use and benefit of the respondents. During both trials the appellant made no claim to the little dwelling which was placed upon the property, but stated that he had no objection to his mother removing the dwelling. We are satisfied from all the evidence in the case that these improvements were not placed upon the property because respondent claimed in good faith to own the property, but were placed there simply for their use during the time they should remain in possession of the property.

The rule is stated in 22 Cyc. p. 8, as follows:

"It is now well settled that where an improvement, such as a building, is put upon the land of another, by his permission, under an agreement or understanding that it may be removed at any time, it does not become a part of the real estate, but continues to be personality, and the property of the person making it; and it is immaterial what is the purpose, size, material, or mode of its construction. And if the improvement is made by the owner's permission, an agreement that it shall remain the property of the person making it is implied in the absence of any other facts or circumstances showing a different intention. But this is not a necessary implication from such permission, and will not be drawn when a different intention is indicated by an express agreement between the parties, or from the interest of the party making the improvement or his relation to the title to the land."

See, also, *Phillips v. Reynolds*, 20 Wash. 374, 55 Pac. 316, 72 Am. St. Rep. 107.

We think the record is clear to the effect that these improvements were made upon this property by consent of the appellant for the use and benefit of the respondents while upon the land. This being so, the trial court improperly allowed a lien upon the land for the value of the improvements, which consisted of a dwelling house and some out-houses of no particular value to the land. The trial court was right upon its first judgment, to the effect that the respondents should have a certain time in which to remove the dwelling house which they had constructed upon the land. The appellant made no objections to this claim; in fact, con-

ceded the right of the respondents, if they desired to remove the dwelling.

The part of the judgment appealed from is therefore reversed, and the cause remanded, with instructions to the lower court to enter a decree, giving the respondents a reasonable time in which to remove the building if they desire to do so.

HOLCOMB, C. J., and TOLMAN, FULLERTON, and BRIDGES, JJ., concur.

(111 Wash. 668)

HUNTER v. RADFORD et al. (No. 15858.)

(Supreme Court of Washington. July 22, 1920.)

1. Sales  $\S$  117—Where time was declared of essence, breach warranted rescission.

Where a contract for the sale of a hotel dated September 7, declared that time was of the essence, and provided for delivery of possession on the 16th of September, and that if title could not be made good in 10 days, the agreement should be void, the inability of the defendant to convey on the 16th of September because he had not yet acquired title warranted the buyer in rescinding the contract.

2. Sales  $\S$  392—Tender unnecessary where it would be vain.

Though the contract for the sale of a hotel made delivery of possession and payment concurrent acts, the buyer need not tender payment in order to recover earnest money paid for the seller's failure to perform within the time limited, where it was known that he was ready and willing, but the defendant seller did not have title, and so could not at that time convey.

Department 2.

Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by E. R. Hunter against George W. Thorne and S. S. Barash and S. P. Barash, doing business as the Seattle Hotel News, and Colin O. Radford and Jane Doe Radford, his wife. After dismissal of the action as to defendants first named, plaintiff had judgment, and defendants Radford appeal. Affirmed.

Tuck & Hyland and Wm. O. Keith, all of Seattle, for appellants.

Howard O. Durk, of Seattle, for respondent.

MOUNT, J. In September, 1918, E. R. Hunter entered into a written contract with the Seattle Hotel News, acting an agent for Colin O. Radford, as follows, omitting immaterial portions:

"Seattle, Wash., Sept. 7, 1918.

"Received of E. R. Hunter two thousand dollars as earnest money and in part payment for the purchase of certain personal property in Multnomah county, Oregon, particularly described as follows: All furniture, equipment, fixtures, electric bus, leasehold of Cornelius Hotel, Park and Alder streets, Portland, for thirteen years at \$890.00 per month, together with all improvements thereon, which we have this day sold to the said E. R. Hunter for the total purchase price of thirty-five thousand (\$35,000.00) dollars on the following terms, to wit: Two thousand (\$2,000.00) dollars as herein receipted for, eight thousand dollars on date of possession on or before September 16, 1918, and balance of \$25,000.00 in monthly payments of \$600.00 per month until satisfied, with interest on balance of 7 per cent. per annum, payable semiannually. \* \* \*

"It is agreed that if the title to said property is not good or cannot be made good in ten days, or if the owner does not approve of the above sale, this agreement is void, and the earnest money herein receipted for shall be refunded, but if the title to said property is good and the above sale is approved by the owner, and the purchaser neglects or refuses to comply with any of the conditions of this sale, then the earnest money herein receipted for shall be forfeited as liquidated damages to the owner of said property. \* \* \*

"Time is the essence of this contract.

"Seattle Hotel News.

"By S. P. Barash.

"I hereby agree to purchase the above property on the above terms. E. R. Hunter."

On the 16th day of September Mr. Hunter employed a manager for the hotel, and sent him from Seattle to Portland to receive the property on the 16th day of September. After this manager had gone to Portland the agent in Seattle informed Mr. Hunter that the owner of the building would not be ready to deliver possession on the 16th, but that he would be ready to do so very shortly. On the 23d of September, 1918, Mr. Barash, the agent in Seattle, informed Mr. Hunter that the owners of the hotel were ready for him to take possession. Thereupon Mr. Hunter procured \$8,000 from the bank in Seattle, and he and Mr. Barash went to Portland for the purpose of closing the contract. When they arrived in Portland Mr. Hunter was informed that possession could not be given at that time. He waited until the 27th day of September, when he demanded the return of his money because possession of the hotel had not been given. Thereafter he brought this action to recover the deposit of \$2,000 which he had paid at the time the contract was entered into. The agents, George W. Thorne, S. S. Barash, and S. P. Barash, doing business as the Seattle Hotel News, and Mr. Radford and his wife were all made parties.

[1, 2] After issues were joined the case was tried to the court without a jury. Upon the trial of the case, when it appeared that the

\$2,000 had been paid over to Mr. Radford, who was supposed to be the owner of the property, and when it appeared that Mr. Radford had approved the contract, the agents were dismissed from the action. The trial proceeded as against Mr. Radford and wife, and resulted in a judgment in favor of the plaintiff Mr. Hunter for \$2,000. The defendants Radford and wife have appealed from that judgment.

On the trial of the case the evidence was conclusive to the effect that Mr. Hunter had paid the \$2,000 at the time the contract was signed; that he went to Portland with the agent who prepared and signed the contract; that he took \$8,000 along with him, which fact was known to this agent, for the purpose of obtaining possession of the property on the 16th or later, if it could be given. When he arrived in Portland Mr. Hunter learned that title to the property had not been acquired by Mr. Radford, and Mr. Radford was not in a position to deliver possession. Mr. Hunter waited until September 27, and then when possession was not offered him he demanded the return of his \$2,000, which was refused. The defense was that the time was extended until October 1, and that after October 1 Mr. Hunter himself defaulted in the payment, and therefore under the contract he was not entitled to the return of his \$2,000. Whether or not there was an extension of time was a disputed question. Mr. Hunter testified positively that he made no agreement to extend the time to October 1. Mr. Radford, on the other hand, testified that there was an agreement to that effect. Upon this disputed testimony the trial court was of the opinion, we think correctly, that there was no extension of the time to October 1 in which the contract should be performed.

The contract upon its face was to be performed within 10 days, namely, on September 16, 1918. It provided that time was the essence of the contract. The contract also provided that \$8,000 was to be paid on the date of possession, and that if the title to said property is not good or cannot be made good in 10 days this agreement is void. We think there can be no escape from the conclusion that after the 16th day of September, 1918, if Mr. Hunter was not put in possession of the property, he was entitled to his \$2,000 back. He was not put in possession of the property within that time, and he therefore had a right to rescind the contract at any time. He did so on the 27th day of September. It is argued by the appellants that before the respondent was entitled to rescission it was his duty to tender the payment of \$8,000. We think according to the terms of the contract the \$8,000 was not due until possession was given, but if we concede for the purposes of this case that the delivery of possession and the tender of payment were concurrent acts, the evidence clearly shows

that Mr. Hunter had the money in his possession with which to make the payments, and Mr. Barash, the agent of the appellant, knew this fact, and knew that Mr. Hunter was in Portland for the purpose of taking possession, and up until the 27th day of September the appellant was not in a position to deliver possession, because he at that time had not acquired the right of possession of the property, and did not do so, according to his own evidence, until October 1, 1918. Under these circumstances it was not necessary for the respondent to tender the \$8,000 and demand possession, because it was known that appellant at that time could not deliver possession.

The judgment of the trial court was clearly right, and is therefore affirmed.

HOLCOMB, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

(113 Wash. 60)

PEARSON v. M. GOTTSTEIN INV. CO.  
et al. (No. 15787.)

(Supreme Court of Washington. Aug. 8, 1920.)

1. Appeal and error  $\S$  265(1), 1009(1)—Findings in equity suit conclusive, and not reviewable unless excepted to.

Though findings are not necessary in a suit in equity, as in law actions, when they are made in such a suit they are as conclusive on appeal as in law actions, and cannot be reviewed unless excepted to.

2. Appeal and error  $\S$  273(9)—General exceptions to refusal to requested findings not sufficient.

A mere general exception is not sufficient to warrant a review of the findings of fact, whether such exception is to the findings as made, or to the refusal by the court to make findings requested by appellant.

3. Pleading  $\S$  142 — Statement plaintiff had forfeited rights held not to invalidate pleading of set-off.

Where the answer to a suit for the balance due on a construction contract and foreclosure of lien therefor alleged damage in excess of the balance due the contractor because of his inattention to the work, a statement therein that contractor had forfeited his right to compensation was merely an allegation of conclusion, not an attempt to set up a forfeiture, and does not invalidate the answer.

Department 1.

Appeal from Superior Court, King County; King Dikeman, Judge.

Action by Alexander Pearson against the M. Gottstein Investment Company and others, to recover the balance due on a construction contract and foreclose a lien there-

for. Judgment for defendants, and plaintiff appeals. Affirmed.

Arthur C. Dresbach, of Seattle, for appellant.

Preston, Thorgrimson & Turner, of Seattle, for respondents.

PARKER, J. The plaintiff, Pearson, seeks recovery from the defendants of the sum of \$2,407.52 as a balance claimed to be due him upon a construction contract for the remodeling of the interior of a large business block owned by the defendants, situated in the business district of Seattle; and also the foreclosure of a lien upon the property, claimed by the plaintiff by virtue of the performance of the contract. Trial in the superior court for King county resulted in findings and judgment in favor of the defendants denying any recovery, from which the plaintiff has appealed to this court.

The contract provided that appellant should furnish all material, and cause to be performed all labor necessary for the completion of the improvement according to plans and specifications prepared by architects; that respondents should pay to appellant the cost of all the material and labor "at the lowest market rates," and 8 per cent. additional as his compensation for carrying the improvement to completion; and "that the contractor (appellant) shall push the work to completion as rapidly as possible." The improvements being completed by appellant at a cost to him of \$52,425.53, and appellant claiming a balance due him from respondents, upon the contract and his percentage compensation, of \$2,407.52, they have defended and resisted appellant's claim, upon the ground, in substance, that by reason of appellant's inattention to the work its completion was delayed beyond a reasonable time for completion, to their damage, especially in the loss of rents they would have received in excess of the amount of his claim of balance due on the contract, had the improvement been completed within such reasonable time, making the rooms of the building available for renting. The trial court made findings of fact fully covering the substantial issues of the controversy, which we regard as clearly supporting the conclusion that the inattention to the work on the part of appellant did result in an unreasonable delay in its completion, resulting in respondent's damage in a sum greater than the balance claimed by him, which findings therefore clearly support the judgment denying recovery. No exception whatever was taken to the finding in appellant's behalf. A general exception was, however, taken to the refusal of the court to make findings, 10 in all, requested by counsel for appellant, which general exception is evidenced in the record by these



words, "Plaintiff duly excepted thereto," indorsed at the foot of the requested findings.

[1] According to our repeated holdings, findings of fact made by a trial court are conclusive upon appeal, unless duly excepted to. While this is a suit in equity wherein findings are not necessary as in law actions, when they are made in such a suit, they become as conclusive upon appeal as when made in a law action. *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476; *Hagen v. Bolcom Mills*, 74 Wash. 462, 476, 133 Pac. 1000, 134 Pac. 1051; *Harbican v. Chamberlin*, 82 Wash. 556, 144 Pac. 717; *Yarbrough v. Pellissier*, 83 Wash. 49, 145 Pac. 81; *Beeler v. Barr*, 90 Wash. 258, 155 Pac. 1040; *Ready v. McGillivray*, 186 Pac. 902.

[2] It is equally plain under our decisions that such a general exception as we have here is not sufficient, when directed to a number of findings covering the whole case upon the merits, to call for a review of the evidence to determine questions of fact upon appeal, and this is true whether exception be taken to the findings made by the court or to the refusal of the court to make a number of requested findings, as was done in this case. In *Pederson v. Ullrich*, 50 Wash. 211, 96 Pac. 1044, it was said:

"No exceptions either to findings made or to those requested and refused appear in the record. In their reply brief the appellants concede that the only mention of any exceptions being taken appears in the certificate of the trial judge to the statement of facts as follows: 'That the findings of fact and conclusions of law hereto attached were the ones proposed by defendants and rejected and refused by the court, and exception allowed thereto.' This, if conceded to be an attempt at exceptions to findings requested, will not secure a review of the evidence, as a general exception to all findings made, or all findings requested and refused, is insufficient for any such purpose." *Crowe & Co. v. Brandt*, 50 Wash. 499, 97 Pac. 503; *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026; *Yakima Grocery Co. v. Benoit*, 56 Wash. 208, 105 Pac. 476; *Snohomish River Boom Co. v. Great Northern Ry. Co.*, 57 Wash. 693, 107 Pac. 848; *Meacham v. Seattle*, 69 Wash. 238, 124 Pac. 1125; *Sallaske v. Fletcher*, 73 Wash. 593, 47 L. R. A. (N. S.) 320, Ann. Cas. 1914D, 760.

We conclude, therefore, that we must view the facts as found by the trial court. We deem it not out of place, however, to here observe that a perusal of the short abstract convinces us that our disposition of the case upon its merits would be in respondent's favor, even if it were necessary for us to discuss the merits.

[3] While counsel for appellant seems to make his principal contention upon the merits of the case in the light of the evidence, he also makes contention that the defense of damages by way of set-off as against appellant's claim was not well

pleaded. It is true, as counsel points out, that respondents pleaded in their affirmative answer in the concluding paragraph thereof that appellant has "forfeited any right to compensation." This, however, is only pleading a conclusion, which in the light of the preceding allegation can only mean that the damages which respondents claim to have been caused by appellant's neglect of the work exceeds the amount of appellant's claim. It is not the pleading of a technical forfeiture, as counsel for appellant seems to argue. We think this contention is not well grounded.

The judgment is affirmed.

HOLCOMB, C. J., and MAIN, MACKINTOSH, and MITCHELL, JJ., concur.

(111 Wash. 685)

CARTWRIGHT et al. v. HAMILTON et ux.  
(No. 15888.)

(Supreme Court of Washington. July 26, 1920.)

1. Boundaries ¶37(1)—Evidence held to show that fence was not a division line fence.

In action to establish boundary line, evidence held to show that fence was not constructed as a division line fence, but was constructed solely to inclose defendant's land at a time when such land was separated from plaintiff's land by a public road.

2. Adverse possession ¶57—Evidence held not to show acquiescence in fence as dividing line for statutory period.

In action to establish boundary line, evidence held not to prove that defendant acquiesced in or treated any part of his fence, not originally constructed as a division line fence, as marking the dividing line between plaintiff's and defendant's land for the period of the statute of limitations.

3. Appeal and error ¶101(1)—Finding on conflicting evidence not disturbed.

Trial court's finding on conflicting evidence will not be disturbed.

Department 2.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Mary A. Cartwright, formerly Mary A. Thompson, and husband, against William Hamilton and others. From the decree rendered, plaintiffs appeal. Affirmed.

Fred J. Cunningham, of Spokane, for appellants.

John L. Dirks, of Spokane, for respondents.

FULLERTON, J. The appellant Mary A. Cartwright owns the southwest quarter, and the respondents T. C. Hamilton and wife own the southeast quarter, of section 32, in

township 23 north, of range 45 east of the Willamette meridian. In March, 1919, the appellant, her husband joining with her as plaintiff, instituted an action in equity in the superior court of the county in which the lands lie to establish the boundary line between the lands. In her complaint the appellant alleged that such boundary line had been marked by a fence for more than 20 years, up to and until some 2 years prior to the commencement of the action, when the same was unlawfully changed by the respondent T. C. Hamilton, by erecting a new fence west of the original location at distances ranging from 17 to 30 feet. She further alleged that the line of the old fence had been recognized and acquiesced in by respective owners as marking the boundary between the lands during the period of time mentioned, and that she and her predecessors in interest had been in the open, notorious, and exclusive possession of such southwest quarter, and all of the land lying east of the same, if any, up to the fence, for more than 20 years, claiming the same adversely to all the world; that the respondent T. C. Hamilton had by his acts unlawfully ousted and ejected her from the land lying between the line of the old fence and the new fence erected by him, and had since the erection of such fence wrongfully and unlawfully withheld possession of the same from her. She further alleged that she and T. C. Hamilton, as adjoining proprietors of lands, could not agree as to the location of the true boundary line between the lands, and prayed that a boundary line between the lands be erected, established, and properly marked, that commissioners be appointed for that purpose, that the land lying between the line of the old fence and the new fence be restored to her, and that she have such other and further relief as to the court may seem just. The answer of the respondents admitted the ownership of the lands as alleged in the complaint, admitted that the parties were adjoining proprietors and could not agree upon the boundary line between the lands, and denied the other allegations of the complaint. The prayer of the answer was that the true and legal boundary line between the lands be adjudged and decreed by the court, and that the expense thereof be equitably apportioned between the parties.

After issue had been thus joined, the trial court appointed a deputy county surveyor as a commissioner to survey and mark the true boundary between the lands. This officer performed the service and made report of his survey to the court, filing therewith a plat and the field notes of the survey. This report shows that the commissioner began his survey on the south side of the section, where he found a galvanized iron pipe set in the ground to mark the corner, and which he found by measurements to be substantial-

ly equidistant from the established corners marking the southeast and southwest corners of the section. From this point he ran a right line to the quarter section corner on the north of the section, reporting that the newly erected fence substantially followed this line, and that the old fence, as nearly as he could ascertain its location, was at the point of beginning 33 feet east therefrom; at 773 feet, "on ridge," was  $29\frac{9}{10}$  feet east; and at 1130 feet, at the point of the intersection of the line with the Palouse Highway, was  $28\frac{9}{10}$  feet east. From the point where the line left the highway named on the north, the fence dividing the lands of the parties was substantially upon the line run by the commissioner.

At the trial, following the report of the commissioner, it developed that the controversy between the parties was over the strip of land lying south of the Palouse Highway, and between the line of the old fence and the line as marked by the commissioner. There was no evidence seriously disputing the fact that the line as run by the commissioner marked the true dividing line; the appellant supporting her claim to the land by evidence tending to show that the old fence had been constructed as a line fence, and that the line marked thereby had been acquiesced in, and that she had been in the adverse possession of the land lying west thereof for more than 10 years, or more than the period of the statute of limitations. The trial court found against her on these contentions, and entered a decree to the effect that the true dividing line between the lands of the parties was the line as run by the commissioner, and that the appellant take nothing by her action in "virtue of her claim to any other boundary line running north and south between said properties upon the ground of adverse possession, use, or acquiescence, or at all." It is from this judgment the present appeal is prosecuted.

[1] The questions at issue as presented here are wholly questions of fact. On the question whether the old fence had been constructed as a line fence, the evidence, in our opinion, hardly leaves the matter in doubt. It appears that at a time some 30 years or more prior to the trial of the cause the county commissioners of the county in which the lands lie laid out a county road passing through the section, of which the lands of the respective parties form a part; that the road was 60 feet in width; that the center of the road followed the dividing line between these quarter sections from their common corner on the north in a southerly direction for approximately three-fourths of distance through the lands, from which point it passed southwesterly, onto the quarter section now owned by the appellant, intersecting its south line some few rods west of the common corner on the south; that when

the respondent's predecessors in interest fenced the quarter section now owned by him the fence was constructed on his side of this road from the north line down to the point where the road turned onto the appellant's land, and from thence in a straight line to the south boundary of the land. The reason why the fence, when constructed, did not follow the side of the road to the dividing line, and continue from thence south on such line to the common corner, is stated by a witness as being due to an inadvertence on the part of the persons who constructed the fence. But, be this as it may, the evidence as a whole makes it clear that the fence was constructed solely for the purpose of inclosing the quarter section now owned by respondents, not as a division line fence. In fact, when constructed, it formed no part of the fence inclosing the appellant's lands; on her side of the road an independent fence was constructed, following the road for the entire distance through the land.

[2] Whether the respondents acquiesced in or treated any part of their fence as marking the dividing line between the premises for the period of the statute of limitations, the evidence is not so clear. It appears that the county road as originally laid out left to the southeast thereof in the appellant's quarter section approximately three acres of land. The fences inclosing the land, as originally constructed, left this tract open to the commons. Some years later, by agreement between the county commissioners and the appellant's predecessor in interest, the road was changed to a better grade, increasing the size of this tract to possibly 12 acres. Some time after the appellant purchased the quarter section she inclosed this tract, using the fence of the respondent to form the east side of the inclosure. From this time on until the time the respondent set the fence back to the true line, the appellant made use of the entire inclosure, cultivating and raising crops on a part of it at times, and at times using it as pasture land. During this period there was no dispute between the parties as to the true line, or as to whether the fence was or was not on the true line. This dispute arose on the establishment of the Palouse Highway, which varies from the original road, and necessitated a new adjustment of the fences.

[3] Between the time the appellant began to make use of the fence and the time the controversy arose the fence was kept in repair seemingly at the mutual expense of the parties, and during this period it could well be found that the fence was recognized and acquiesced in as forming the boundary lines between the lands. The difficulty is in determining the time the appellant inclosed the tract. Her testimony is to the effect that it was more than 10 years prior to the time and

dispute arose over the boundary, while the respondent testifies that the time was less than that, saying that it was possibly 7 or 8 years. The supporting evidence—that is, the evidence of the disinterested witnesses—is also in conflict. These witnesses vary as much in their estimates of the time the land had been inclosed as do the principals, and we cannot say that there was any decided preponderance either way. Under these circumstances, following our general rule, we are constrained to adopt that version of the evidence adopted by the trial court.

The remaining question, whether the appellant has title by adverse possession, is determined by the time she remained in the exclusive possession of the land. This possession began when she first inclosed the tract, and, since acquiescence of the adverse party is not a condition of the running of the statute of limitations, she is entitled to claim her possession as being adverse from that time down to the time the respondent actually set back the fence. But here, again, the evidence is conflicting, and we are not able to say that it preponderates against the conclusion of the trial court.

These conclusions require an affirmance of the decree of the trial court, and an affirmance is ordered.

HOLCOMB, C. J., and MOUNT, TOLMAN, and BRIDGES, JJ., concur.

(112 Wash. 282)

PORTER v. BURKLEY et al. (No. 15765.)

(Supreme Court of Washington. Aug. 24, 1920.)

**Taxation**  $\Rightarrow$  805(2)—Recitals in tax deed were irregularities, not preventing running of limitations.

A tax deed, given on foreclosure by an individual holder of a certificate of delinquency, was not vitiated by reason of its having the form used in cases where the county forecloses, recitals in the deed as to an order of the board of county commissioners and ownership by the county being surplusage only, and an action could not be brought to cancel it after expiration of three years, under Rem. & Bal. Code, § 162.

Department 2.

Appeal from Superior Court, Ferry County; C. H. Neal, Judge.

Action by Samuel Porter against E. E. Burkley and others. From an adverse judgment, plaintiff appeals. Affirmed.

Samuel Porter, of Republic, for appellant. G. W. Sommer, of Spokane, for respondents.

TOLMAN, J. Appellant, as plaintiff in the court below, brought this action to fore-

close a mortgage upon certain real estate in Ferry county, Wash. Respondents by answer admitted the execution and delivery of the note and mortgage, and that the latter was duly recorded, and pleaded affirmatively that respondent, Margaret Howell, is the owner of the land described in the mortgage, by virtue of a tax deed duly issued to her by the treasurer of Ferry county on June 28, 1915, and that more than three years elapsed after the issuance of such deed and before the commencement of this action. By his reply appellant admits the issuance of the tax deed more than three years prior to the bringing of the action, but pleads that the tax deed was null and void by reason of irregularity in the proceedings leading up to its issuance; that the county treasurer had no authority in law to issue it, and also that it is void on its face. A judgment on the pleadings was entered, denying the foreclosure of the mortgage, and dismissing the action as to the respondent Howell, and this appeal followed.

Appellant raises the question as to the sufficiency of the summons in the tax foreclosure case, under which respondent claims title; the sufficiency of the service in that case, and that the tax deed recites:

"That whereas, at a public sale of real estate, held on the 26th day of June, 1915, pursuant to an order of the board of county commissioners of the county of Ferry, state of Washington, duly made and entered, and after having first given due notice of the time and place and terms of such sale, and, whereas, in pursuance of said order of said board of county commissioners, and of the laws of the state of Washington, and for and in consideration of the sum of one hundred fifty-four & 98/100 dollars, lawful money of the United States of America, to me in hand paid, the receipt whereof is hereby acknowledged, I have this day sold to M. Howell, the following described real estate, and which real estate is the property of Ferry county \* \* \*

—claiming, in effect, that the deed being in the form used in cases where the county forecloses, it is not entitled to the protection of the statute in a case such as this of a foreclosure by an individual holder of a certificate of delinquency. The statute (Rem. & Bal. Code, § 162) is a statute of limitations barring any action "to set aside or cancel a deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, \* \* \*" after three years from the date of the issuance of such deed.

We think the recitals in the deed, as to the order of the board of county commissioners, and the ownership by Ferry county, surplusage only, which does not vitiate, and such irregularities, and the irregularities, if

any, in the summons, and the manner of its service, are such as the statute is meant to set at rest. We have so often upheld the statute and decided all the questions here presented, in similar cases, that a further discussion at this time seems unnecessary. *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082; *Fleming v. Stearns*, 66 Wash. 855, 120 Pac. 522.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., and BRIDGES, MOUNT, and FULLERTON, JJ., concur.

(111 Wash. 631)

MILLER v. SCHOBEL et al. (No. 15389.)

(Supreme Court of Washington. July 21, 1920.)

**Mechanics' Liens § 99(2)**—Statutory notice to owner not required, where material delivered directly on owner's order.

Where a materialman furnished materials for a building to the contractor on the owner's order, and on the contractors becoming unable to pay for more lumber the owner told the materialman to continue supplying materials, the materialman could have a lien on the building for such lumber without giving the notice required by Rem. Code 1915, § 1133.

Department 2.

Appeal from Superior Court, Kittitas County; John B. Davidson, Judge.

Action by M. C. Miller against Joseph Schober and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Ralph Kauffman, of Ellensburg, for appellants.

G. P. Short and C. R. Hovey, both of Ellensburg, for respondent.

MOUNT, J. This action was brought to foreclose a lien for lumber furnished by the plaintiff and used in the construction of a building for the defendants Schober and wife. On the trial of the case to the court without a jury, judgment was rendered in favor of the plaintiff for the amount of his claim. The defendants have appealed.

There is no dispute as to the amount of the material furnished, nor its value, nor as to the balance due on account thereof. The sole question is whether Mr. Schober's property is liable for the amount of the claim. It appears that in June, 1918, Mr. Schober entered into an agreement with one Hutter for the construction of this particular building and also another building. Mr. Hutter constructed the building, obtaining the lumber from the

respondent. Before the building was finally completed, he became embarrassed, and was unable to pay the balance due for the lumber. The respondent filed a claim for lien.

It is conceded that no notice was served upon the appellant, as provided for in section 1133 of Remington's Code. The appellant insists here that the trial court erred in sustaining the lien, because this notice was not served. The respondent maintained in the lower court, and maintains here, that there was no obligation to serve the notice provided for in that section, because the lumber was ordered by the appellant himself, and therefore it was not necessary for the notice to be given him. This court has held in several cases that—

"When the materialman furnishes material to the owner, either directly or through an agent of the owner, the statute in question has no application." *Spokane Valley Lumber & Box Co. v. Dawson*, 94 Wash. 246, 161 Pac. 1191, and cases there cited.

Upon this question the trial court found as follows:

That the appellant, with Mr. Hutter, went to the respondent, and Mr. Schober "thereupon solicited plaintiff \* \* \* to supply him, the said defendant, with the building materials which he would need in the construction of two buildings which he was about to erect in the city of Cle Elum, and of the construction of which buildings the said Frank Hutter was to have charge; and the said Schober thereupon informed the said plaintiff that the said Hutter would inform him of the details as to what would be needed."

The trial court also found that, after Mr. Hutter became insolvent and had notified the respondent that he would not be able to pay for any more lumber, the respondent notified Mr. Schober of that fact—

"and asked him what his wishes were in the matter, and Schober instructed plaintiff to go ahead and continue the supplying of materials, as the building had to be completed, and that practically all of the materials which had not been paid for were supplied on and after said time."

These findings were made upon disputed testimony, but we have read the statement of facts carefully, and conclude therefrom that the findings are amply justified by the testimony. In fact, we are of the opinion that the weight of the evidence is in favor of these findings. This being true, it follows that under the rule above stated it was not necessary for the respondent to give notice to the owner of the building, as required by section 1133, Rem. Code, because under these facts the material was furnished upon the order of the appellant. He knew that the respondent was furnishing the lumber, and not only that, when he was informed that Mr. Hutter could not pay for more, he told the respondent to

go ahead and continue furnishing materials, and that after that time all the materials which had not been paid for were supplied.

The judgment appealed from must therefore be affirmed.

HOLCOMB, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

(112 Wash. 88)

RAMEY v. GRAVES et al. (No. 15738.)

(Supreme Court of Washington. Aug. 6, 1920.)

1. Attorney and client  $\S$  150 — Reasonable compensation recovered on discharge of attorney employed on contingent fee.

Where an attorney's compensation is contingent on the successful prosecution of a suit, and he is discharged or prevented from performing the service, the measure of damages is not the agreed contingent fee, but reasonable compensation for the service actually rendered, and in the absence of evidence of such reasonable value there can be no recovery.

2. Attorney and client  $\S$  165—Recovery for expenditures not authorized when case tried on different theory.

In an action by an attorney employed on a contingent fee and discharged by the client, proof of expenditures by the attorney did not support a recovery, where the case was tried on the theory that plaintiff could recover on the contract, and it was expressly stated that plaintiff was not seeking to collect such expenditures as special damages.

Department 1.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by H. M. Ramey, Jr., against Clifford Graves, a minor, and W. I. Graves as guardian of his person and estate. From a judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Geo. H. Rummens, of Seattle, for appellants.

H. M. Ramey, Jr., and J. Speed Smith, both of Seattle, for respondent.

MAIN, J. By this action the plaintiff seeks to recover upon a contract for services rendered as an attorney. The cause was tried to the court without a jury, and resulted in findings of fact, conclusions of law, and judgment sustaining the right to recover in the sum of \$2,000. From this judgment the defendants appeal. The respondent is an attorney at law, practicing his profession at Seattle, Wash. The appellant, W. I. Graves, is the guardian of the person and estate of Clifford Graves, a minor. On or about October 30, 1915, the father, mother, and a brother of Clifford Graves were injured in a railway accident

at or near Sand Point, Idaho. All of them died as a result of such injury. The parents of Clifford Graves prior to their decease were residents of the city of Seattle. On November 8, 1915, W. I. Graves, in King county, Wash., was duly and regularly appointed guardian ad litem for Clifford Graves for the purpose of prosecuting an action or actions against the Northern Pacific Railway Company. On the day following he was appointed special administrator of the estate of Minor Graves and Clara Graves, the deceased parents of Clifford Graves. On the 10th day of November, W. I. Graves, in his own behalf, and as guardian ad litem for Clifford Graves, a minor and special administrator of the estates of Minor Graves and Clara Graves, deceased, entered into a written contract with the respondent, by which he was employed to prosecute an action against the railway company. The fee which the respondent was to receive by this contract was to be contingent upon a recovery, or a settlement. Subsequently Graves was appointed guardian of the person and estate of Clifford Graves, a minor in King county, Wash. Prior to the time that the respondent had instituted an action which was contemplated by the contract, the maternal grandfather, residing at Portland, began an action as guardian ad litem in the state of Idaho for the purpose of recovering from the railroad company damages for the death of Clifford Graves' parents. In this action the maternal grandfather was represented by attorneys other than the respondent. After the action had been begun W. I. Graves, being represented by the respondent, was appointed in the state of Idaho guardian of the person and estate of Clifford Graves, a minor, and in this capacity filed a petition in the action then pending in the state of Idaho, asking that he be substituted as party plaintiff, and that the respondent be substituted as an attorney in the action. While this petition was pending, and before it had been determined, W. I. Graves discharged the respondent, and refused to permit him to proceed further under the contract. The action in the state of Idaho proceeded to trial and judgment. After the respondent had been discharged, W. I. Graves, the guardian, consented that the petition which he had filed in the action should be dismissed. The amount of recovery in the Idaho action was \$12,000. The contract sued upon in this case provided that in the event of recovery in an action respondent was to be entitled to 50 per cent. of the judgment. This action was instituted for the purpose of recovery upon the contract.

[1] The respondent claims that, after W. I. Graves was appointed guardian of the person of the estate of Clifford Graves for the state of Washington, he in that capacity ratified the contract. It will be assumed, but

not decided, that the contract was a valid one. The contract in this case being for a contingent fee, and the respondent being discharged or prevented from rendering the services which he had contracted to perform, the first question that arises is, What is the correct measure of damages in such a case? The rule is that, where the compensation of an attorney is to be paid to him contingently on the successful prosecution of a suit, and he is discharged or prevented from performing the service, the measure of damages is not the contingent fee agreed upon, but reasonable compensation for the services actually rendered. 6 Corpus Juris, 725; Pratt v. Kerns, 123 Ill. App. 86; Joseph, Adm'r, v. Lapp's Adm'r (Ky.) 78 S. W. 1119; Western Union Telegraph Company v. Semmes et al., 73 Md. 9, 20 Atl. 127; Harris, Adm'r, v. Root et al., 28 Mont. 159, 72 Pac. 429; French v. Cunningham et al., 149 Ind. 632, 49 N. E. 797. In the last case cited it was said:

"If the compensation agreed upon is contingent on the successful result of the suit, the measure of damages is not the contingent fee, but the reasonable value of the services rendered."

From this it follows that there can be no recovery in this case in the absence of evidence showing what was the reasonable value of the services rendered by the respondent under the contract up to the time he was discharged or prevented from further proceeding in the case. As we understand it, the theory of the action as made by the pleadings and as tried in the superior court was a claimed right of recovery under the contract; the respondent being satisfied to waive the full amount to which he would be entitled under the language of the contract, and accept a judgment as stated in the complaint for \$3,000, and as stated upon the trial for \$2,000. No evidence was offered or received for the purpose of proving what was the reasonable value of the services rendered by the respondent up to the time he was discharged. This being true, there is nothing on which to base a recovery.

[2] Over the objection of the appellants there was introduced certain items of expenditures by the respondent during the time he was proceeding under the employment. Whether any of these items could be recovered it is not necessary here to determine. They were offered only for the purpose of showing what had been done under the contract, and as stated by the attorney for the respondent upon the trial, "We are not seeking to collect these as special damages." This case differs from *Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707, in that there the services for which the attorneys had been employed were substantially, if not entirely, completed at the time of the discharge or attempted discharge.

There being no evidence by which the reasonable value of the services rendered by the respondent prior to his discharge can be determined; there is no alternative but to reverse the judgment and remand the cause to the superior court, with direction to dismiss the action. It is so ordered.

HOLCOMB, C. J., and PARKER, TOLMAN, and MITCHELL, JJ., concur.

(112 Wash. 83)

**LEWIS v. ELLIOTT BAY LOGGING CO.**  
(No. 15762.)

(Supreme Court of Washington. Aug. 4, 1920.)

1. **Frauds, statute of** §111—Memorandum must show in what quantities goods are sold.

Under the statute the note or memorandum of sale of goods must show in what quantities the goods are sold.

2. **Frauds, statute of** §111—Seller's letter held not to sufficiently designate quantity of goods sold.

Seller's letter, referring to sale of "fir" held insufficient under statute; the quantity of fir not being sufficiently designated.

3. **Frauds, statute of** §118(3)—Telegrams or letters may be construed together if connected by reference.

Memorandum consisting of telegrams or letters may be construed together, if sufficiently connected by reference.

4. **Frauds, statute of** §115(3)—Seller could not be charged on memorandum signed by buyer.

Where memorandum signed by seller did not sufficiently describe the quantity of the goods to be sold, seller could not be held liable for breach of the contract on letter from buyer designating such quantity, since it could not be charged on a memorandum which it did not sign.

5. **Frauds, statute of** §158(3)—Parol testimony not admissible to show essential term of memorandum.

Though the situation of the parties and the surrounding circumstances at the time the contract was made may be shown for the purpose of applying the contract to the subject-matter, parol testimony is not admissible to show an essential term of memorandum required by the statute.

Department 1.

Appeal from Superior Court, Snohomish County.

Action by B. A. Lewis against the Elliott Bay Logging Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss action.

Byers & Byers, of Seattle, for appellant.

George Harroun, of Seattle, for respondent.

MAIN, J. The purpose of this action was to recover damages for failure to deliver logs which it is claimed the defendant had sold to the plaintiff. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$241.66. The defendant timely made motions for judgment notwithstanding the verdict and for a new trial, both of which were overruled, and judgment was entered upon the verdict. The defendant appeals. The essential facts may be stated as follows:

The appellant is a corporation organized under the laws of the state of Washington, engaged in the logging business at Dabob, Wash. The respondent is engaged in the business of buying and selling logs. On the 25th day of April, 1917, the respondent visited Dabob, and looked over a boom of logs owned by the appellant, consisting of about 300,000 feet, and had a conversation with the president of the appellant company with reference to purchasing these logs, together with sufficient logs to be brought from the woods to constitute a raft. The logs at the time had not been rafted. Subsequently the 300,000 feet in the boom were rafted with other logs brought from the woods, and in the raft as made up there was approximately 470,000 feet. On the day following the conversation mentioned, one of the trustees of the appellant wrote respondent a letter, which contained the following:

"Having been away from camp the day you was here and Mr. Leber sold fir to you for \$7-10-18, \* \* \* so therefore under the condition we let you have fir at \$7-10-13 delivered in Everett or Seattle. \* \* \*"

After receipt of this letter, and on April 28, the respondent wrote appellant a letter, containing the following:

"Your letter of the 26th inst. is received, in which you agree to let me have the raft of fir logs to be delivered in Seattle, by you at \$7.00, \$10.00, and \$13.00, \* \* \* and I will take the fir logs as per your offer at the above prices. \* \* \*"

It should be noted that in appellant's letter the subject-matter of the sale is referred to simply as "fir." There is no mention of the quantity. In the respondent's letter for the first time the subject-matter is referred to as "a raft of fir logs." As above stated, the logs were not delivered, and, since the price of logs had advanced, this action was brought for the purpose of recovering damages.

The first question to be determined is whether the letters referred to constitute a sufficient memorandum to satisfy the statute of frauds. One of the essentials of a memorandum under the statute is that it shall designate the subject-matter of the contract.

Considering, first, the letter signed by the

appellant, there is no designation therein of the quantity, but the subject of the sale is referred to simply as "fir." The rule as stated in 1 *Mechem on Sales*, § 437, is that—

"The note or memorandum must also show what goods were sold and in what quantities. This rule requires that the goods shall be set out either by name or by such description as will enable them to be ascertained without other recourse to parol evidence to identify the goods or apply the description of them."

[1] Under this rule it is necessary that the note or memorandum show in "what quantities" the goods are sold. In 25 R. O. L. 648, the rule is stated substantially the same as in *Mechem*, and is as follows:

"In case of contracts for the sale of goods the memorandum must designate with reasonable certainty the subject-matter of the sale, and where the sale is of a quantity of a commodity the quantity must be stated with reasonable certainty as well as its kind."

[2, 3] This rule requires that the quantity be designated in the memorandum. The letter written by the appellant, which referred to the subject-matter of the sale as "fir," did not sufficiently designate the quantity. The respondent, however, argues that the two letters should be considered together. It is true that where the memorandum consists of telegrams or letters they may be construed together, providing they are sufficiently connected by reference. In the letter of the respondent the quantity of the subject-matter, namely, "a raft of fir logs," is for the first time designated. Under the authorities above cited this was one of the essentials of the memorandum.

[4] The question then arises, the memorandum of the appellant which is sought to be charged not sufficiently describing the subject-matter, can it be held upon the letter of the respondent which for the first time contains that essential term of the contract? Respondent cites a number of cases upon this question, all of which have been carefully read and considered, but none of them would sustain a holding that the appellant could be charged upon a memorandum which it did not sign, and which designated the quantity, where the writing signed by the appellant did not sufficiently designate the subject-matter in that respect. They are cases where the party sought to be charged signed a memorandum which contained all the essential terms of the contract, and which was simply accepted by the opposite party, or cases where the party sought to be charged had accepted the terms as they were written by the opposite party. They are therefore not applicable to the facts in the case now before us.

[5] The respondent also cites a number of authorities to sustain his contention that the word "fir" as used in the letter of the appellant was a sufficient designation of the subject-matter, and that oral testimony was admissible for the purpose of showing that that word referred to a raft of logs and the quantity thereof. In all the cases cited, with possibly one exception which will be specially noticed, the memorandum contained language which made the quantity reasonably certain. It cannot be said that simply the word "fir" bears any relation to the quantity. We have not overlooked the rule that the situation of the parties and the surrounding circumstances at the time when the contract was made may be shown for the purpose of applying the contract to the subject-matter, but this rule does not go to the extent of permitting an essential term of the memorandum to be shown by oral testimony. The case of *Brewer v. Horst & Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240, is probably the most closely in point of any case cited by respondent, but that case, when carefully read, is distinguishable. There a telegram to a hop dealer by his agent, stating "bought thirteen at eleven five-eighths net you; confirm purchase by wire," with the reply by the dealer to the effect that, "We confirm purchase eleven five-eighths cents, like sample," was held to constitute a sufficient memorandum, since it was shown by parol evidence that according to the custom of the hop business the words were understood by the parties to mean an agreement to purchase a certain quantity of hops, of a certain grade, for a certain price. There is no showing in the present case that the word "fir," according to the custom of the business, had any particular meaning. The case of *Wright v. Seattle Grocery Co.*, 105 Wash. 383, 177 Pac. 818, is cited and relied on by both parties, but that case does not discuss or determine the question here involved. There the memorandum designated the subject-matter as "1 car" of flour, and it was held that the parol evidence was admissible to explain what the term "1 car" of flour meant, and that the price agreed upon was in full for that quantity. There is nothing in that case which would sustain a holding that, where a memorandum does not sufficiently designate the subject-matter, in that it does not fix the quantity with reasonable certainty, this fact may be shown by oral evidence.

The judgment will be reversed, and the cause remanded, with directions to the superior court to dismiss the action.

HOLCOMB, O. J., and PARKER, BRIDGES, and MITCHELL, JJ., concur.



(111 Wash. 615)

STATE ex rel. LINCOLN et ux. v. SUPERIOR  
COURT OF OKANOGAN COUNTY  
et al. (No. 15464.)(Supreme Court of Washington. July 20,  
1920.)

1. Eminent domain  $\S$  47(1)—Ditch may be condemned by order of necessity for carrying additional water from another source.

Where plaintiff and defendants were owners of a ditch, plaintiff's order of necessity, condemning it for carrying additional water from another source, could not deprive defendants of their means of making use of water, but merely added an additional servitude, entitling defendants to compensation, and the order is not prevented by Laws 1917, p. 448, § 4, declaring the beneficial use of water to be a public use, and the rule that property devoted to public use by one person cannot be taken from him without his consent and given to another for a similar use.

2. Eminent domain  $\S$  47(1)—Joint owners of ditch tenants in common.

Any added burden to the common property of plaintiff and defendants, which leaves it intact, cannot in any just sense be said to be a taking of the property within the rule that tenants are seized both in the whole and in part of their irrigation ditch for beneficial use of water, to which ditch the burden was to be added, since joint tenancy has been abolished, and the parties are tenants in common.

3. Eminent domain  $\S$  47(1)—Statute, granting right to enlarge existing structures, construed to grant use as enlarging by implication.

Laws 1917, p. 448, § 4, declaring beneficial use of water a public use, may not be construed as a grant of the right to enlarge existing structures for irrigation purposes, but not to grant a right to use them when so enlarged, since such right, if not expressly granted, is granted by necessary implication.

4. Eminent domain  $\S$  56—Party seeking to condemn land for carrying of water must use existing ditch where feasible.

Where it was feasible and practical to carry additional water through a ditch owned in part by plaintiff and in part by defendants, plaintiff had no choice, but must have the ditch condemned for the carrying of the additional water, since Rem. Code 1915, § 6364, prevents any improved or occupied land being taken for a new ditch without owners' consent, where an existing ditch can be made to carry it.

5. Appeal and error  $\S$  889(3)—Defect in complaint which may be remedied by amendment must be considered as made.

Where it was objected that an order of necessity for condemning a ditch for carrying additional water was erroneous because condemning the entire ditch, if the complaint was defective in asking condemnation for only a part of the ditch, the defect could be remedied by amendment, and in view of Rem. Code 1915, § 1752, all amendments which could be made must

be considered as made, so the complaint must be considered as broad as the evidence and to support the order.

6. Constitutional law  $\S$  118—Right of eminent domain superior to private contract.

Laws 1917, p. 448, § 4, permitting condemnation of a ditch by one of its owners and tenants in common for the carrying of additional water to another source, is not to such extent void because violating a contract between such tenants in common, since ownership contracts do not exempt from the eminent domain statutes, which are paramount and superior to any rights acquired by private contract.

7. Eminent domain  $\S$  196—Evidence held to warrant order of necessity, condemning irrigation ditch to carry additional water.

In an action by one of tenants in common of an irrigation ditch against another to condemn the ditch to an additional servitude to carry water from another source, evidence held to support an order of necessity for condemnation.

## Department 2.

Proceeding by the State, on the relation of W. A. Lincoln and wife, against the Superior Court of Okanogan County and Hon. C. H. Neal, Judge thereof, and the Little-Wetsel Company for review of an order of necessity for condemnation in an action by the Little-Wetsel Company against W. A. Lincoln and wife, to condemn a right of way to carry additional water through a ditch. Order affirmed.

Wm. O'Connor, of Okanogan, for plaintiffs.  
P. D. Smith, W. C. Brown, and Smith & Brown, all of Okanogan, for respondents.

FULLERTON, J. The petitioners, and the respondent Little-Wetsel Company, own abutting lands situated in Okanogan county. The lands are in an arid region and require irrigation to make them productive. The sources from which water is obtained for irrigating the lands are above the lands of the petitioners. The lands of the respondent were in part formerly owned by one Hess, and he, together with the petitioners, appropriated the waters of a creek known as Wolf creek, and constructed a ditch from the creek to their lands. The ditch for the first 1,000 feet passes over what was then government land, the title to which was afterwards acquired by one Allison, and from thence it passes over the petitioners' lands to the land now owned by the respondent. Hess on the one part and the petitioners on the other owned the land and water appropriated as tenants in common in equal moieties. The respondent at the time it acquired the land of Hess acquired also his interest in the ditch and his interest in the appropriated waters. The ditch seems to have become known locally as, and is called in the record, the

Hess-Lincoln ditch. As originally constructed, and as now operated, the ditch has a capacity of some 16 cubic feet of water per second of time.

Wolf creek, while furnishing water sufficient to supply the carrying capacity of the ditch in the early part of the irrigating season, diminishes in flow rapidly thereafter, and for the later part of the season the water from that source is insufficient to supply the needs of the parties. To augment its own supply the defendant constructed a ditch from the Methow river to the head of the Hess-Lincoln ditch, and sought to convey water from that source through its constructed ditch and through the Hess-Lincoln ditch to its lands. The petitioners objected to its doing so, and the controversy engendered thereby gave rise to the case of *Little-Wetzel Co. v. Lincoln*, 101 Wash. 435, 172 Pac. 746. We there held that the respondent had no right to so convey the water without the consent of the Lincolns, since it was to subject their interests in the ditch and their lands to an additional servitude not warranted by the agreement under which the ditch was constructed.

After the decision of this court in that case, the defendant instituted an action in the superior court of Okanogan county against the petitioners to condemn the right to carry through the Hess-Lincoln ditch the additional water mentioned. As a part of the relief sought they asked to have the ditch widened through the lands of the petitioners by taking a strip of land 1 foot in width from the upper side of the ditch, so as to give the ditch a carrying capacity of 19 feet of water per second of time, instead of 16 feet, its present capacity. At the trial of the cause the court entered an order of necessity, and this proceeding was brought by the petitioners to review the order.

The contentions of the petitioners can be divided into two principal propositions, namely: First, that the property sought to be condemned is not subject to condemnation; and, second, that, conceding it to be so subject, the evidence is insufficient to justify the order.

[1] In support of the first of these propositions, the petitioners call attention to the declaration of the Legislature to the effect that the beneficial use of water is a public use (Laws 1917, c. 117, § 4), and argue therefrom that the right in the ditch sought to be condemned, since it is in aid of this use, is also devoted to a public use, and that to permit the defendant to convey through the ditch water from an independent source for its own private benefit is to take property from them and transfer it to the defendant, contrary to the rule that property devoted to a public use by one person cannot be taken from him without his consent and given to another to be devoted to a like or similar use.

But, without quarreling with the legal rule as stated, we think the premise assumed as the basis for invoking the rule has no foundation in the facts shown. The order of necessity as entered does not deprive the petitioner of any beneficial use they are making of the waters of Wolf creek, nor can we conceive that it deprives them of the means by which they make use of such waters. The ditch as at present constructed has, as we have said, a carrying capacity of 16 cubic feet of water per second of time. The petitioners' right therein, since they are the owners of a half interest in the ditch, is to carry and to apply to their own use water up to one-half of this carrying capacity. The order of the court preserves this right in them. It but gives to the respondent the right to enlarge the ditch and the right to carry therein for its own benefit such additional water as the increased capacity of the ditch will enable it to carry. This does no more than add to the ditch and to the lands of the petitioners an additional servitude for which they are entitled to compensation, but manifestly it does not deprive them of any property which they are now devoting to a beneficial use.

[2] The argument advanced in this connection, to the effect that the petitioners are seized of the whole, as well as the part, of the common property devoted to the beneficial use of this water, and that any interference therewith is of necessity a taking of such property, is not tenable. At common law, for the purpose of tenure and the right of survivorship, joint tenants of property were said to be seized by the moiety and by the whole, but we have no such tenancies in this state. Not only is a tenure by joint tenancy against the spirit of our institutions, but it has been expressly abolished by statute and now all common owners of property hold as tenants in common. In such a tenancy, even at the common law, the tenants hold by distinct moieties, and their titles are not joint but several. Any added burden to the common property which leaves its use intact cannot, therefore, in any just sense, be said to be a taking of the property within the rule for which the petitioners contend.

[3] A second reason urged for denying the power of condemnation is that there is no statutory authority for it. But we think there is. The section of the laws above cited provides:

"The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use, including the right to enlarge existing structures employed for the public purposes mentioned. \* \* \* Such property or rights shall be acquired in the manner provided by law

for the taking of private property for public use by private corporations."

Concerning the applicability of the statute counsel say:

"This portion of the Water Code gives the right to enlarge only, and the court, I do not believe, is justified in reading something else into the statute. The rule of strict construction applies when dealing with a statute covering eminent domain proceedings, and I do not believe I need to state authorities to sustain me in this contention. This being true, that said statute should be strictly construed, the only proceeding the Little-Wetsel Company could maintain, if any at all, would be a proceeding in eminent domain for enlarging the ditch, and that is all the court could legally grant to the Little-Wetsel Company under any view of the case. To go further and entertain a proceeding to condemn the rights in a ditch already constructed and devoted to a public use for a like public use is clearly error."

But we think it clear that this is to place an unwarranted construction on the statute. The section is a part of the act known as the Water Code, one of the main objects of which was to provide means by which water could be impounded and carried to arid lands for irrigating purposes. To hold, therefore, that the statute is a grant of the right to enlarge existing structures constructed for such purposes, but is not a grant of the right to use them when so enlarged, would, in our opinion, be a perversion of the statute. Plainly, if the right is not expressly granted it is granted by necessary implication.

[4] Again it is said that no order of condemnation could be entered without a showing that no feasible route exists for the construction of an independent ditch for carrying the water to the respondents' land, and that the evidence is to the contrary. The showing was that the water could be conveyed by the construction of a new ditch across the petitioners' land, but that no other feasible route existed therefor. The objection is therefore met by the statute. Section 6364 of the Code (Rem.) provides:

"No tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch."

While the petitioners contend to the contrary, the evidence as we view it shows that it is both feasible and practical to unite and convey the waters as the statute contemplates. The contrary view is based on the opinion of certain of the witnesses, to the effect that the excess volume of water, because of the somewhat extreme fall of the ditch,

will cause the ditch to wash at one place and fill at another, and thus eventually destroy it for use. But, aside from the fact that there were opinions, seemingly of equal weight, to the contrary, it is in evidence without contradiction that the remedy for the condition assumed, should it occur, presented no engineering difficulty, but that it could in fact be remedied by the insertion of very simple contrivances. It being feasible and practical to convey the additional water through the ditch, the respondent has, under the statute, no choice of means for conveying the additional water; it must convey it through the existing ditch if it is permitted to convey it at all.

[5] It is further contended that the order of necessity entered is erroneous because broader than the complaint upon which it is founded; the more precise contention being that the complaint asks a condemnation only of that part of the ditch extending through the petitioners' lands, whereas the order covers the entire ditch. But the objection is not fatal. Aside from the fact that we think the complaint sufficient in the respect mentioned, when the question was suggested in the court below, that court held the complaint sufficient, and the cause was tried on that theory; the evidence going to show a necessity for condemning the petitioners' interests in the entire ditch. The defect, if defect there is, is capable of being cured by amendment. In such a case we are required by statute (Rem. Code, § 1752) to "consider all amendments which could have been made as made," and must consider the complaint as broad as the evidence, even though we should find it otherwise.

[6] The final objection on this branch of the case is that the statute, permitting the enlargement of existing structures constructed for unpounding and conveying water for irrigating purposes (Laws of 1917, c. 117, § 4), is void, when applied to the particular instance, because it violates the obligation of a contract. It appears that when the petitioners and Hess appropriated waters for irrigating their lands, they entered into a written contract, by which they defined their respective rights in the water appropriated and their respective interests in the ditch by which the appropriated waters were to be conveyed to their lands, and it is argued that this contract is violated by the statute because it permits the acquisition by one of the parties to the contract of greater rights in the ditch than the contract confers upon him. But we cannot conclude that this is the meaning of the constitutional inhibition invoked. Rights in property are not exempt from the statutes of eminent domain merely because they are acquired by contract, nor is common property exempt merely because the owners entered into a contract defining their interests in the

property when it was acquired. Private property of one person is allowed to be taken by another for use in irrigation, either because the taking is for a public use, as declared by the statute cited, or because it is a right granted by the Constitution of the state. *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 893. In either event it is a right paramount and superior to any right acquired by private contract, and a taking thereunder by one of the parties to the contract cannot be said to be a violation of the provision of the Constitution referred to, unless it might be so said in an instance where the contract expressly provides against the acquisition by the one party of rights not inuring to the benefit of the other party. But this question it is not necessary to decide, as it is not here presented.

[7] The second of the principal propositions urged requires no extended discussion. To our minds, the evidence amply shows that the respondent has not, apart from the supply it here seeks to make available, sufficient water to irrigate the lands it now has under cultivation, and shows further that by means of this supply it cannot only make good this deficiency, but can by means thereof bring under cultivation other of its arable lands which must otherwise remain arid and unproductive. There is thus a necessity for the taking of the property sought to be taken within the meaning of that term as used in the statute, and the trial court did not err in so holding.

The order is affirmed.

HOLCOMB, C. J., and MOUNT, TOLMAN, and BRIDGES, JJ., concur.

(111 Wash. 672)

**SCHWARZMILLER v. SCHWARZMILLER.**  
(No. 15697.)

(Supreme Court of Washington. July 22, 1920.)

1. Judgment  $\S$  570(12)—Cause of action not lost by failure to serve summons within 90 days.

Failure to serve summons within 90 days of filing of complaint, as required by Rem. Code 1915,  $\S$  220, does not deprive a plaintiff of his cause of action.

2. Pleading  $\S$  249(4)—Complaint for separate maintenance may be amended to state cause of action for divorce.

In wife's action for separate maintenance, where husband had not been served, as required by Rem. Code 1915,  $\S$  220, and had not appeared in the case, the court was within its powers and discretion in permitting amendment

to complaint, so as to state a cause of action for divorce, and in suggesting the form therefor, and a judgment rendered on constructive service on the amended complaint was valid.

3. Divorce  $\S$  79—Published summons, stating object of action as one for divorce, held sufficient.

Published summons, stating action to be one for divorce, held to sufficiently state the object of the action, under Rem. Code 1915,  $\S$  228, subd. 4.

**Department 1.**

Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by E. R. A. Schwarzmiller against Ellen A. Schwarzmiller. Judgment of dismissal, and plaintiff appeals. Affirmed.

Coleman & Fogarty and Q. A. Kaune, all of Everett, for appellant.

E. C. Dailey and A. E. Dailey, both of Everett, for respondent.

MITCHELL, J. On May 1, 1918, E. R. A. Schwarzmiller commenced this action in the superior court of Snohomish county, against his wife, Ellen A. Schwarzmiller, for a decree of nullity of their marriage solemnized on January 8, 1917. He has appealed from a judgment denying any relief and dismissing the action.

Respondent and one Thomas D. Murphy intermarried in the year 1890. He was living at the date of the commencement of the present suit. It is the claim of respondent that she was divorced from her former husband by a decree of the superior court of King county, Wash., filed therein on March 17, 1905. On the contrary, appellant contends the divorce proceedings in that case were fatally defective and that the decree is void. The record in that case shows substantially the following facts and proceedings:

On September 20, 1903, Murphy and his wife came to Seattle to live. On June 7, 1904, she filed in the superior court of King county a summons and complaint against her husband, for separate maintenance. No service of any kind was had or attempted to be had on the defendant therein prior to December 5, 1904, at which time the court made and signed a written order reciting that it was made upon her application to amend her complaint and the prayer thereof in certain formal particulars that were enumerated, so as to make it a complaint for a divorce, and further reciting that she had now resided in King county continuously for more than a year, and that the complaint stated facts sufficient to support an application for a divorce upon two grounds: First, cruel treatment; second, neglect to make suitable provisions for the family, etc. The order further provided that the complaint be deemed filed as of the 3d day of December, 1904, that

the complaint be amended as indicated, that the order be made a part of the complaint, and that a copy of the complaint as amended be served upon the defendant therein. The order was duly filed on December 5, 1904, in and became a part of the record in that case. On December 17, 1904, the sheriff made a return of "not found" on a 20-day summons in the case. Promptly there was made and filed a due and proper affidavit, followed by publication of summons, of which publication proof by affidavit was filed on February 20, 1905. On February 20, 1905, default was entered against the defendant, and on March 4, 1905, the court upon the trial of the divorce case made its findings, conclusions, and decree in favor of the plaintiff therein, which were filed with and entered by the clerk on March 17, 1905.

[1] In the present case it is the contention of appellant that the complaint for separate maintenance filed in the case of Murphy v. Murphy could not thereafter be converted or amended into a complaint for divorce, or at all. That it had lost its efficacy for any purpose since there had been no personal service or the commencement of service by publication therein within 90 days from the date of filing the complaint and in the absence of any appearance on the part of the defendant therein. Section 220, Rem. Code, provides that civil actions in the superior court shall be commenced by the service of a summons, or by filing a complaint with the clerk of the court:

"Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint."

It appears, therefore, that prior to December 5, 1904, Mrs. Murphy had not commenced any action against her then husband, having only filed a summons and complaint on June 7, 1904. But even after the expiration of 90 days she had not lost all her rights, for, as was said in *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049:

"But a party does not for these reasons lose his cause of action or his right to serve a complaint and summons at a subsequent time."

[2] After the expiration of the 90 days, and after she had been living in the state more than a year, she applied to the court

on December 5, 1904, for leave to amend her complaint concerning the length of her residence in this state, and to change its prayer to one for divorce. Those were the only respects in which the original complaint was lacking to allow proof of cause for a divorce, which she then claimed she was entitled to. At the time of asking leave to amend the defendant therein had no control whatever over the matter. He had neither been served with process nor had he appeared in the case. The matter was entirely under the control of the plaintiff therein, and the court in whose clerk's office the summons and complaint were on file. Unquestionably, under those circumstances, the court was within its powers and discretion to permit the amendment and suggest the form therefor as provided in the order. The making and filing of the order constituted the amendment to the complaint, which was adjudged and to be considered as filed on December 8, 1904. That was shown by the very terms of the order, which were accepted and adopted by the plaintiff as an amendment to the complaint. It was after the complaint was thus amended and considered as refiled by the order of the court that service was had on the defendant therein by the publication of a 60-day summons, commenced on the 20th day of December, 1904. The summons, as the affidavit of publication discloses, stated that the action was one for divorce. So far as the rights of the defendant therein were concerned, as well as the jurisdiction of the court over the marriage relation of the parties, the action was upon the complaint as amended, of which the record gave ample and complete information; and the failure to commence the action as intended at the time of filing the original complaint should cause no confusion, nor does it weaken the efficacy of the subsequent proceedings, including the amendment to the complaint, the service by publication of summons, order of default, trial, findings and conclusions, and decree of divorce.

[3] It is further contended that the summons published in the divorce case inadequately stated the object of the action. We are satisfied, however, that it sufficiently answers the requirements of the statute. Subdivision 4, § 228, Rem. Code.

Judgment affirmed.

HOLCOMB, C. J., and PARKER, BRIDGES, and MAIN, JJ., concur.

(111 Wash. 691)

**OLSON et ux. v. CLARK et ux.** (No. 15843.)

(Supreme Court of Washington. July 26, 1920.)

1. Master and servant §301(1)—Automobile owner prima facie responsible for driver's negligence.

Generally automobile owner is prima facie responsible for the negligence of driver, but such rule is not inexorable.

2. Master and servant §301(4)—Hirer having control of vehicle and driver liable for driver's negligence.

One who hires and obtains control of vehicle and driver under agreement to pay specified amount per day therefor is responsible for any injuries caused by vehicle and driver, if due to driver's negligence, even though driver is paid by owner.

3. Master and servant §332(1)—Hiring giving control of automobile and driver held question for jury.

In an action against a hirer of an automobile for the negligence of the driver employed by the owner, whether defendant hired the automobile under contract giving him control of the method of the performance of the work held a question for the jury.

4. Appeal and error §1002—Verdict on conflicting evidence not disturbed.

Verdict on conflicting evidence, where there is any competent testimony to sustain it, will not be disturbed.

Department 2.

Appeal from Superior Court, Lewis County; E. M. Card, Judge.

Action by Swen Olson and wife against W. H. S. Clark and others. Judgment for plaintiffs, and defendants W. H. S. Clark and wife appeal. Affirmed.

Hayden, Langhorne & Metzger, of Tacoma, for appellants.

C. A. Studebaker and H. E. Donohoe, both of Chehalis, for respondents.

**HOLCOMB, C. J.** On June 28, 1918, plaintiff Olson and wife, while driving a horse and buggy along the county road near Winlock, were struck by an automobile truck owned by Fred Veness and A. C. Sheves and driven by one Smith. In this collision Mrs. Olson was severely injured, and the vehicle in which she and her husband were riding was damaged. The Olsons brought this action against defendants Clark on the theory that defendants were hirers of the truck, and that Smith, the driver, was their employé or servant. As to defendants Robert Clark and wife, a nonsuit was entered. Defendants W. H. S. Clark [called Henry Clark] and wife also moved for a nonsuit and for a directed verdict, both of which motions were denied. The jury returned a verdict in favor of plain-

tiffs, and from the judgment entered upon that verdict defendants have appealed.

[1] For a further and more particular statement of the facts, reference is made to *Olsen v. Veness*, 105 Wash. 599, 178 Pac. 822; that being an action arising from the same circumstances here involved. Here the controlling question is: Were appellants the hirers of the truck, and, as such, responsible for the negligence of the driver in causing the collision resulting in the injuries of which respondents complain? While generally true, as urged by appellants, that the owner of an automobile is prima facie responsible for the negligence of the driver, that rule is not inexorable, as decided in *Olsen v. Veness*, supra.

[2] Over the objection of appellants, the court gave the jury the following instruction:

"Members of the jury, it is the law that one who hires from another a vehicle and driver, and agrees to pay therefor a given amount per day, is responsible for any accident or injuries caused by such vehicle and driver, if due to the negligence and want of care of the driver, even though such driver might be paid by the owner of such vehicle. In other words, after the owner has turned such rented vehicle and driver over into the control of the person renting or leasing same, then such latter person stands in the same position with third persons as though he were the owner, and is liable to any third persons for all injuries caused by such vehicle or truck, due to the negligence and want of care of the driver of same."

We think this instruction correctly stated the law as laid down in *Olsen v. Veness*, supra. That case came before us on an appeal from the action of the trial court in sustaining a motion of defendants Veness and Sheves for a nonsuit [respondents here being appellants in that case], and we said:

"To our minds, the question of control of operation is the determining factor in this case. The respondents [Veness and Sheves], in the course of business, had transferred the vehicle and driver to the control of the hirer, who alone could say where and in what the work of the truck should thereafter consist; and if this effected a transfer of control it must, ipso facto, have effected a transfer of responsibility. If such be the fact, we feel that respondents' contention, that the hirer stood, in relation to the law of this case, as if he had purchased the truck and hired the driver, must logically follow."

[3] Part of another instruction which the court gave the jury reads as follows:

"It is for you to decide whether or not the defendant W. H. S. Clark hired the truck which caused the accident, if you find that the accident was caused by a truck, and whether he hired it for himself, or for use in his business, or for some one else, and further

whether or not by such contract of hiring he assumed control of the method of the performance of the work to be done by the truck. \* \* \*

This instruction clearly and correctly submitted to the jury the issue determinable by them. It was a pure question of fact, upon which there was sharp conflict in the testimony. The chief testimony on the proposition of who was the hirer and in control of the truck at the time of the injury was by the parties themselves. Some of it was testimony as to admissions and declarations on the part of Henry Clark at the trial of the former case and elsewhere.

Upon a motion for a directed verdict in behalf of appellants the trial court, in disposing of the same, stated:

"There is a conflict on the facts; Mr. Olson's testimony against Mr. Clark's. Of course, that question can go to the jury. The only question is this presumption as to responsibility; liability for operating the truck on the part of the owner. I consider that settled by this decision I have taken notice of. The decision holds that the owner of this particular truck is not liable, and that the operator or hirer as it were [is], so that the case is sufficient to go to the jury. \* \* \*

The testimony shows that the son made no arrangements at all concerning the hiring, and had not seen his father for a week before the accident. It was the father, Henry Clark, who on the evening before the accident gave the driver, Smith, directions when and where to go and what road to take, and it was while the driver was following such directions that the accident occurred. The contract in writing, which was lost, if signed at all by either Clark, was signed by Henry Clark, ostensibly as principal, and he kept it himself until it was lost. While the son, Robert Clark, did testify that it was his work that the truck was hired for, that he instructed his father to rent the truck for him, and that his father had no interest whatsoever in his [Robert Clark's] contract, or the business being conducted by him, the jury was not bound to believe his evidence. Under this state of the facts the trial court properly submitted the case to the jury, and in doing so properly gave the instructions heretofore quoted, and there was no error in refusing to give the instructions requested by appellants.

[4] We are not inclined to depart from the rule we have so often announced and uniformly followed, which is that a verdict upon conflicting evidence, where there is any competent testimony to sustain the verdict, will not be disturbed upon appeal.

There are other assignments of error, including alleged misconduct of counsel for respondents in argument to the jury. They have all been carefully examined, and are

found to be without sufficient merit to warrant discussion.

The judgment is affirmed.

BRIDGES, FULLERTON, MOUNT, and  
TOLMAN, JJ., concur.

(111 Wash. 656)

# BURNHAM v. ROWLEY. (No. 15899.)

(Supreme Court of Washington. July 22,  
1920.)

1. Witnesses  $\S$ 165—Book account admissible, where decedent admitted its correctness.

Where plaintiff executor testified that the debtor admitted the correctness of his testator's books showing the indebtedness, the account book in the testator's own hand was admissible in evidence, notwithstanding the death of the debtor pending the action, although, of course, the evidence must be weighed in consideration of the fact that it was a conversation with a deceased person.

2. Bills and notes  $\S$ 527(1) — In action on note, evidence held to show sum was still due thereon.

In an action on a note, evidence, considered as a whole, held to show that the sum of \$1,000 was still due thereon, and to rebut a receipt for \$3,000 given by the holder; it appearing that the amount was a mistake.

3. Appeal and error  $\S$ 1008(1) — Appellate court will not defer to findings on undisputed evidence.

The appellate court is not bound to defer to the findings of the trial court on undisputed evidence.

## Department 1.

Appeal from Superior Court, Clarke County; W. A. Reynolds, Judge.

Action by Allison Burnham, as executor of the last will and testament of William C. Hazard, deceased, against Edson M. Rowley and wife, Mabel A. Rowley. The first-named defendant having died pending trial, Mabel A. Rowley, as executrix of the last will and testament, was substituted as defendant. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions.

McMaster, Hall & Drowley, of Vancouver, for appellant.

Crass & Harden, of Vancouver, for respondent.

MAIN, J. The purpose of this action was to recover the balance claimed to be due upon a promissory note. The plaintiff is the executor of the last will and testament of William C. Hazard, deceased. The original defendants were Edson M. Rowley and wife. Subsequent to the time the action was in-

stituted, and prior to the time it came on for trial, Mr. Rowley died, and Mrs. Rowley, as executrix of his last will and testament, was substituted as a party defendant. The cause was tried to the court without a jury, and resulted in a judgment dismissing the action. From this judgment the plaintiff appeals.

The facts are not in substantial dispute. On April 8, 1911, at Vancouver, Wash., Mr. Hazard loaned to Mr. Rowley the sum of \$7,500 and took a note, signed by Mr. and Mrs. Rowley. The note provides for interest at 8 per cent. per annum, payable semiannually. On October 8, 1911, the first installment of interest became due and was paid; the sum being \$300. A like payment was made on April 8, 1912. For each of these payments Mr. Hazard wrote and delivered to Mr. Rowley a receipt. The payments are also indorsed on the back of the note. On October 8, 1912, an interest payment of \$300 was made, and, as the appellant contends, \$2,000 on the principal. The respondent admits the interest payment of \$300 on this date, but claims that the payment on the principal was \$3,000, instead of \$2,000. Subsequently, and on March 24, 1914, a payment of \$4,500 was made on the principal. If the appellant's contention as to the prior payment is correct, there was still a balance due of \$1,000, aside from interest. If the respondent's contention be correct, this last payment liquidated the principal of the note.

[1, 2] Upon the trial the appellant offered in evidence the ledger account kept by Mr. Hazard covering this transaction, after proving the entries therein to be original. This item of evidence was excluded. Whether the ledger account was admissible under what is known as the "shop book rule" need not here be determined. The appellant testified that just prior to the time he filed his inventory this account was shown to Mr. Rowley, and he then admitted that it was correct. Under this testimony we think the account should have been admitted in evidence. The testimony of the appellant which made it admissible being a conversation with a now deceased person, the evidence must be weighed in accordance with the rule in such cases. As shown by the account, the payment on the principal on October 8, 1912, was \$2,000. At the time the payment was made, Mr. Hazard wrote and signed a receipt, in which it is recited that \$3,000 was on this day received as part payment on the principal of the note. At the same time he wrote the receipt for \$300 for the interest payment. The principal question in the case is whether this receipt has been overcome by the other evidence in the case, which is substantially as follows: The receipt stub shows a payment of \$2,000. The indorsement on the back of the note is \$2,000, and, as already indicated, the ledger record made by Mr. Hazard

was \$2,000. On April 8, 1913, an interest payment of \$220 was made, for which a receipt was given by Mr. Hazard. This was 8 per cent. on \$5,500 for six months. If a \$3,000 payment had been made, as claimed by the respondents, Mr. Rowley was voluntarily paying more interest than was due upon the note at the time. Subsequent to this time, and prior to October 8, 1913, when the next interest payment became due, Mr. Hazard died. On the latter date an interest payment of \$220 was made to his executor. When the payment in controversy was made, Mr. Rowley gave a check to Mr. Hazard for \$2,300, \$300 of which was for interest.

It is suggested that the other \$1,000 claimed to have been paid was in cash. There is some evidence that it was Mr. Rowley's custom to pay all larger sums by check. There is also some evidence that he sometimes paid cash. There is one other item of evidence which seems quite persuasive, and that is the ledger account of Mr. Rowley. Under date of October 8, 1912, it recites a payment of \$300 interest and \$2,000 on the principal of the note. Under the evidence thus detailed the conclusion seems irresistible that the payment in controversy was \$2,000, and not \$3,000. Mr. Hazard, at the time having just written the receipt for \$300 interest, probably continued to use the "three" in front of the "thousand," when receipting for the principal, instead of "two."

Some mention is made of the fact that the action was not instituted for approximately five years after the last payment was made. The fact that the executor may have delayed this period of time should not militate against his right to recover any sum that may be justly due the estate which he represents. In addition to this, if the principal of the note had been fully liquidated when the \$4,500 payment was made, Mr. Rowley would have had a right to an action for the recovery of the note. There was equally as much delay upon his part as upon the part of the appellant in instituting the action.

[3] This as not a case where the oral testimony was in conflict upon any material matter, and the trial court, after hearing the testimony, had made a finding thereon. It is a question of the proper inference to be drawn from the undisputed evidence. In our opinion the evidence establishes the fact that the payment in controversy was \$2,000, and not \$3,000.

The judgment will be reversed, and the cause remanded, with directions to the superior court to enter a judgment for the balance due upon the principal of the note, together with interest.

HOLCOMB, C. J., and PARKER, BRIDGES, and MITCHELL, JJ., concur.



(112 Wash. 164)

**BEEMAN v. TACOMA RY. & POWER CO.**  
(No. 15852.)

(Supreme Court of Washington. Aug. 10, 1920.)

**1. Street railroads**  $\Leftrightarrow$  117(28)—Contributory negligence of automobile driver crossing track held for jury.

An automobile driver, who started to cross street car track when car was 100 feet distant, and who would have had ample time to cross track if his automobile had not unexpectedly skidded, causing him to kill the engine while the machine was on the track, *held* not negligent as matter of law.

**2. Street railroads**  $\Leftrightarrow$  99(9)—Automobile driver may assume motorman will keep street car under control.

Automobile driver, in approaching street car track, has right to assume that motorman will keep his car under such reasonable control as is commensurate with the situation.

**3. Damages**  $\Leftrightarrow$  132(1)—\$2,000 verdict for cuts on head held not excessive.

\$2,000 verdict for three cuts in head, one of which was a deep cut in the temple region, which opened up some of the deeper vessels, and which tore away part of the temple muscle to such an extent that plaintiff had not regained the use of such muscle, and suffered pain and headaches at the time of the trial, seven months after the accident, *held* not excessive.

Department 2.

Appeal from Superior Court, Pierce County; John D. Fletcher, Judge.

Action by Frank W. Beeman against the Tacoma Railway & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. D. Oakley, of Tacoma, for appellant.

Harry H. Johnston, of Tacoma, for respondent.

**BRIDGES, J.** This is a personal injury suit. There was a verdict of the jury in the sum of \$2,000. At the conclusion of the plaintiff's case the defendant moved for a nonsuit, which was denied by the court. At the close of the taking of all the testimony there was a motion for an instructed verdict for the defendant, which motion was denied. Defendant's motion for a new trial was also refused. Thereafter judgment was entered on the verdict in favor of the plaintiff and against the defendant in the sum of \$2,000. From this judgment the defendant has appealed to this court.

The testimony tended to show the following facts: The respondent was an experienced Ford truck driver, and was in the employ of the Olympic Ice Cream Company, of Tacoma, Wash. On February 26, 1919, he was driving his truck south on Pacific avenue, in Tacoma, and intended to turn to the left and cross

that avenue at Twenty-Second street and continue easterly on that street, for the purpose of going to the factory where he was employed. For three or four blocks on Pacific avenue north of Twenty-Second street he had been driving at the rate of about 10 miles per hour, and for that distance, or most of it, one of appellant's street cars was following him, going at about the same rate of speed. Pacific avenue has two street car tracks upon it, located near the center of the street; the westerly track being for south-bound cars, and the easterly track for the north-bound cars. The corner of Pacific avenue and Twenty-Second street is a busy and important intersection of streets in the city of Tacoma. As he approached the intersection of Pacific avenue with Twenty-Second street, the south-bound car, which had been following him, was about 100 feet back of him. He gave a signal by throwing out his left arm, showing that he intended to cross Pacific avenue at Twenty-Second street. At about the time of turning into that street, or a little before that time, he saw coming toward him a street car on the easterly track and going northerly along Pacific avenue. At that time the north-bound car, according to plaintiff's testimony, was about 100 to 125 feet south of the center of the intersection of the two streets. It was raining, and the street was wet and slippery. When the rear wheels of his truck struck the west rail of the street car track, they skidded, so as to practically stop the forward motion of the truck, and in order to stop the skidding he threw the clutch into neutral, thus stopping the forward motion of the car. As soon as the car ceased to skid, he immediately engaged the clutch, but only succeeded in moving the truck 3 or 4 feet, when the engine stopped running, thus leaving him stalled on the easterly street car track. At this time the north-bound car was some 30 or 40 feet from him. The street car did not appear to decrease its speed as it approached respondent, but hit his truck with great force, derailing the street car, and carrying the truck over the street to the curb, a distance of more than 100 feet. He further testified that, when he started to cross Pacific avenue, he thought he had, and as a matter of fact did have, ample time to get across ahead of the street cars, and that he would easily have made the crossing, had not his car started to skid, and had he not "killed" his engine.

There was also testimony to the effect that a block or two south of Twenty-Second street three passengers had come aboard the north-bound car, and, among the others, a Japanese, who gave to the conductor, who was also the motorman, a \$2 bill, and he was given small change therefor; that as the car approached Twenty-Second street the motorman was counting out the change and handing it to

the passenger, and was looking in the direction of the passenger, and that the collision with the truck occurred at once after the change was handed to the passenger; and that the collision caused the passenger to drop the change on the floor of the car. The car in question was what is known as a "one-man" car; the motorman acting also as conductor.

It is vigorously argued by the appellant that under the decisions of this court the respondent was, as a matter of law, guilty of contributory negligence, and that appellant's motion for nonsuit and for a directed verdict should have been granted. Appellant cites many cases from this and other courts, but the facts in this case are so at variance with the facts in all of the cases cited that we find them all inapplicable, and that they give us very little assistance. Appellant particularly seems to rely on *Helliesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458, *Fluhart v. Seattle Electric Co.*, 65 Wash. 291, 118 Pac. 51, and *Beeman v. P. S. T. L.*, etc., Co., 79 Wash. 137, 139 Pac. 1087.

In the *Beeman* Case the plaintiff, who was a pedestrian, was crossing one of the streets in the city of Seattle. As he stepped on the sidewalk he looked up the street, and saw a street car coming toward him, which was, he thought, about 450 feet away. It was dark, and the street car was carrying a headlight. The plaintiff was picking his way across the muddy street, when he was struck by the car and injured. Under the facts of that case the court held that the plaintiff was guilty of contributory negligence and could not recover. In the *Helliesen* Case, *supra*, the facts were that the plaintiff was intending to cross Bellevue avenue, and as she came to that street she saw two cars, one headed east and the other west. Thinking she had time to cross the street before the cars should reach the intersection, she started across, and was struck by one of the cars. The court held that under the physical facts shown to exist it was plain that plaintiff did not look for the approach of cars before she attempted to cross; that, had she looked, she must have seen the car near her, and that it was dangerous for her to attempt to cross. In the *Fluhart* Case the facts were that a pedestrian was held to be guilty of contributory negligence, where he stepped in front of a well-lighted approaching car, and which he could have seen a block away.

[1] We cannot here review all the cases cited by appellant. Suffice it to say that each case rested upon facts very different from those shown by the plaintiff to exist here. The law of each personal injury case must to a very large extent depend upon the facts of that case. In this case, if the plaintiff's testimony is to be believed, he had ample time to make the crossing in front of the street car which hit him, and the reason he

did not succeed was that his truck unexpectedly skidded, and that as the indirect result thereof he "killed" his engine, and his truck was left helpless on the street car track. He testified that, when he started to make the crossing, the car which hit him was from 100 to 125 feet from the place where he would cross, and that after he had been delayed by the skidding of his car, the consequent necessity to check its forward movement to stop the skidding, the shifting of gears, and the final "killing" of his engine, the street car was still some 30 or 40 feet from him. Under facts such as these we cannot say as a matter of law that he was guilty of negligence. The question of his negligence was for the jury. It is true appellant produced much testimony tending to show that respondent was reckless in attempting to cross; that the car following him was at all times immediately at his heels, and the car which struck him was so close to him when he turned for the crossing that an accident was almost inevitable. But the jury had a right to believe that the facts existed as shown by respondent. The testimony was contradictory, and the jury had a right to pass on it.

Appellant takes exception to the following instructions given by the court to the jury:

"The driver of a vehicle approaching a street car crossing is entitled to presume that an approaching street car will be moved at that point under control of the motorman, who is keeping a reasonable lookout ahead, and is keeping his car under such reasonable control as is commensurate with the situation at such point, having due regard to the general traffic and the probable danger of collision, and the conduct of the driver of a vehicle in attempting to cross in face of an approaching street car is to be measured with regard to his right to rely on the street car being under such control, and the opportunity of the motorman to observe in making such crossing.

"It is not necessarily negligence for a driver of an automobile truck to attempt to cross over a street car track at a crossing in face of an approaching car, if under all the circumstances a reasonably careful driver would be justified in believing that he could pass over in safety, relying on the duty that both he and those in charge of the street car must act with reasonable regard to the rights of others."

[2] It is contended that these instructions are wrong because "they informed the jury that the respondent had a right to presume that the motorman was keeping his car under such reasonable control as was commensurate with the situation at this point"; whereas, the respondent, having seen the car approaching, could not rely on any such presumptions. But we think the instructions, while general in their nature, not only state the law as it should be, but as it has often been announced by this court. In the case of *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351, this court said:

"A pedestrian is justified in ordering his movements upon the assumption that street cars will be operated, not only in conformity with local laws, but with a high degree of care, and with due regard for public travel on the street." *Chisholm v. Seattle Electric Co.*, 27 Wash. 237, 87 Pac. 601; *Mallett v. Seattle, Renton & S. Ry. Co.*, 66 Wash. 251, 119 Pac. 743.

Appellant cites *Beeman v. Puget Sound, etc., Co.*, supra, in support of its argument against these instructions. But that case goes no farther, on this point, than to hold that one traveling a street may not implicitly and blindly rely upon the presumption that the street car will be operated with due care; that he cannot rely upon such presumption to the point that he need not exercise care for himself; that one may not see a car coming toward him at an excessive rate of speed, and still rely on the presumption that it will not violate the speed ordinances. In short, that case in substance holds that that one may not rely on presumptions which he knows are being violated. We cannot find any substantial error in the instructions complained of.

Complaint is also made that the court did not give certain requested instructions. We think the instructions given by this court amply covered those requested. In fact, the instructions are very full, and they fairly presented to the jury all the issues involved.

[3] Appellant further contends that the verdict, which was for \$2,000, was excessive, and that it should have been given a new trial on that account. The testimony shows that respondent's injuries consisted of a slight cut over the right ear, and another cut about an inch long over the center of the right eye, and a large semicircular cut in the right temple region. His physician testified that the first two mentioned cuts were of a comparatively unimportant nature, but that the other was a rather deep cut. It opened up some of the deeper vessels, and tore away part of the temple muscle. This torn muscle was sewed up, and several stitches taken in the various cuts. At the time of the trial, which was some seven months after the injury, that portion where the temple muscle was cut was numb, and respondent had not regained the use of those muscles, and thus his face was greatly affected. He still suffered some pain and headaches. The jury and the trial court actually saw the condition of respondent's face, and were much more capable of measuring the extent of the injury than we. The trial court must have been satisfied that the verdict was not excessive. While we feel that it was liberal, we cannot say that it was excessive.

The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and TOLMAN, JJ., concur.

(112 Wash. 186)

## LINCOLN COUNTY STATE BANK v. MARTIN et al. (No. 15866.)

(Supreme Court of Washington. Aug. 11, 1920.)

1. Pledges  $\Leftarrow$  58(1)—Pledgee held entitled to foreclose mortgage deposited as security.

Where mortgagee deposited mortgage and mortgage notes with bank to secure payment of his note payable to bank, and thereafter assigned mortgage to third person, who assumed payment of a portion of mortgagee's indebtedness to bank, and executed note to bank for such amount under agreement whereby bank held mortgage as security for payment thereof and whereby third person assumed payment of mortgage notes to the extent of the amount of his note to bank, the bank, on third person's failure to pay his note, could foreclose mortgage; such mortgage not having been paid.

2. Mortgages  $\Leftarrow$  171(1)—Purchaser takes property subject to mortgage of record at time of conveyance.

Purchaser took property subject to mortgage of record at time of conveyance, being chargeable with notice thereof.

3. Mortgages  $\Leftarrow$  305—Renewal of note not satisfaction of mortgage.

Execution of renewal note did not constitute payment so as to satisfy mortgage, since a change in the form of a debt does not affect the security.

Department 2.

Appeal from Superior Court, Lincoln County; John Truax, Judge.

Action by the Lincoln County State Bank against Floyd G. Culver and others. Judgment for plaintiff, and defendants H. N. Martin and wife appeal. Affirmed.

Mulligan & Bardsley, of Spokane, for appellants.

Freece & Pettijohn, of Davenport, for respondent.

MOUNT, J. This action was brought to foreclose a real estate mortgage held by the plaintiff as collateral security upon a note executed by the defendant H. N. Martin. All the defendants except Martin and wife defaulted. These two defendants, after a general demurrer to the complaint was denied, answered separately. They denied generally all the allegations of the complaint, and set up affirmative defenses to the effect that the mortgage debt had been paid and the mortgage was therefore of no force. On these issues the case was tried to the court without a jury, and resulted in a judgment and decree as prayed for in the complaint. The defendants Martin and wife have appealed.

Eighteen assignments of error are made. Most of these assignments are based upon preliminary matters and the introduction of evidence, which are not necessary to be not

ticed. The principal question and the one upon which the appellants apparently rely is that the mortgage sought to be foreclosed had been paid, and was not effective as against these appellants.

The facts, as they appear from the evidence, are as follows: On September 13, 1908, the defendants Floyd G. Culver and wife purchased from the defendant C. H. Katsel a tract of land in Lincoln county. At the time of this purchase Culver and wife executed two notes amounting to \$3,460. One of these notes was for \$2,000 and the other for \$1,460. In order to secure the payment of these notes they executed and delivered to Mr. Katsel a mortgage upon the real estate purchased. At that time Mr. Katsel was indebted to the Lincoln County State Bank upon a note for some \$4,600. After Mr. and Mrs. Culver had executed the notes and mortgage for \$3,460 and delivered the same to Mr. Katsel, Mr. Katsel assigned the notes and mortgage to the bank as security for the payment of his note for \$4,600. In the spring of 1909 Mr. Culver informed Mr. Katsel that he was unable to make the payments, and requested Mr. Katsel to take back the property and release Mr. Culver from the notes and mortgage. Mr. Katsel was unwilling to do this, but told Mr. Culver that he would endeavor to find a purchaser for the land, so that both might be satisfied. Thereupon Mr. Katsel, on April 9, 1909, entered into a contract with Mr. Martin, by the terms of which Mr. Katsel agreed to assign to Martin the Culver mortgage, and to cause to be conveyed to Mr. Martin, or whomsoever he should designate, the real estate covered by the mortgage. Mr. Martin agreed to pay the bank for application on the Katsel debt the sum of \$3,000, and also agreed to deed to Mr. Katsel certain residence property in Davenport for the land which then stood in the name of Mr. Culver and wife. On the 13th of April Mr. Katsel and Mr. Martin went to the respondent bank, where they explained to the cashier the agreement which they had made, and desired to know of the bank if it would take Mr. Martin for the \$3,000 instead of Mr. Culver. The bank agreed to do this, and on the next day Culver and wife deeded the lands in question to A. V. Martin, the wife of H. N. Martin, the consideration named in the deed being \$10,500. This deed was not filed for record until April 15, 1909. On April 13 Mr. Martin and Mr. Katsel went to the bank, and Mr. Martin executed his note for \$3,000 with the understanding that the mortgage and notes executed by Mr. Culver should stand as collateral security for the payment of his \$3,000 note. Thereafter from time to time Mr. Martin made payments on the \$3,000 note, and on May 16, 1916, executed a new note for \$1,900, the balance due at that time. He

made no further payments after that date, and this action was brought by the bank for the balance due upon this \$1,900 note and to foreclose the Culver mortgage held by the bank as collateral security.

[1] As we have said above, the main contention of the appellants is that the Culver notes and mortgage, given to Mr. Katsel and by Mr. Katsel deposited in the bank, had been paid, and therefore the mortgage was of no effect at the time this action was brought. We fail to see any sound theory upon which it can be held that the Culver notes and mortgage have been paid. It is true that Mr. Katsel, the original payee of the notes, has been satisfied, and it is also true that Mr. Culver, the original maker of the notes and mortgage, has also been satisfied. But these satisfactions occur in this way: The bank became the owner and holder of the Culver notes and mortgage by assignment from Mr. Katsel, the payee. Mr. Martin, by agreement between the bank, Mr. Culver and Mr. Katsel, has assumed these notes to the extent of \$3,000. The result is that Mr. Martin has become the payor of the notes and the bank the payee. But the notes have not been paid, except to the extent that Mr. Martin has made payments on his \$3,000 note and the notes and mortgage are held by the bank as security for the balance due upon that note. So it is apparent that the notes secured by the mortgage have not been paid, and the mortgage has not been satisfied, and will not be satisfied until the Martin note, originally for \$3,000, now for \$1,900, has been paid. That the bank is authorized under these circumstances to foreclose the mortgage held by it as collateral security for the note of Mr. Martin is without question. *Hillman v. Stanley*, 56 Wash. 320, 105 Pac. 816; *Bank of Montreal v. Howard*, 44 Wash. 10, 86 Pac. 1115. Under the last case the bank clearly had the right to foreclose the mortgage for the amount due upon the note for which the mortgage was collateral security.

[2] It is argued by the appellants that Mrs. Martin took the property as her separate property without notice of the mortgage sought to be foreclosed in this action. The mortgage was of record, and she was bound to take notice of it. She therefore took the property subject to the mortgage, even if it might be held that the property was her separate property.

[3] Counsel for appellant make some contention that the evidence shows that the \$3,000 note of Mr. Martin has been paid. We find no evidence in the record to justify that contention. The evidence of Mr. Martin himself as to the payment of the note is at least unsatisfactory, and, we think, does not amount to a statement that the note had been actually paid. On the other hand, the testimony for the respondent clearly shows that it had not been paid, and at

the time of the last payment Mr. Martin himself had executed the renewal note. The fact that the original \$3,000 note has been renewed does not change the character of the debt. The rule is that a change in the form of a debt does not affect the security. *Straw-Elsworth Mfg. Co. v. Cain*, 20 Wash. 351, 55 Pac. 321.

The demurrer was properly overruled. The facts contained in the statement we have made are substantially the facts alleged in the complaint, and no doubt stated a cause of action. We find no merit in the other assignments of error, and are convinced that the judgment of the lower court is correct, and it is therefore affirmed.

HOLCOMB, C. J., and BRIDGES, TOLMAN, and FULLERTON, JJ., concur.

(112 Wash. 131)

**SORGE v. SORGE. (No. 15857.)**

(Supreme Court of Washington. Aug. 9, 1920.)

1. Divorce  $\Leftrightarrow$  298(1)—In awarding custody, child's welfare foremost consideration.

The court, in awarding custody of minor child in a divorce case, must exercise a judicial discretion; the welfare of the child being the foremost consideration.

2. Divorce  $\Leftrightarrow$  303(1)—Past delinquency of wife no bar to awarding her custody of infant daughter.

Past delinquencies of mother should not bar her from having custody of her infant daughter, on petition for modification of divorce decree, in absence of evidence that she was delinquent at the time of the petition.

3. Divorce  $\Leftrightarrow$  324—Husband not liable for support of child placed in custody of remarried wife.

Where wife was given custody of infant daughter, on modification of divorce decree, after her marriage to man able to provide for maintenance of child, former husband will not be required to pay towards the child's support.

**Department 2.**

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Herman Sorge, Jr., against Ida Sorge. Decree for plaintiff. From a judgment modifying such decree on defendant's petition, plaintiff appeals. Affirmed, as modified.

Albert D. Martin, of Seattle, for appellant. Longfellow & Fitzpatrick, of Seattle, for respondent.

HOLCOMB, C. J. In October, 1918, plaintiff, Herman Sorge, brought an action for divorce from his then wife, defendant, Ida Sorge (now Ida Brand), and asked that he be

awarded the care and custody of their minor child, Pearl May Sorge. Plaintiff in his complaint charged the defendant with cruelty and improper conduct. The answer was a general denial of the allegations of the complaint, and affirmatively charged plaintiff with drunkenness, cruelty, and adultery. Defendant also prayed for the custody of the child. Issues were joined upon the pleadings, after which the parties entered into a stipulation whereby, for a consideration of \$250, defendant released certain property rights and did not appear in person at the trial of the cause. Upon hearing the evidence of plaintiff, the court made findings, and on November 22, 1918, entered a decree in favor of plaintiff, awarding him a divorce, with the custody of the minor child, then a little over 3 years of age. In July, 1919, defendant filed a petition for a modification of the decree which she alleged to have been procured by fraud, stating that she was frightened into not appearing to contest the divorce case; that it was not her intention or desire to waive custody of the minor child; that she was a fit and proper person to have the care and custody of the child, and that plaintiff was not; that the child's environments while in the custody of its father were not conducive to its proper bringing up; and that defendant had since her divorce been happily married to another man, and was in a position to provide a good home for the child. Whereupon plaintiff was cited to appear and show cause why the custody of the child should not be awarded to its mother. Plaintiff denied practically all the allegations of this petition, and upon these issues another trial was had. Upon this hearing the court modified the original decree to the extent of awarding the child to the care of its mother, with the right of plaintiff to visit it at reasonable times. From this modification of the decree, plaintiff has appealed.

The evidence, as presented by the record, is flatly contradictory throughout. Respondent's testimony, which was supported by her witnesses, was to the effect that she was a fit and proper person to have the custody of the child; that her present husband is a man of good reputation, and able and willing to assist her in raising and caring for the child in a suitable manner. Her testimony and that of her witnesses assailed the character of the child's father in serious respects. The evidence adduced by appellant was of like character to that of respondent, to wit, that he was a fit and proper person to have the custody of the child; that he has a good home with his parents, who are willing to assist in the proper care of the child. At the same time the character of respondent was affirmatively attacked, and her unfitness for the custody of the child sought to be shown.

Appellant claims that the trial court erred

in taking the minor child from his custody, and awarding it to respondent and her present husband; and contends that the court, having awarded the child to appellant in the divorce case, must be presumed to have done so upon sufficient evidence, and because the charges made in the complaint were sustained. Appellant also suggests that it is significant of the truth of these charges that respondent married her present husband just as soon as permitted by law after the divorce from appellant. Appellant concedes the desirability of awarding young children to the mother, other considerations being the same, but contends that, when the woman shows no affection for the child when she has it, and neglects it for the society of men other than her husband, then her wishes should give way to the welfare and wishes of the child and its father; and it is contended that respondent should be required to wait at least long enough to prove her second marriage successful before having the decree modified, and that the welfare of the child was not taken into consideration.

[1, 2] Even if there were sufficient evidence to sustain the charges made in the original complaint, which we may assume for the sake of argument, there would still be no reason why changes for the better could not occur in the condition, habits, or character of a parent, who might formerly have been delinquent. Such parent might well, during the course of time, become in every way fit to have the custody of a child. It is unquestionably true that the welfare of the child should be the foremost consideration, and that in making the award of custody the court must exercise a judicial discretion. It can hardly be seriously urged that the trial court departed from these rules of guidance in making its decree. The court no doubt realized that the welfare of the minor daughter and the moral conduct of respondent at the time of the petition for modification of the decree of divorce were determining factors, when he decided that respondent should have the custody of her minor daughter, and that past delinquencies, if any there were, should not bar her from having the child. Even if the conduct of a wife be immoral (but not grossly so)—and certainly that has not been shown to be true of respondent—her guilt may be overlooked, if the child be of tender years, or it may be shown that the guilty party has repented, or that a recurrence of the improper conduct is not likely. Here the trial court found that there was no testimony to show

that respondent was not conducting herself properly at the time of her petition for modification of the divorce decree, and that there were only insinuations to show that she had ever done anything very improper; that she may have been somewhat reckless in her manner, but that no criminal acts were shown. The court also said:

"From what I have said, it is unnecessary for me to say more than I have, except that I do not think he [appellant] is fit to have the care and custody of the child. The question is: Is she [respondent] a fit and proper person to have the care and custody of this child, and has she a proper place to take it. The evidence not only shows by a fair preponderance—not only shows beyond a reasonable doubt, but beyond all doubt, that for several months past she has lived an exemplary life, and the evidence also shows by the same fair preponderance that she has a good place to take it."

As to the charge that respondent showed no affection for the child when she had it, and neglected it for the society of men other than her husband, she denies that, and it is simply another part of the testimony as to which there is conflict. Regarding the suggestion that respondent should be required to wait at least long enough to prove her second marriage successful before the decree is modified, we may say that such a situation at least suggests morality, and does not show unfitness to have the custody of her child. At any rate, the child is still within the jurisdiction of the court for future change of control, if the circumstances surrounding it so require.

[3] Respondent's testimony being to the effect that her present husband is amply able to provide for the maintenance of the child, we can see no reason for requiring appellant, for the present, to pay the sum of \$10 a month toward its support. Respondent asked no such relief in her petition for modification of the decree. To the extent of relieving appellant, for the present, of further payments toward the support of the child, the decree is modified. It should be arranged by the trial court, under its decree, that appellant may visit the child, or take it, or have it taken, to his home, at reasonable times, in order to avoid friction with respondent and her husband.

In all other respects the decree is affirmed. Neither party will recover costs.

BRIDGES, FULLERTON, MOUNT, and TOLMAN, JJ., concur.

(112 Wash. 71)

**COLLINS v. NELSON et ux. (No. 15783.)**

(Supreme Court of Washington. Aug. 4, 1920.)

**1. Municipal corporations  $\S$  706(5) — Evidence held to prove negligent operation of automobile.**

In action for injuries by pedestrian struck by defendant's automobile while crossing street between intersections, evidence held to sustain findings in favor of plaintiff as to defendant's negligence as proximate cause of accident and as to plaintiff's freedom from contributory negligence.

**2. Appeal and error  $\S$  932(1) — \$1,000 for loss of time and suffering not disturbed, though no evidence as to earning capacity.**

In personal injury action to recover for loss of time and for pain and suffering, judgment for \$1,000 will not be set aside, notwithstanding absence of proof as to earning capacity of plaintiff during the time he was kept from his work, but will be sustained upon the ground that it was warranted by evidence of pain and suffering, and that loss of time was not considered in making award.

**3. Damages  $\S$  96—For pain and suffering left to judgment of trier of case.**

Damages for pain and suffering, not being susceptible of being estimated in money by direct proof, must be left to the judgment of the trier of the case.

**Department 1.**

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Charles R. Collins against Oscar W. Nelson and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

Roberts & Skeel and L. B. Schwellenbach, all of Seattle, for appellants.

Kerr & McCord, of Seattle, for respondent.

MITCHELL, J. This case was tried without a jury. The court found:

"That on March 23, 1918, the plaintiff was crossing over said Third avenue on foot from the west side of said street to the east side in a diagonal direction, the view of said street at said place from either direction being unobscured to the driver of defendant's automobile, or any one else. That the driver of the defendant's car failed to keep the proper lookout for the plaintiff, and was driving the said car at an excessive and dangerous rate of speed, and when he observed the plaintiff failed to use reasonable care in stopping said car and avoiding collision with the plaintiff, and that all of the said acts and negligence were the direct and proximate cause of the collision between the defendant's automobile and the plaintiff, and the plaintiff at all times acted in a careful and prudent manner. That at the time when the plaintiff had passed to the east side of the center of said street the driver of defendant's automobile negligently struck the plaintiff, knocked him down. \* \* \*

[1] The findings are sustained by a clear preponderance of the evidence. Respondent, going south on Third avenue in Seattle, stopped and parked his car by the west curb, about 160 feet south of Virginia street and a like distance north of Stewart street. There were a few other cars standing alongside the same curb, north and south of respondent's car. There are two street car tracks upon the avenue—one on each side of and near the center of the street. From the street curb to the nearer rail of the nearer street car track the distance is 17½ feet. Having business across the avenue, the respondent, upon alighting on the sidewalk, passed around in front of his car into open vision upon the avenue, paused, looked south, and observed no traffic, then looked north, and saw appellant's automobile crossing Virginia street, traveling south along the right-hand or westerly side of the avenue. There was no other traffic of any kind at that time on the avenue between the two cross streets mentioned. Upon observing appellant's automobile approaching, respondent threw up his hand as a signal to the driver, and immediately walked at a fairly rapid pace in a straight line diagonally across the avenue toward a point about 60 feet further south. Shortly the automobile ran upon him over on the east side of the avenue, as he reached the west rail of the east street car track, and knocked him down, causing the injuries complained of. In spite of ample opportunity, by keeping on the right-hand side of the street, to have passed safely behind respondent, as testified to by all the witnesses to the accident, other than the driver, it appears that from a point an appreciable distance to the north the driver commenced to veer his car toward the east in the direction respondent was going, or, as a disinterested witness expressed it, "seemed to kind of follow Mr. Collins," and struck him over on the east side of the avenue, not with the left nor front of the automobile, but with the hub of the right front wheel.

We are not impressed with the claim of contributory negligence. A pedestrian is not prohibited by the ordinance of the city from the use of the streets between intersections and crossings. It makes his right to the use of such places inferior to the rights of vehicles, and exacts from him a higher degree of care than at street intersections and crossings, where he has the right of way over vehicles. Admitting the superadded care imposed by the ordinance upon pedestrians between street intersections, we find in the present case no proof of conduct on the part of the respondent to relieve the appellant of its negligence as the proximate cause of the injury.

[2, 3] It is further contended that, because of the absence of proof as to the earning ca-

capacity of respondent during the time he testified to have been kept from his work, the judgment for \$1,000 for loss of time, pain, and suffering is erroneous and must be set aside. The judgment is in general terms and mentions no element of damage upon which it is based. The case is tried de novo by us. There are allegations and proof of pain and suffering entirely sufficient to sustain the amount of the award. While there is an allegation and also proof of loss of time on the part of respondent, without any testimony of the value thereof, we adopt the plan, obviously pursued by the trial court, of not considering the loss of time, as such, in fixing the amount of respondent's recovery, but confine it, so far as the \$1,000 is concerned, to the element of pain and suffering, a damage not susceptible of being estimated in money by direct proof, but which must be left to the judgment of the trier of the case.

Judgment affirmed.

HOLCOMB, C. J., and PARKER, TOLMAN, and MAIN, JJ., concur.

(112 Wash. 289)

**CORTEZ v. SPOKANE INTERNATIONAL RY. CO. (No. 15807.)**

(Supreme Court of Washington. Aug. 24, 1920.)

**1. Release ¶57(2)—Proof of fraud must be clear and convincing.**

In personal injury action, commenced more than one year after written settlement, during which time no complaint has been made that plaintiff had been defrauded, proof of fraud, to warrant setting aside of the settlement, must be clear and convincing.

**2. Release ¶58(6)—Validity of written settlement claimed to have been fraudulently induced question for court, unless proof is clear and convincing.**

In personal injury action, involving validity of written settlement claimed to have been induced by fraud, it is the duty of the trial court to determine whether evidence upon the question of fraud is clear and convincing, within rule requiring clear and convincing proof of fraud to warrant the setting aside of the written settlement, and, if not clear and convincing, to take the question of fraud from the jury.

**3. Release ¶58(6)—Evidence held insufficient for submission of validity of written settlement to jury.**

In action for injuries to employé's foot, involving the issue of whether written settlement had been induced by fraud, where settlement was made at the voluntary solicitation of the employé on his own terms, and where only evidence of fraud was statements of physicians as to length of time before employé would recover,

it was court's duty, under Rem. Code 1915, § 340, to direct judgment for defendant; the statements by the physicians being mere expressions of opinion.

**Department 2.**

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by A. J. Cortez against the Spokane International Railway Company. Judgment of dismissal notwithstanding a verdict for plaintiff, and plaintiff appeals. Affirmed.

Plummer & Lavin, of Spokane, for appellant.

Allen, Winston & Allen, of Spokane, for respondent.

MOUNT, J. The plaintiff brought this action to recover for personal injuries. Upon issues joined the case was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff for \$6,680. Thereupon the defendant filed a motion for a new trial and for judgment notwithstanding the verdict. On the hearing upon these motions the trial court denied the motion for a new trial, but granted the motion for judgment notwithstanding the verdict. The plaintiff has appealed from the order of dismissal.

The facts may be briefly stated as follows: On the 9th day of October, 1917, the appellant was employed as a switchman in the yards of the respondent in the vicinity of Spokane. The respondent at that time was engaged in interstate commerce. On that day several carloads of logs were shipped over the line of the respondent railroad from Idaho to the city of Spokane, in this state. These cars were placed upon a siding upon a grade. The brakes were securely fastened while the switching crew, of which the appellant was one, were switching other cars. The switch engine coupled onto these loads of logs. The appellant was directed to release the brake on the car next to the engine. In order to do this he was required to stand on the drawbar between the engine and the loaded car. While he was in the act of releasing the brake, a fellow employé by means of a rock released the brake, which let the loaded car come down against the appellant's foot, thereby severely crushing the foot. The bones of the little toe and the second toe of the right foot were broken, and some bones were broken from the great toe of that foot. Thereupon the appellant was taken to the hospital, and was treated by Dr. Doolittle, who was then in the employ of the railway company. The appellant remained in the care of Dr. Doolittle for one month, and then left the hospital. He called upon Dr. Doolittle about twice a week after that time. On the 15th day of February, 1918, the appellant proposed to the claim agent that a settlement be made; appellant



(191 P.)

stating that he desired to purchase a Ford car and go into the junk business. He offered to settle for \$450. Mr. Shaw, the claim agent of the company, submitted this proposition to the railroad company. It was accepted, and a settlement was made. The appellant signed a release for all claims of damages and was paid \$450 in cash at that time. He had been paid by the company up to that time his average wages after he was injured. Thereafter, in May of 1918, he was employed by the respondent as a brakeman, and continued in that employment until December of that year. At that time, on account of slack business, the crew was laid off, and the appellant demanded wages for the month of December, which being refused, he made the statement, "I will make you pay," and then in 1919 brought this action for damages on account of the injuries received on October 9, 1917.

The single question presented upon this appeal is whether the court erred in granting the judgment notwithstanding the verdict, upon the ground that the evidence was insufficient to show fraud in the settlement. The principal defense made by the respondent was that the settlement had been made. In reply to this defense the appellant alleged that the settlement was void, because it was fraudulently made. Upon the trial of the case it appeared that Dr. Doolittle, who had charge of the appellant after he was brought to the hospital, had gone to Florida in the early part of January, 1918. The appellant testified upon the trial of the case as follows:

"A. Yes, sir; I went to Doolittle—that is, just before he went to Florida—and he told me it was only a matter of 30 to 60 days at the outside. 'All you have to do is to get out and exercise that foot, and you will gain in strength; but,' he says, 'loafing around the way you are,' he says, 'throw that cane away, and get out and go to work.'

"Q. When he said it would be 30 to 60 days, what did you say to him at that time as to whether or not he was positive of it, or anything of that kind? A. I told him I hoped it would be so, and he said it surely would—not in those words; he said, 'Your foot will be all right.'

"Q. Now, after he went to Florida, did Dr. Brown still treat you? A. Yes, sir. I was up to see—I was up to Dr. Brown twice a week.

"Q. And what did he say about you being well in 30 to 60 days? A. He said just the same as Dr. Doolittle did.

"Q. Did you tell him at that time that you were negotiating a settlement with the company, and wanted to know positively what the result would be? A. Yes, sir.

"Q. And what did he say to that? A. Well, he says, 'You will be all right,' just as Dr. Doolittle said my foot would be all right, in 30 to 60 days. All it would need was exercise and to walk on it. I told him all the time that there was broken bones in there; that it was hurting me. He said there would be a cartilage

formed around those bones; that 'it would be all right; you won't feel that at all.'

"Q. Did you rely upon that statement the doctors made to you? A. I certainly did.

"Q. Would you have signed that release, but for that statement? A. No, sir; I would not.

"Q. Did Dr. Doolittle, at the time he took charge of this foot, take any X-ray plates of it, so that he could see? A. Yes; he took them the next morning after I was injured. \* \* \*

"Q. Did he tell you that you would fully recover and that your foot would be as good as it ever was? A. He certainly did.

"Q. Never mentioned to you that it was his opinion, did not say, 'It is my opinion it will be,' he guaranteed it to you? A. He certainly did.

"Q. He said it sure would happen? A. He says, 'In 30 to 60 days you will never know your foot was hurt; it will be as good as it ever was, and you can do as good a job switching as any man working for a railroad.'

"Q. And told you, Mr. Cortez—how long after the injury was that? A. That was along the fore part of January."

Mrs. Cortez testified that in January Dr. Doolittle was called to her house on account of sickness, and she was asked the following question:

"Did Dr. Doolittle say anything at that time with reference—that is, to Mr. Cortez in your presence, or to you in the presence of Mr. Cortez, where he could hear it, as to when his foot would be all right? A. Yes, sir; I wanted Dr. Doolittle to look at his foot, to see if he could relieve it; and he told me that I need not worry about the foot, that he had done all that any doctor could do for the foot, and that the foot was all right, and that within a month or two months, at the most, he would be able to switch again; that is what he said."

Both Dr. Doolittle and Dr. Brown denied that any such conversations had taken place, or that they made any representations as to when the foot would be well. We think it is plain from the evidence in the case that, even if Dr. Doolittle and Dr. Brown made the statements attributed to them by the appellant and his wife, these statements were mere expressions of opinion. This court has laid down the rule in a number of cases that, before a written contract can be set aside for fraud, the evidence upon that question must be clear and convincing. In the case of *Nath v. O. R. & Nav. Co.*, 72 Wash. 664, 131 Pac. 251, which was a case similar to the one now before us, we said:

"The law favors an amicable settlement of claims of this character, and when such a settlement appears to have been fairly made, and has not been secured by fraud, false representations, or overreaching, it must be sustained."

Then, after citing cases:

"To avoid a settlement on the ground of fraud requires clear and convincing proof. The most convincing evidence should be required in a case such as this, where the validity of the set-

tlement was not questioned for more than two years. If respondent was defrauded and misled, as he now contends, he should have discovered that fact long prior to the commencement of this action. Yet he retained the money, worked for appellant at hard labor, and for more than two years made no attempt to rescind."

[1] The same is true of this case. The appellant here made the settlement in February of 1918, and for two or three months after that time he was engaged in the junk business. Then on the 1st of May he went to work for the respondent again in the capacity of a brakeman, and continued in their employ until December of that year. He brought this action in 1919, more than a year after the settlement. There is no evidence in the record that between the time of the settlement and the time of the suit any complaint was made that he had been defrauded. In the case of *Spratt v. N. P. R. Co.*, 90 Wash. 592, 156 Pac. 563, we said:

"Releases in a case of this kind are like any other writing, and they are not to be lightly overcome. \* \* \* The testimony should be clear and convincing, especially so where, as in this case, the issue strips down to one charge that the one seeking to overcome it did not understand the paper which he admits was read to him."

In *Reynolds v. Day*, 93 Wash. 395, 161 Pac. 62, we said:

"Releases of this kind are like any other writing, and are not to be lightly overcome. If they are not induced by fraud, false representations, or overreaching, they must be sustained. The testimony to sustain the charge of fraud must be clear and convincing"—citing a number of cases.

It is argued by counsel for appellant that the statements made by Drs. Doolittle and Brown were fraudulent, because they knew or should have known that appellant would not be well in the time stated, and that the question was for the jury whether the doctors' statements were expressions of opinion or the statement of a fact. No bad faith on the part of either of these doctors is shown. They were not urging a settlement. The settlement was made at the voluntary solicitation of the appellant himself, after he was walking around. It was made upon his own terms to the claim agent of the respondent, before that agent had suggested a settlement, except to say to appellant that he was anxious to get him off his list.

[2] At the time of the trial neither of the doctors were in the employ of the respondent, and they had no interest in the controversy, except to state the truth. We do not mean by this that the trial court should weigh conflicting evidence; but it is the duty of the trial court to determine whether evidence

upon the question of fraud is clear and convincing, within the rule of the cases above cited, and, if not so, to take that question from the jury.

[3] We are satisfied in this case, after carefully reading the evidence, that, even though the doctors made the statement attributed to them, their statements were mere expressions of opinion, and not a "guaranty" or "assurance" that the appellant would be well in 30 or 60 days, or any other time. There is no other evidence of fraud, and no claim of fraud, except in the statements of the doctors to the effect that appellant would be well in 30 or 60 days. Under the rule that the evidence of fraud must be clear and convincing, we are satisfied that the evidence in this case did not measure up to that rule, and that the court, therefore, properly concluded that the evidence upon this question was not sufficient to go to the jury, and, that being so, it was his duty, under section 340 of Rem. Code, to direct a judgment in favor of the respondent.

The judgment appealed from is therefore affirmed.

HOLCOMB, C. J., and TOLMAN and BRIDGES, JJ., concur.

(111 Wash. 608)

ZINN v. KNOPES et al. (No. 15775.)

(Supreme Court of Washington. July 19, 1920.)

1. Husband and wife  $\S$  17 — Wife need not sign lease to husband's real property.

It is not necessary for the signature of a wife to appear on a lease of the husband's sole and separate real property.

2. Frauds, statute of  $\S$  129(4)—Possession under lease takes out of statute as far as description is concerned.

Where lessee goes into possession of land under a written instrument, the contract is taken out of the statute of frauds, so far as the question of sufficiency of description is concerned.

3. Frauds, statute of  $\S$  144—Lessor held estopped to set up statute.

Where one under a lease for three years, acting on the faith of the lessor's attitude touching the contract, entered upon the land, and in accordance with the lease stored feed to care for increase in cattle, of which he was to have one-half, and expended sums in breeding the stock, and prepared summer fallow, the lessor was estopped to cancel the lease on the ground that it was void under the statute.

Department 1.

Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Action by John Zinn against Henry Knopes and others. Judgment for plaintiff, and defendants appeal. Affirmed.

C. H. Baldwin, of Asotin, for appellants.  
E. J. Doyle, of Clarkston, for respondent.

MACKINTOSH, J. Respondent and appellant Knopes, on August 12, 1918, signed a written lease for a term of three years; the lease including the farm of appellant and a large number of cattle, sheep, horses, and pigs, which, under the lease, the respondent was required to feed, care for, and breed, sharing the crops of the land and the increase of the stock with the lessor. Respondent entered into possession September 1, 1918, and farmed the land, fed and cared for and bred the live stock, and cared for the increase thereof. In the summer of 1919 more than 120 acres of the farm had been put in summer fallow for the next year's crop, the respondent had stored in the barn enough hay to care for the live stock during the succeeding winter, and the cattle, horses, sheep, and hogs had been bred, and from some the increase had been foaled and born, and some were about to be foaled and born. Some of the live stock had been bred for 1920 and were with foal. Respondent had hired helpers and herders, and had not yet received any benefit from the increase of the stock, because the increase was not yet mature or marketable. On September 1, 1919, these things having been done, the appellant served notice under the unlawful detainer statute, demanding that the respondent vacate the land, and upon the respondent's failure to comply with the notice, an action was begun by the appellants against the respondent seeking to obtain possession. After that action had been commenced, the present action was instituted by the respondent against the appellants, asking for an injunction restraining them from proceeding further with their suit, and this appeal is from a decision favorable to respondent in the second action.

Some confusion exists in the record and the briefs in regard to the two actions, but the first action is not before this court. The action that was tried was the suit in which the respondent was plaintiff, and we are not here interested in the other action, which has not been appealed. The appellants claim their right to the possession of the property upon three grounds: (1) That the lease in question was void for the reason that appellant Anna Knopes, the wife of Henry Knopes, did not sign the lease, and that the property is community property; (2) that the lease was void for the reason that it contained no description of the land; and (3) that the lease was void for the reason that it was unacknowledged.

[1] First. The testimony shows that the land was the separate property of the hus-

band, Henry Knopes, and, that being true, if the lease was otherwise good, the fact that the wife had not joined in the execution of it is immaterial. The husband, having the control and management of personal property, had a right to lease that without the wife joining in the execution of the lease, and, the real property being his sole and separate property, it was not necessary for her signature to appear.

[2] Second. The description contained in the lease is:

"The land to be rented in this lease is what used to be the A. C. Hollenbeck ranch, now owned by the first party, and is located on what is known as Montgomery Ridge, in township 8, range 46, and township 8, range 47, all in Asotin county, Washington."

It may be that this description would not be sufficient in an unexecuted contract to convey the property, or in a contract between an owner and broker for real estate commission; but this was not an unexecuted contract or commission agreement. The respondent entered into possession and did those things called for by the instrument, and this is sufficient to make the question of imperfect description of no moment. The cases of *Rogers v. Lippy*, 99 Wash. 312, 169 Pac. 858, L. R. A. 1918C. 583, and *Nelson v. Davis*, 102 Wash. 313, 172 Pac. 1178, relied on by appellant, are cases of incomplete description in unexecuted contracts to convey. The parties here being in possession under the instrument was sufficient to take the contract out of the statute of frauds, so far as the question of description is concerned. *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867; *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418; *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039.

[3] Third. The more troublesome question arises from the fact that the lease was unacknowledged. While it has been held that an unacknowledged lease for a term of years is under the statute valid for a period not exceeding one year, or where the lease provides for an indefinite term with periodical rent reserved, it shall be construed as creating a tenancy from period to period, yet under certain circumstances the rule has been that an unacknowledged lease for a term of years will be held to be binding for the entire term reserved, upon the principle of equitable estoppel, which prevents a party to a transaction from relying upon the invalidity, where the other party has acted in conformity with the contract and its subject-matter, and has thus placed himself in a position where it would be unfair to hold the contract invalid. In other words, the party has been prevented from asserting the invalidity of a contract entered into where "it would be a fraud in a party to assert what his previous conduct had denied, when on the

fact of that denial others have acted." 16 Cyc. 725. Such "a person will not be allowed to use the statute as a means to perpetrate fraud, since the chief object of the statute was to remove the temptation to commit perjury." 22 Cyc. 280. Where the consideration which has been paid by the person against whom the invalidity of the lease or contract has been urged is not a consideration which goes to the entire term provided in the writing, it has been held that there is no reason for the exercise of the rule of equitable estoppel. *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322; *Grubb v. House*, 93 Wash. 200, 160 Pac. 421; *Spreitzer v. Miller*, 98 Wash. 601, 168 Pac. 179; *Eriksen v. Manufacturers' Distributing Co.*, 103 Wash. 159, 178 Pac. 1095. But where the lessee has performed such acts as are called for in the lease or contract in the belief, and relying upon the contract, that it would be inequitable to hold the contract invalid, such leases have been sustained, as though they had been executed in strict conformity with the law.

In this case the provisions of the lease themselves show that it was the intention that the respondent was to have a full term of three years in which to receive the benefit of the various things to be done by him during the first year of the term. The evidence shows that young live stock on the place at the time the lease was sought to be terminated was of little value; that the respondent had stored in the barns stacks of feed with which he intended to care for this increase until such time as it could be marketed profitably. To cancel the lease would be to force the respondent to abandon all the unfoaled and unborn increase, the cost of breeding which had already been paid by the respondent. Altogether the record is such as plainly to call for the application of the doctrine of estoppel. *McGlauffin v. Holman*, 1 Wash. 239, 24 Pac. 439; *Schulte v. Schering*, 2 Wash. 127, 26 Pac. 78. Especially does this case fall under the doctrine as announced in *Matzger v. Arcade Bldg., etc., Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915A, 288, as follows:

"That the broad principle of equitable estoppel, preventing a party to a transaction from asserting its invalidity in any case where the other party, acting on the faith of the first party's attitude touching the contract and its subject-matter, has placed himself in a posi-

tion where it would be inequitable to hold the contract invalid to his injury, applies alike to leases as to other contracts is clearly recognized in *Forrester v. Reliable Transfer Co.*, supra, where we said (59 Wash. 95): 'This court has heretofore held that there may be such performance of acts referable to a lease contract that its terms will be enforced as though it had been executed with all the formalities prescribed by statute, the same as rights under an informally executed deed will be protected under like circumstances. \* \* \* These cases involved both unacknowledged and oral leases. All were for terms for more than one year, and hence did not comply with the statute in their execution, yet their provisions were given full force and effect because of the performance of acts with reference to and in the belief that they were binding contracts between the parties.' The language which we have quoted construes our own decisions, not as limiting the doctrine of equitable estoppel as applied to the sustaining of contracts of lease, but as recognizing that doctrine as applicable to such contracts with like force and to the same extent as to other contracts. A careful consideration of our own decisions convinces us that what is said in some of them relative to estoppels by improvements made by the tenant beneficial to the freehold was said because that was the only estoppel claimed in the given case, not because that was the only fact which could work an estoppel in any case. In each of the cases called to our attention and chiefly relied on by the appellant, where written leases have been held invalid for lack of acknowledgment, there was apparently an absence of sufficient facts invoking the principle of equitable estoppel on any ground."

The appellant in his testimony admits that the respondent, at the time the lease was entered into, stated that he would not take the land unless he could have it for three years, and to now forfeit the lease would be to deprive the respondent of the summer fallow which he had prepared, the live stock which had not yet matured, and all of the live stock of which the increase was not yet born, and would deprive him of his labor and expense in caring for the stock, and various other items to which we have referred.

For these reasons, the judgment will be affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and MITCHELL, JJ., concur.

(113 Wash. 97)

MEAD v. CHELAN COUNTY. (No. 15800.)

(Supreme Court of Washington. Aug. 6, 1920.)

1. Highways  $\S$  213(2)—Nonsuit held properly granted, on theory that county was not chargeable with notice of condition of road.

In action against county for injuries caused by ice-covered mountain road, held, that court properly granted nonsuit on theory that unsafe condition of road was not shown to have existed for a sufficient length of time to put the county on notice.

2. Highways  $\S$  193—County commissioners not required to frequently inspect remote mountain road, serving but few families.

County commissioners were not required to give a remote mountain road, serving but few families, constant or even frequent inspection, but might rely on the users of the road or those living in the neighborhood to give them notice of any unusual conditions which would render the road unsafe.

3. Highways  $\S$  197(3)—Driver of heavy wagon down mountain road held negligent.

Driver of farm wagon, with  $2\frac{1}{2}$ -ton load, drawn by team weighing 2,200 pounds, was contributorily negligent in descending mountain road, abounding in sharp curves and steep grades, with which he was entirely familiar, with notice of the presence of water and ice in the road, without ascertaining whether road immediately ahead had frozen over, making use thereof extremely dangerous.

#### Department 2.

Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by W. H. Mead against Chelan County. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Ludington & Shiner, of Wenatchee, for appellant.

W. F. Whitney, of Wenatchee, for respondent.

TOLMAN, J. On November 23, 1916, appellant, who was plaintiff below, was engaged in hauling apples from his farm on the Wenatchee Heights to the city of Wenatchee. He traveled what is known as the "Snake Road," because of its curves, with a load of some  $2\frac{1}{2}$  tons, on an ordinary  $2\frac{3}{4}$ -skeln farm wagon, drawn by a team weighing about 2,200 pounds. The road at this point passes along a ridge or hog back for a few hundred feet, and at this point there is an irrigation ditch above the road, fed from a flume. Occasionally in the history of the road, this ditch has broken or become stopped up and overflowed, so as to permit the water to escape into the road, and at such times some passer-by, or the road supervisor under general orders from the county commissioners, has removed the flume, swinging it back so that the water escaped in some other

direction, thus stopping the flow into the road. The evidence as to notice to the commissioners, and orders from them to remove the flume, is somewhat hazy at best; but, even if direct and positive, it would have advised them of inconvenience merely, not danger, to the traveling public. Two days before the time in question appellant had traveled this same road, and found no water in it, and on the morning of the accident he drove down the road, past the flume and ditch, descending a grade of approximately 2 per cent., and there found that water had escaped into the road and followed down the left wheel track, causing mud and thin ice, through which the wheels of the wagon readily cut. Continuing down the road, he came to a place where the road curved sharply, so as to make a switchback, and fell off rapidly into a descent of 10 per cent. or more, and on this curve the roadbed was hard and impervious, so that water, instead of following the wheel track as theretofore, spread over the entire roadway, and as so spread out it froze solidly, forming a slippery surface, through which, it developed the wheels would not cut, and upon which the horses could get no secure footing. Before entering upon the curve, and the steep grade, appellant stopped his team, looked after his brake and equipment, to see that everything was in order, and then started forward. As the team and wagon began to swing around the curve on the slippery, frozen, icy surface, the wagon skidded, the horses lost their footing, and team, wagon, and driver were carried off the road and down the sheer mountain side; appellant sustaining severe injuries, for which he sues. On the trial below, at the close of appellant's case, a nonsuit was ordered, from which result this appeal is taken.

[1, 2] The nonsuit appears to have been granted on the theory that the unsafe condition of the road was not shown to have existed for a sufficient length of time to put the county on notice. It does not appear that either the running water in the roadway or the mud caused thereby was ever in itself a menace to one using the road. On the contrary, it is made to appear that some mud and water had a tendency to make the wheels cut in, and this actually made the roadway safer, and less likely to produce such an accident as occurred here. But it is argued that, if the condition happened in freezing weather, the county was bound to anticipate that the water would freeze, form ice, and become dangerous. The fallacy of this argument lies in the lack of proof in the case that the county commissioners knew, or had any reason to anticipate, that there would be water in the flume or ditch after the close of the irrigation season, and during that portion of the year when freezing weather was

to be expected. It is to be borne in mind that this was a somewhat remote mountain road, serving but few families, and in the nature of things the commissioners could not be required to give it constant or even frequent inspection, but might rely upon the users of the road, or those living in the neighborhood, to give them notice of any unusual conditions which would render the road unsafe. The facts fall far short of what is required for the application of the rule announced in *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616, 40 L. R. A. (N. S.) 182, upon which appellant seems to rely.

[3] But, without continuing the discussion upon this point, we think, under the facts shown, that appellant should be held guilty of contributory negligence or assumption of risk. Considering the size of his wagon and the weight of his team, he was carrying a very heavy load upon a road abounding in sharp curves and steep grades, with which he was entirely familiar, and must have known that he was loaded to the extreme limit of safety under favorable conditions. He had actual notice of the presence of the water and ice in the road before coming to a place where any prudent person, familiar with conditions as he was, must have known that those conditions might prove dangerous, and he so far appreciated the probability, or possibility, of danger as to then stop his team and look to his equipment. This all occurred in broad daylight in the middle of the forenoon, and it is not shown that he could not and did not see that the water had spread thinly out and frozen over the whole roadway immediately ahead of him. He must, in fact, have so seen, had he looked, and certainly, under the conditions here shown, it was his duty to look. Charged with this notice, if he then deliberately drove into a place of danger, he cannot recover.

The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(112 Wash. 113)

**BOSTON & SPOKANE REALTY CO. v. FRANC INV. CO. (No. 15896.)**

(Supreme Court of Washington. Aug. 6, 1920.)

**1. Mortgages**  $\S$ 199(5) — Senior mortgagee, not entitled to rents, need not be notified of hearing on report of receiver.

Where mortgagor agreed to give junior mortgagee possession and right to collect rents, but failed to so do, and where such mortgagee in foreclosure action procured appointment of receiver to collect rents and an order directing

distribution of such rents, senior mortgagee, who was not entitled to possession of lands, and who was not a party to the proceeding, was not entitled to have order vacated on ground that he received no notice of hearing, since he had no interest in the rents, and therefore was not entitled to notice.

**2. Mortgages**  $\S$ 199(5) — Mortgagee, purchasing for full amount of judgment, not entitled to have prior rents applied to payment of taxes.

Senior mortgagee, who purchased mortgaged property, subject to taxes and assessments, for the full amount of its judgment, could not require rents collected by receiver in mortgage foreclosure action by junior mortgagee, who, by agreement with mortgagor, was entitled to possession and to collection of rents, devoted to satisfaction of such taxes and assessments, not being entitled to rents prior to time when its right to possession accrued.

Department 2.

Appeal from Superior Court, Spokane County; R. M. Webster, Judge.

Action by the Boston & Spokane Realty Company against Arthur A. Dunphy and others. Receiver appointed, and order directing distribution of rents collected by receiver was vacated on petition of the Franc Investment Company, and plaintiff appeals. Judgment reversed, with directions to reinstate order.

Danson, Williams & Danson and R. E. Lowe, all of Spokane, for appellant.

Charles P. Lund, of Spokane, for respondent.

**TOLMAN, J.** The appellant, Boston & Spokane Realty Company, commenced this action against Arthur A. Dunphy and others, for the foreclosure of a second mortgage made by Dunphy and wife. Respondent, the holder of the first mortgage, was not made a party to the action.

In its complaint appellant alleged, among other things, that at the time its mortgage was executed the mortgagors by a separate writing agreed that appellant should be placed in possession of the mortgaged property, should collect the rents, and disburse them: (1) In payment of agent's commission; (2) In payment of taxes, assessments, insurance and operating and maintenance charges; and (3) any sum remaining to be applied, first, to the payment of interest, and, second, to the payment of the principal of any mortgages, which might be a lien against the property. It is further alleged that, notwithstanding such written agreement, the mortgagors had regained possession of the property and were collecting the rents and applying them to their own use, and the prayer was for the appointment of a receiver, as well as the usual prayer for foreclosure. After the filing of the complaint, a hearing was had and a receiver appointed, who, during the pendency

of the action, and before the sale on foreclosure, collected the fund now in dispute. On November 1, 1919, appellant bid in the property at sheriff's sale, leaving a deficiency unsatisfied upon its judgment against the mortgagors of \$717.79. Thereafter the receiver made his report of receipts and disbursements, which was approved, his fees were fixed and allowed, and he was directed to pay over the balance in his hands to appellant to apply on its deficiency judgment.

Thereafter the respondent filed its petition in the action, in which it alleged that it was the holder of a first mortgage on the property, made by the predecessors in interest of the defendants Dunphy and wife; that it began an action to foreclose thereon on April 17, 1919; that then, and at all times since, the owners of the legal title had failed to pay certain taxes and special assessments thereon, which were a first lien; that appellant began its action to foreclose a junior mortgage on June 3, 1919, and procured the appointment of a receiver to collect the rents "and apply the rents as shall be directed by the court, and to the payment of taxes, assessments, interest, and mortgage indebtedness on the several pieces of real estate, from the rent received from such real estate, as the court shall direct." The petition further set forth the substance of the receiver's report and the order made thereon, alleged that petitioner had no notice of the hearing on said report, and prayed that the order be set aside and the receiver be directed to apply the money in his hands toward the payment of taxes and assessments on the mortgaged property. The petition does not allege, but it is admitted here, that prior to the making of the order therein complained of, and prior to the filing of the petition, respondent at its own foreclosure sale had purchased the mortgaged property for the full amount due to it under its decree, and its judgment was wholly satisfied. Appellant demurred to the petition, and upon a hearing the trial court vacated the prior order and directed the funds in the hands of the receiver to be paid towards the satisfaction of the taxes and assessments on the mortgaged property. This appeal followed.

[1] It is apparent that appellant, by reason of the written agreement giving it possession and the right to collect and apply the rents, was in a more advantageous position than an ordinary mortgagee, and had that agreement been respected it would have been a mortgagee in possession, and as against re-

spondents (it not being contended that such agreement was made for respondent's benefit) it could have held possession and collected the rents up to the day when by virtue of its purchase at sheriff's sale respondent became entitled to possession, and would have been accountable then, not to respondent, but only to its mortgagor, or his successor in interest. This being so, how can it be contended that respondent has any right to, or interest in, the rents which accrued, and were paid before it had any right to the possession or rents? The terms of the written agreement having been violated, appellant sought, as it had a right to do, the aid of a court of equity, through its receiver, to secure merely what the agreement gave it, and that only. The receiver in such a case is a special one, for a special purpose, and his duties are circumscribed by the issues in the case in which he is appointed. Nor is he subject to control, directly or indirectly, by one not a party to the cause; hence the respondent, having no interest in the fund in the receiver's hands, and no control over the receiver's acts, was not entitled to notice of the filing of the receiver's report, and had no interest in, and was not bound by, the order made thereon.

[2] Moreover, respondent at its own foreclosure sale, knowing, as it was bound to do from the public records, that the taxes and assessments were unpaid and a first lien upon the land, saw fit to purchase the property subject to such taxes and assessments, for the full amount of its judgment, which judgment apparently was not against Dunphy and wife, but was against previous owners only, and thus satisfied that judgment in full, and has no further claim against any one. So far as appears, and under the usual form of mortgage in use in this state, if respondent's mortgagees covenanted to pay taxes and assessments, their breach of that covenant might entitle the mortgagee to declare the debt due, or to pay the taxes and add the amount to the mortgage debt or both, but except under unusual conditions not here shown to have been alleged or proven in its action to foreclose, it could not reach out and seize the rents prior to the time when its right to possession accrued.

The judgment of the trial court is reversed, with directions to reinstate the order attacked by respondent's petition.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(112 Wash. 188)

**DULEY v. DULEY.** (No. 15773.)

(Supreme Court of Washington. Aug. 11, 1920.)

**Partnership** §325(2)—Grounds held to justify appointment of receiver pending dissolution suit.

There being pending a suit for dissolution of a partnership and an accounting, and there being shown a serious lack of harmony between the partners and control of the property in one of them, and a disposition on his part to dissipate the property and advise creditors to enforce collection of their claims by action, appointment of a receiver is justified.

**Department 2.**

Appeal from Superior Court, Okanogan County; C. H. Neal, Judge.

Action by S. G. Duley against M. W. Duley. From an order appointing a receiver, plaintiff appeals. Affirmed.

Wm. O'Connor, of Okanogan, for appellant.  
P. D. Smith and W. C. Brown, both of Okanogan, for respondent.

**MOUNT, J.** This appeal is from an order of the lower court appointing a receiver over partnership property. The parties are brothers. The plaintiff brought an action against the defendant, alleging a partnership in certain farm property in Okanogan county; that defendant had sold and converted certain of the partnership property to his own use, and refused to account therefor, and prayed for the dissolution of the partnership and an accounting. The defendant for answer alleged a copartnership different from that alleged in the complaint, and also alleged that the plaintiff had converted partnership funds to his own use and refused to account therefor, and also that there were debts past due and creditors were threatening suit, and prayed for dissolution and an accounting and for a receiver to take charge of the property. After the answer was filed a show cause order was issued, directed to the plaintiff, to show cause at a certain time why a receiver should not be appointed. Upon a hearing upon this show cause order the court appointed a receiver. The plaintiff has appealed from that order.

At the hearing upon this show cause order it appeared that the parties could not do business with each other. Each accused the other of converting the partnership property to his own use. It also appeared that there were secured debts amounting to some \$10,800 and unsecured debts amounting to \$700 or \$800, all past due and that the appellant had advised the creditors that they would have to sue in order to collect their claims; that appellant had collected \$1,100 after the action was brought, converted the same to

his own use for the purpose of prosecuting this action; that all the property which was in possession of the appellant is liable to be lost if creditors should bring suit to collect their claims.

In *Martin v. Wilson*, 84 Wash. 625, 147 Pac. 404, we said:

"The rule is well established that where a partnership has been dissolved, or a suit for dissolution and an accounting is pending and there is a serious lack of understanding and harmony between partners, and one partner is excluded from any voice in the management and control of the affairs of the partnership, a receiver will be appointed. *Cole v. Price*, 22 Wash. 18, 60 Pac. 153; *Redding v. Anderson*, 87 Wash. 209, 79 Pac. 628, 30 Cyc. 726 et seq. The rule may be epitomized: If the parties to a partnership will not trust each other, equity will not trust either of them to settle an affair in which each of them, but for their differences, would be entitled to share in equal degree."

Here there is not only shown a serious lack of harmony between the parties and control of the property in the appellant but also a disposition on the part of the appellant to dissipate the property and advise creditors to bring actions to enforce collections of their claims. We are satisfied that the trial court was justified in appointing a receiver under the facts stated.

The order appealed from is therefore affirmed.

**HOLCOMB, C. J., and BRIDGES, TOLMAN, and FULLERTON, JJ., concur.**

(111 Wash. 650)

**NOEL et al. v. GARFORD MOTOR TRUCK CO. et al.****SAME v. GARFORD MOTOR TRUCK CO.** (No. 15711.)

(Supreme Court of Washington. July 22, 1920.)

**1. Sales** §121—Retention of truck on assurance that it would be put in order, no waiver of right to rescind.

That the buyer retained a motortruck for several weeks after discovering that the engine heated does not deprive him of the right to rescind, where the seller sent numerous mechanics to repair the truck, and at all times assured that it would be placed in order, for in such case the retention was not for an unreasonable time so as to deprive the buyer of the right to rescind.

**2. Sales** §124—Injuries to motortruck not preventing substantial restoration held not to prevent rescission.

Where the seller of a motortruck constantly assured that it would place the same in order, and invited the buyer to use it after making



repairs, the buyer may, where by reason of defects the truck became stalled on a street car track and was injured in a collision, rescind, despite the seller's contention that it could not be placed in status quo; it not appearing that the repairs necessary after the collision substantially altered the condition of the truck.

#### Department 1.

Appeal from Superior Court, King County; James B. Murphy, Judge pro tem.

Action by Frank Noel and another against the Garford Motor Truck Company, a corporation, and another, consolidated with an action by the corporate defendant against plaintiffs in the first action. From a judgment for plaintiffs, the named defendant appeals. Affirmed.

Kerr & McCord, of Seattle, for appellant.  
Ryan & Desmond, of Seattle, for respondents.

**MAIN, J.** The two above-entitled cases were consolidated in the superior court and tried as one action. The subject-matter of the litigation was a motortruck. In one of the cases the plaintiffs were seeking to rescind the contract of purchase and recover their money back. In the other the seller was attempting to foreclose a lien for labor performed upon the truck. The trial court sustained the right of rescission, and entered a judgment accordingly. From this judgment the Garford Motor Truck Company appeals. The controlling facts are not in material dispute.

On May 26, 1918, Fred Noel, one of the respondents then residing at Yakima, came to Seattle and contracted for the purchase of a Garford motortruck. The truck purchased was at the time en route from the factory to Seattle. It arrived shortly before June 19, and was taken to the shop of the Commercial Garage to have a certain type of body placed on the chassis. On June 19, Fred Noel came again to Seattle, went to the Commercial Garage, received the truck, and drove it to the Garford Company's place of business some blocks distant in the same city. During this trip up town there were several grades, and the motor, when it arrived at the Garford place, was heated to such extent that it stalled. The workmen of the Garford Company spent most of the afternoon checking up the motor, and Noel left late in the afternoon to drive the truck to Yakima. He was unwilling, owing to the fact that the motor had heated upon its first trip through the city, to make the trip to Yakima without assistance, and an employé of the Garford Company, a mechanic, accompanied him. The truck was run all that night, and arrived at Yakima late the following afternoon. During the night it heated continuously; about every two hours the driver was forced to stop and let it cool off. Shortly after the truck arrived at Yakima it was driven a short dis-

tance on the road to tow in a broken-down car, and during this drive the motor heated and missed. The following morning the truck was taken to Sunnyside, and during this trip it also heated. After reaching Sunnyside it was put immediately to work hauling gravel, but could only make a few trips a day, while other trucks of the same make would make 10 or 12. The Garford Company was notified, and in a few days sent a mechanic from Seattle to put the truck in proper condition. After this the truck continued to heat when used, as before, and required frequent stops in order to cool it off. At different times subsequent other mechanics, upon complaint of the purchaser being made, were sent to look after the truck. It was operated at Sunnyside for a period of six or seven weeks, when it was taken to Seattle. During the period that it was operated at Sunnyside it burned out four sets of wires, four sets of connecting rods, and a number of valves. When the car arrived at Seattle it was taken to the Garford Company's garage, and W. H. Krause, the sales agent who had sold the car, expressed his pleasure at the truck's being brought there, and said:

"We will see if we can fix it while you have it here. You need not worry about payment of the notes. Everything will be all right until your truck is either fixed up or we will do something."

The truck was then placed in the garage, where it was thoroughly overhauled. A few days later it was delivered to Noel again, who sent it out to haul gravel from the water front in Seattle to a paving job on Ranier avenue. During the first trip the motor heated and missed, and the driver, when he reached the top of the grade, was compelled to stop and let it cool off. He finally delivered the load, and started back to the city. On the return the motor continued to miss, and as he attempted to cross the car tracks it stalled, and approaching street car rolled into it, causing serious damage to the frame and other parts of the truck. The truck was then towed to a garage near that of the Garford Company. The motor was loosened from the frame and was taken to the Garford Company for repair while the straightening of the frame was done in the other garage. The Garford Company, by arrangement made at the time, was not to charge anything for labor performed, and Noel was to pay for new parts that might be necessary in restoring the truck from its broken condition caused by the collision. After the truck was repaired Noel tested it, and discovered that it had the same tendency to heat and knock as it had during all the time that he had used it, and declined to have anything further to do with it. The truck was sold under a warranty, which is referred to as "standard form" warranty. It is unnecessary here to set out the warranty, because there seems to be no controversy over

the fact that up to the time the car was returned to Seattle it had not fulfilled the warranty. It had been kept and used under the repeated assurance of Krause that it would be made to work, and, as already stated, mechanics were on a number of occasions sent by the Garford Truck Company to put the truck in condition. Under the evidence there can be no question but what the motor was defective. The trial court entered a decree, canceling the notes and mortgage which had been given for the balance due on the purchase, less the sum expended in the purchase of new parts.

[1] Under the heading "Argument" in the appellant's brief it first propounds the question, "Could the respondents rescind at the time they attempted to do so?" Answering this question, if we have gathered the argument correctly, two principal contentions are made, the first of which is that Noel had retained and used the truck for such a length of time that it would be inequitable to permit a rescission. In support of this position reliance is placed upon the general rule that where an article is sold and does not meet the requirements of an express warranty, failure to give notice or failure to return the property within a reasonable time after discovering the defects operates as a waiver of the right to rescind, and leaves the purchaser only the right to recover or offset damages. *Dickinson Fire, etc., Brick Co. v. F. T. Crowe & Co.*, 63 Wash. 550, 115 Pac. 1087; *Fink v. Marr*, 81 Wash. 92, 142 Pac. 482. But that rule is not applicable to the facts in this case. While the truck was used for a considerable time, it was retained in reliance upon the assurance of Krause that it would be put in such condition as to satisfy the warranty. Repeated efforts were made by mechanics sent by Krause to put the motor in good working condition, but without success. Diligence in rescission is a relative question. What is unreasonable delay in a given case must depend upon particular circumstances. Delay in formal decision induced by the promise of the vendor to make the machinery work properly is not a waiver of the right to rescind. *Schroeder v. Hotel Commercial Co.*, 84 Wash. 685, 147 Pac. 417. In the present case under the facts and circumstances the truck was not retained and used for an unreasonable time before rescission was attempted.

[2] The appellant's second contention is that since the truck had been damaged in a collision with a street car company the right of rescission does not exist. In this connection reliance is placed upon the rule that, where property while in the possession of the purchaser has been damaged to such an extent that the parties cannot be placed in status quo, that the remedy of the purchaser is one of damages and not rescission. *Burnley v. Shinn*, 80 Wash. 240, 141 Pac. 326,

*Ann. Cas.* 1916B, 96. This rule contemplates that where rescission is attempted the article purchased must be returned in substantially as good condition as when received, and the inability to return it in such condition is due to the fault of the purchaser. If the repairs did not effect a material change in the truck or substantially alter its condition, there is no reason why it could not be lawfully returned to the seller. *Mechem on Sales*, vol. 2, § 819; *Klock v. Newbury*, 63 Wash. 153, 114 Pac. 1032. The motortruck, after its repair, was in substantially as good a condition as it was prior to the accident. In addition to this the evidence shows that the collision was brought about by the stalling of the truck, due to a defective motor, and that the driver was free from fault in attempting to cross the street car tracks at the time and place that he did.

The judgment will be affirmed.

HOLCOMB, C. J., and PARKER, TOLMAN, and MITCHELL, JJ., concur.

(112 Wash. 702)

**STATE ex rel. MILLER LOGGING CO. v. SUPERIOR COURT FOR SNOHOMISH COUNTY. (No. 15958.)**

(Supreme Court of Washington. Aug. 11, 1920.)

**Eminent domain §56—Logging company with access to river not entitled to condemn right of way.**

There is no necessity in law for right of way sought by logging company in condemnation proceeding under Laws 1913, p. 412, where the company has a fairly practical means of access to market for its logs and timber by water transportation on a certain river.

Department 1.

Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Certiorari by the State, on relation of Miller Logging Company, against the Superior Court for Snohomish County, to review order denying an order of necessity in condemnation proceeding. Order affirmed.

M. J. McGuinness, of Snohomish, Kerr & McCord, of Seattle, and W. P. Bell, of Everett, for plaintiff.

L. A. Merrick, of Everett, for defendant.

PER CURIAM. The relator, Miller Logging Company, seeks by certiorari proceedings in this court a review and reversal of an order of the superior court for Snohomish county, denying an order of necessity prayed for by it in a condemnation proceeding commenced and prosecuted in the superior court for Snohomish county, in which condemna-

(191 P.)

tion proceeding a right of way was sought to be acquired by it for a logging road, as a private way of necessity, under the provisions of chapter 133, Laws of 1913. A review of the evidence introduced upon the trial of the issue of necessity in the superior court, and a comparison thereof with the evidence introduced upon the trial of the issue of necessity which was under consideration by us in State ex rel. Stephens v. Superior Court, Snohomish County, which case was decided on June 2, last, and is reported in 190 Pac. 234, convinces us that the decision in that case is controlling in this case. The evidence in this case is more voluminous, and it may be said that it shows the facts touching the question of necessity in greater detail than the evidence in that case; but the situation is not shown to be substantially different, and we are quite convinced that it calls for the same conclusion. That is, that there is no necessity in law for the right of way here sought, in view of the fact that relator has a fairly practical means of access to market for its logs and timber, over the highway furnished by the waters of the Snohomish river.

The order of the superior court is affirmed.

(112 Wash. 745)

## STATE v. COLLINS. (No. 15585.)

(Supreme Court of Washington. Aug. 13, 1920.)

1. Criminal law ⇨170—Conviction on complaint not stating an offense will not bar subsequent prosecution.

Proceeding before justice of peace, wherein defendant, who had been arrested on complaint charging that he struck named person with his hand, pleaded guilty and was sentenced to pay nominal fine, did not bar subsequent prosecution for assault, since such conviction, being on a complaint which does not state an offense, would not support a plea of former jeopardy.

2. Criminal law ⇨211(4)—Complaint for assault held not sufficient.

Complaint charging that defendant struck named person with his hand held not sufficient to charge the offense of assault.

3. Criminal law ⇨170 — No plea of former jeopardy on conviction or acquittal on information, indictment, or complaint not stating offense.

In the absence of a statute to the contrary, there can be no lawful conviction or acquittal on an information, indictment, or complaint which is insufficient to state an offense, and hence no plea of former jeopardy can be based thereon.

4. Criminal law ⇨168 — Proceeding before justice of peace, not conducted according to statute, not a bar to subsequent prosecution.

Proceeding before a justice of the peace, in which a defendant, accused of striking certain

person, pleaded guilty, under Rem. Code 1915, § 1929, and was sentenced to pay a nominal fine, without injured person being summoned to appear and testify, as required by sections 1930, 1931, does not bar subsequent prosecution for assault; prior proceedings not having been conducted in accordance with mandatory requirements of statute.

Bridges, J., dissenting.

Department 2.

Appeal from Superior Court, Stevens County; W. H. Jackson, Judge.

J. E. Collins was convicted of assault in the second degree, and he appeals. Affirmed.

John Sallsbury, of Spokane, for appellant.  
L. B. Donley, of Colville, for the State.

FULLERTON, J. The defendant, J. E. Collins, was convicted in the superior court of Stevens county of the crime of assault in the second degree, and appeals from the judgment pronounced against him.

The assault for which the defendant was convicted was committed upon the person of one George Vath, Sr., on July 2, 1915. Shortly after the assault the defendant was taken into custody by one H. R. Pope, whose legal capacity to make arrests does not appear, and was brought before the justice of the peace of Loon Lake precinct, of the county named, where a written complaint was made by the person having the defendant in custody, purporting to charge the defendant with the crime of assault. The defendant was immediately put upon trial, and, according to the justice's record, "pleaded guilty to having struck George Vath, Sr., with his hand," whereupon the justice found the act illegal and against the peace and dignity of the state of Washington, and assessed a fine against him of \$1, together with the costs of the prosecution; the whole amounting to \$2.25. The defendant paid the fine and was discharged from custody.

Afterwards, and on the same day, the defendant was arrested on a warrant issued by a justice of the peace of another precinct in the same county, charging him with an assault in the third degree committed on the person of George Vath, Sr. Of this offense he was convicted by the justice, and sentenced to pay a fine of \$100, together with the costs of the prosecution. From the judgment of conviction he appealed to the superior court. When the record reached that court, the prosecuting attorney filed an information against him, based upon the justice's record, charging him with an assault in the second degree. To the information the defendant interposed a plea of former conviction or the same offense, and sought to sustain the plea by offering the record of the justice of the peace before whom the first of the proceed-

ings were had. This proffered evidence the trial court rejected, and its rejection constitutes the error relied upon for reversal on the appeal now before us.

[1-3] We think the ruling of the trial court right for at least two reasons:

First. The complainant on which the conviction was had before the justice of the peace did not state an offense. It merely charged that, in a quarrel between the defendant and George Vath, Sr., the defendant "did strike George Vath, Sr., with his hand," all of which could be true, and still no offense be committed under the statutes defining the offense of assault. In the absence of a statute to the contrary, there can be no lawful conviction or acquittal upon an information, indictment, or complaint which is insufficient to state an offense, and hence no plea of former jeopardy thereon. *State v. George*, 84 Wash. 113, 146 Pac. 378. The cited case also holds that we are without such a statute.

[4] Second. The proceedings before the justice were contrary to the plain mandate of the statutes governing the proceedings in such cases. These statutes, while providing that a defendant may plead guilty to any offense charged against him (Rem. Code, § 1929), also provide that in all cases where the offense charged involves an injury to a particular person, who is within the county, it shall be the duty of the justice of the peace to summon the injured person, and enforce his attendance at the trial, if necessary, and, further, that no justice shall assess a fine, or enter a judgment, until a witness or witnesses have been examined to state the circumstances of the transaction. *Id.*, §§ 1930, 1931. These statutes were ignored by the justice of the peace in this instance. The injured party was not summoned, although he was within the county, and it does not appear that any witness was sworn and examined, much less any witness who stated the circumstances of the transaction. The statutes have a purpose. They were intended to prevent the very thing that evidently occurred in the justice's court—the imposition of a nominal or an inadequate punishment for a grievous offense. The justice's proceedings, therefore, failed to show a legal conviction of the defendant, and hence there was no error in rejecting as evidence the record showing such proceedings.

The judgment is affirmed.

HOLCOMB, C. J., and MOUNT and TOLMAN, JJ., concur.

BRIDGES, J. (dissenting). I am unable to concur in that portion of the opinion of the court which holds that appellant cannot successfully raise the question of former jeopardy, simply because the complaint, technically read, failed to charge him with a crime. Here we have a man arrested upon a criminal

complaint, tried, found guilty, fined, and the fine paid. Later he is charged by information with the very crime of which he was convicted, and the judgment of which he has paid, and he is not permitted to plead former jeopardy, because the complaint upon which he was found guilty was insufficient to state a crime according to the rules of law.

This does not seem to me to be right or fair. Under that theory, one pays the penalty of a crime because he is unable to foresee that the courts will later hold that he was not legally convicted. If this rule is applicable to misdemeanors, it is likewise applicable to more serious offenses, and thus it might be that one would be required to serve two terms in the penitentiary for one offense. As I read the case of *State v. George*, 84 Wash. 113, 146 Pac. 378, upon which the court's opinion is largely based, it is not applicable to the facts of this case. It would be in point if the appellant had appealed from the judgment of conviction in the justice court, and the appeal court had held the complaint insufficient. In that case the defendant was convicted, he appealed to this court, and we held that the complaint did not state facts sufficient to constitute a crime and we ordered the case dismissed. He was later arrested and put to trial on a sufficient information. At that trial he entered a plea of former conviction, which was denied. Upon appeal we upheld that ruling. It seems to me that there is a vast distinction between that case and this one. Here the state, having caused the appellant's arrest and conviction, and having caused sentence to be imposed upon him, and required him to discharge the same, it is in no position to say that the whole proceeding amounted to nothing, simply because the complaint, under which he was convicted, did not legally charge a crime. In the case of *Commonwealth v. Loud*, 3 Metc. (Mass.) 328, 37 Am. Dec. 139, the facts were that the defendant, who was convicted in the court of the justice of the peace, and who paid the fine there imposed upon him, was thereafter indicted for the same offense, and on trial under the indictment offered to prove the record and proceedings of his prior conviction before the justice of the peace as a bar, which offer was denied him. I cannot do better, nor as well, than to give my ideas in the language of the court in that case:

"But in the case at bar the defendant waived any exception to the judgment, complaint, proceedings, or sentence, and he has performed the sentence. The commonwealth now desire to have those proceedings held for nothing, so that, by an indictment in technical and legal form, the defendant may be again tried and punished for the same offense of which he has been informally convicted. We cannot think that those proceedings before the magistrate were merely void. On the contrary, it is reasonable to believe that the complainant intended to prosecute for a larceny. The defendant

understood it so, and so did the magistrate. Now the judgment that the defendant was guilty, although upon proceedings which were erroneous, is good until the same be reversed. This rule of criminal law is well settled. \* \* \* But he might well waive the error, and submit to and perform the judgment and sentence, without danger of being subjected to another conviction and punishment for the same offense."

See, also, *Commonwealth v. Keith*, 8 Metc. (Mass.) 532; 8 R. C. L. 140.

I therefore dissent.

(112 Wash. 75)

**EMPSON PACKING CO. v. LAMB-DAVIS LUMBER CO. et al. (No. 15780.)**

(Supreme Court of Washington. Aug. 4, 1920.)

**1. Sales ¶29—Contract held not to have been executed by the parties.**

Where seller on receipt of contract signed by buyer made certain changes therein before signing it, and where buyer accepted such changes, but made other changes and insisted upon the contract without interlineations and erasures, and where, after additional changes were made, it was agreed that a contract, containing the terms on which the parties had then agreed, should be signed by the presidents of the respective companies, but no contract was ever so signed, there was no completed enforceable contract between the parties.

**2. Contracts ¶32—Parties acting under preliminary agreement bound, though formal contract never executed.**

Where the parties act under a preliminary agreement, they will be held to be bound, though a formal contract has never been executed.

**3. Sales ¶413 — Letters, showing original draft of contract not accepted, admissible under general denial.**

In buyer's action for breach of contract to deliver letters between the parties, showing that original draft of contract had never been accepted by either of the parties, held admissible under a general denial.

**Department 2.**

Appeal from Superior Court, Chelan County; Wm. Grimshaw, Judge.

Action by the Empson Packing Company against the Lamb-Davis Lumber Company and another. Judgment of dismissal, and plaintiff appeals. Affirmed.

Pershing, Nye, Fry & Tallmudge and Robert G. Bosworth, all of Denver, Colo, for appellant.

Fred B. Morrill, of Spokane, for respondents.

**MOUNT, J.** The purpose of this action was to recover \$14,138.63 for an alleged breach of a written contract between the

plaintiff and the defendants. The complaint alleged, in substance, that on the 8d day of November, 1916, the plaintiff and defendant entered into a written contract, by the terms of which the defendant Lamb-Davis Lumber Company bound itself to furnish to the plaintiff all its requirements of box shooks, not exceeding a total of 1,000,000 boxes, the various types of boxes and the width of lumber to be used being specified in the contract; that thereafter in accordance with the terms of the contract the plaintiff sent specifications and orders for more than 200,000 boxes, as required by the contract; that the defendant refused to ship the said box shooks, and the plaintiff was required to purchase the same in the open market at a loss of more than \$14,138.63 over the agreed price according to the terms of the contract. The defense was a general denial. Upon these issues the case was tried to the court without a jury, and resulted in a judgment of dismissal, and plaintiff has appealed.

The facts are as follows: In the year 1913 the Lamb-Davis Lumber Company, through its agent, Mr. J. P. Packham, entered into a three-year contract with the appellant for the sale of box shooks. In October, 1916, when the prior contract was about to expire, the Packham Sales Company wired the Lamb-Davis Lumber Company, asking quotations on box shooks to meet the appellant's future requirements. As a result of this telegram a written contract was prepared and dated November 3, 1916. This contract was signed by the appellant and handed to the respondent's agent, Mr. Packham, who sent the contract to the respondent for signature. Upon receipt of this contract the respondent made certain changes therein, and returned the contract signed as changed with a letter dated November 17, 1916, stating these changes and erasures as follows:

"When boxes are shipped without any printing on the ends or sides, the party of the second part is to be allowed twelve and a half cents per hundred boxes for all such blank shooks shipped," and also added to the sentence relative to the prices that shooks 'are to be f. o. b. Longmont, Colorado, or common points, based on the present rate of freight,' and also changed the paragraph regarding the material from which the shooks were to be manufactured by changing the words 'Oregon or Washington white pine' to read 'Western pine' and in the paragraph regarding the loading of cars inserted the words 'or rope' in the sentence providing that 'all shooks should be thoroughly bound with strong wire.'"

The words "party of the second part" above quoted refer to the appellant. On receipt of this letter the appellant answered as follows:

"Your letter of the 17th has been forwarded to me at this place from our Longmont office,

also contract for box shoos which I signed before I left Longmont. I think it would look better to have a new contract entirely instead of so many changes in the old one. I am therefore sending you them in duplicate. I see no objections to making the various changes you speak of, although I want them a little clearer so long as you suggest that they be made at all. \* \* \* In regard to adding that your price delivered to our factory is based on present rate of freight, will say that it is satisfactory to us, but to make that a little clearer we have stated we will pay the excess freight, if any, over the present rate, and if the rates decline we were to have the advantage of the decline. \* \* \* In regard to the material as we specified in the contract our stenographer copied contract we last made with you. If you prefer to use the words 'Western pine,' however, we have no objection to your doing so; but to make it clearer we have added, 'the material furnished under this contract is to be of the same kind and of the same quality as furnished to us during the years 1914, 1915 and 1916.' \* \* \* In regard to tying the boxes, we formerly had them tied with rope and a great many bundles would get broken and boxes would be damaged in transit; for that reason we changed our contract to read wire instead of rope, but as you are responsible for the delivery of goods to us in good order you can tie them any way you see fit. Any expense that would accrue to us in handling by reaching us in bad condition will, of course, be charged to you. I believe this covers all of the points that you speak of."

To this letter the Lamb-Davis Lumber Company replied by letter of December 18, 1916, as follows:

"We are inclosing herewith revised copy of our canning case contract, duly signed by Mr. George L. Gardner, as attorney in fact for the Lamb-Davis Company. The delay in returning this contract has been caused by Mr. Gardner having just returned from the East, and before signing the contract had it examined by our attorneys, who recommended the changes which we have made.

"We have taken the liberty to make changes as suggested by the attorney and have changed the wording to make more clear the intent of the different paragraphs changed. For instance, the paragraph relative to dating in the old contract, specified that shipments might begin at any time desired after February 1st of each year, provided the first car shipped was billed May 15th and all cars shipped after that date to be billed as much later than May 15th as the various shipments are later than the first shipment. We have changed that paragraph to read that the party of the first part may begin shipments at any time between February 1st and May 15th of each year, provided that all cars shipped prior to May 15th bear May 15th dating, and all subsequent shipments bear regular dating. This is the intent of the paragraph mentioned and is the manner in which it has always been interpreted by both parties of the contract. \* \* \* Would like to have you acknowledge receipt of the contract and your acceptance of the changes, which we will attach to our copy of the contract in order to show that the changes have met with your approval."

To this letter appellant replied by letter dated December 28, 1916, which letter contained the following:

"Your letter of the 18th, inclosing contract, received, and it would have had an earlier reply had it not come along the holiday season. \* \* \*

"We see no objection to the minor changes you have made in the contract. There is one clause where you say that deliveries shall be within a reasonable length of time after receipt of the order. What might seem reasonable to you might be very unreasonable to us, and we think you should specify a certain amount to be delivered each week after receipt of order, although we will not insist upon that, as we have had no difficulty until last fall, and you tell us that you are in shape to ship more promptly in the future. Our attorney tells us, though, that the contract should be signed by president of your company and the official seal should be attached. We therefore return them to you for this correction. Kindly get them to us with this change made as soon as possible. We will return and attach our seal as soon as possible. We seem to have considerable difficulty to get these contracts in good shape this year, but as they are running for some time we feel that we ought to be careful to have them right."

In answer to this letter the respondent replied by letter dated January 3, 1917, in part as follows:

"We acknowledge receipt of your favor of the 28th returning contracts, and wish to advise that it will be some time before we can return these contracts to you, as the president of this company is in the East, and the contracts will have to be sent to him for his signature."

These contracts appear never to have been signed. The appellant, relying upon the first draft of the contract, which was signed, sought to order box shoos as therein required and the respondent declined to furnish box shoos under the contract. Appellant then purchased the box shoos in the open market. This action resulted.

[1] Upon the trial of the case the trial court was of the opinion that the first draft of the contract was a completed contract, and that the subsequent modifications amounted to an abrogation of the original contract. We are of the opinion that the trial court was in error in holding that the first draft of the contract, which was signed by both parties, was a completed contract. We think it is clear from the evidence that a completed contract was never executed by the parties thereto. It is plain from the last letter above quoted, which was written by the appellant to the respondent, that it was the intention of the parties to have a formal written contract, signed by the presidents of both companies, with the seal attached. No such contract was ever signed. We think the evidence is plain to the effect that the parties were endeavoring to reach a satisfactory agreement. The original draft

of the contract was reduced to writing. It was signed by one of the parties, and forwarded to the other. The other, before signing, made certain changes therein, signed it, and forwarded the contract with these changes to the other party. The other party, while accepting the changes, made other changes, and insisted upon a contract without interlineations and erasures. It was then sent to the other party, and additional changes were made therein, and it was finally concluded that after the parties had agreed upon all of the terms of the contract that it should be signed in a certain way by the president of the respective companies. It was never so signed. We are of the opinion, therefore, that there was no completed enforceable contract entered into between the parties.

In the case of *Schulze v. General Electric Co.*, 184 Pac. 342, quoting from an earlier case, we said:

"An offer by one party, assented to by the other, will generally constitute a contract, but the assent must comprehend the whole of the proposition. It must be exactly equal to its extent and terms, and must not qualify them by any new matter. A proposal to accept, or an acceptance of, an offer on terms varying from those proposed, amounts to a rejection of the offer."

Under this rule, when the original contract signed by the appellant was sent to the respondent and changes made therein, that amounted to a rejection of that proposed contract. And so all the way through the different changes by the different parties amounted to rejections of those provisions previously proposed. When all the terms were finally agreed to the appellant insisted that the completed contract should be signed by the president of the respondent company with the seal attached.

In the case of *Sparks v. Mauk*, 170 Cal. 122, 148 Pac. 926, it was said:

"It is next asserted that the contract contemplated a signing by both parties; that plaintiff did not sign; that the contract is not complete and therefore unenforceable. It is the undoubted rule that where the contract contemplates the execution of it by signing, either party has the right to insist upon the condition, and mere acts of performance on the part of one who has not signed will not validate the contract."

In *Aftergut Co. v. Mulvihill*, 25 Cal. App. 784, 145 Pac. 728, it is said:

"And as it was the expressed intention of the parties that it should be reduced to writing and signed by them, certain it is that, this stipulation not having been performed, the contract cannot be regarded as binding on either of the parties."

In *Barber v. Burrows*, 51 Cal. 404, the rule is to the same effect.

See, also, *Morrill v. Mining Co.*, 10 Nev. 125; *McDonnell v. Coeur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135.

[2] Since the contract was never completed it was not enforceable by one against the other. The trial court seemed to be of the opinion that *Hunter v. Byron*, 92 Wash. 469, 159 Pac. 703, controlled, and that the mere signing of the original contract by the parties constituted an effective agreement. That no doubt would have been true if there had been no modification of the terms of the original contract. In the case of *Hunter v. Byron* the contract was acted upon, and for that reason made a binding contract. Where the parties act under a preliminary agreement, they will be held to be bound, notwithstanding the fact that a formal contract has never been executed. 6 R. C. L. p. 619.

[3] The appellant argues that the trial court erred in receiving in evidence the letters above referred to, because the answer of the respondent was a general denial, and there was no affirmative defense to the effect that the original contract had been abrogated. The effect of these letters was to show that the original draft of the contract had never been accepted by either of the parties, and therefore, we think, were admissible in evidence under a general denial. In this view of the case it is unnecessary to notice the other assignments of error.

The judgment appealed from must be affirmed because there was no completed contract.

FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

HOLCOMB, C. J. I concur in the result, agreeing with the trial court that the first draft of the contract was a completed contract, as to form and substance. The subsequent correspondence resulted in finally materially modifying the original contract, but which modifications were not executed in manner and form as contemplated and required by the parties, leaving them without a completed contract in writing.

(112 Wash. 197)

## In re UTTER'S ESTATE.

## MARSHALL v. PRESCOTT. (No. 15865.)

(Supreme Court of Washington. Aug. 11, 1920.)

1. Executors and administrators  $\Leftrightarrow$  17(6)—Appointment of creditor as administrator within 40-day period following decedent's death proper in absence of others qualified to act.

Where there was no surviving wife or heir eligible to appointment as administrator under Probate Code, § 87, requiring administrator to be a resident of the state, the appointment of a creditor within the 40-day period following decedent's death on petition containing all the essentials necessary to give the court jurisdiction under section 62 was proper; a delay of 40 days before appointment of administrator being unnecessary in such case.

2. Executors and administrators  $\Leftrightarrow$  17(7)—Heir other than surviving spouse cannot nominate another.

An heir's right of preference to appointment as administrator under Probate Code, § 81, is a preference to appointment only, and does not entitle her to nominate another to be appointed; the right to nominate another extending only to the surviving spouse.

## Department 1.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

In the matter of the estate of Joseph Utters, deceased. From order appointing F. L. Prescott, administrator, and refusing to appoint nominee of Anna Marshall, deceased's next of kin, Anna Marshall appeals. Affirmed.

King & Kerr, of Spokane, for appellant.

F. A. McMaster, of Spokane, for respondent.

MITCHELL, J. An appeal has been taken from an order disposing of conflicting petitions for the appointment of an administrator of the estate of Joseph Utters, deceased. A duly verified petition was filed in the superior court of Spokane county wherein it was alleged that Joseph Utters died intestate on February 17, 1920, in and a resident of Spokane county, leaving estate in that county; that the next of kin and heir at law of the deceased was a sister, — Marshall, residing in New York; that the petitioner was one of the principal creditors of the deceased; and that the deceased left surviving him no wife or children living within this state. The petition asked for the appointment of F. L. Prescott, of Spokane, as administrator, and that notice of the petition and hearing thereon be given as required by law. Proper notice of hearing the petition was given. Another creditor by petition joined in the application for the appointment of F. L. Pres-

cott, who also filed a petition for the appointment of himself as administrator. Some days later a petition for the appointment of another party, a resident of Spokane, was filed by Anna Marshall, wherein, objecting to the appointment of Prescott, she alleged, among other things, that she was a resident of New York, a sister of the deceased, and that the only other heirs at law of the deceased were certain sisters, nephews, and nieces residing in Germany. Other and formal written objections to the appointment of Prescott were filed by her, and also by her attorneys, alleging that she had a preference right of appointment which she exercised by her application for the appointment of the party designated in her petition; that 40 days had not elapsed after the death of the decedent when the creditor's petition was filed; that the so-called creditor was not a creditor within the terms of the applicable statute, nor entitled to nominate an administrator; and that said Prescott is not a fit and suitable person to act as such administrator. Later the cause came on for hearing with all the parties present. Renewed objections to the consideration of all the petitions other than that of Anna Marshall were overruled and testimony taken. The court entered findings, among other things, to the effect that the decedent died in and a resident of Spokane county on February 17, 1920, leaving estate therein consisting of real and personal property; that at the time of his death he was a bachelor, and no father or mother survived him; that he had no brother or sister or survivor of such living within the state; that said F. L. Prescott is a resident of Spokane, and for 20 years immediately preceding the death of said Utters had full charge of and managed the estate and property of Joseph Utters as if it were his own at the request of said Utters, rendering regularly quarterly statements, of his services to the satisfaction of said Utters, and that said Prescott is a proper and suitable person to act as administrator; that the next of kin and only heirs at law of the deceased are Anna Marshall, a sister, of New York City, one nephew residing in New York City, and certain other named sisters, nieces, and nephews residing in Germany. The court also found that the party suggested for appointment in the petition of Anna Marshall was a resident of Spokane and a proper and suitable party to be appointed administrator. The court concluded to appoint F. L. Prescott, and entered a judgment and order upon the findings and conclusion, and appointed him as administrator of the estate. All of the proceedings, including the order, were had and made within 40 days after the death of Joseph Utters.



[1] Upon her appeal Anna Marschall contends that the court was without jurisdiction to entertain the petition for the appointment of Prescott within 40 days after the death of the decedent. But we are of the opinion the contention cannot be maintained. The first petition filed was in the form prescribed, and contained all the essentials necessary to give the court jurisdiction, by the terms of section 62, c. 156, Laws of 1917, known as the Probate Code; and when it appeared, as it did by the petitions, including the one filed by the appellant, that there was no surviving wife, nor any heir at law eligible to appointment under section 87 of the Probate Code, since all of them were nonresidents of the state, a situation was presented that obviated any necessity for a delay of 40 days in proceeding to exercise jurisdiction by the appointment of an administrator.

[2] It is further contended that, "appellant having nominated, within 40 days, a suitable and competent person as administrator, it was the duty of the court to appoint such nominee." The order of preference in the appointment of an administrator is designated in section 61 of the Probate Code. So far as it is material here, it provides:

"1. The surviving husband or wife, or such person as he or she may request to have appointed. 2. The next of kin in the following order: 1, child or children; 2, father or mother; 3, brothers or sisters; 4, grandchildren."

It is to be observed that subdivision 1 gives to a surviving husband or wife the right to nominate another for appointment by the court, while subdivision 2 is silent upon the subject of any such right on the part of the next of kin. The right accorded the next of kin is a preference to appointment only, in the order named, all of whom are preferred over persons described in subsequent subdivisions of the section. provided, of course, such next of kin are not nonresidents of the state, for in such case they are not qualified under section 87 of the Probate Code. A suggestion made by the next of kin of a fit and suitable person for appointment as administrator, while fraught with considerable persuasion, is not controlling in shaping the discretion and judgment of the court making the appointment. In this case there was abundant and convincing evidence to support the selection of F. L. Prescott to act as administrator. The judgment to that effect from which the appeal has been taken will not be disturbed.

Affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and MACKINTOSH, JJ., concur.

(113 Wash. 101)

AMERICAN SAV. BANK & TRUST CO. et al. v. PETERSON. (No. 15745.)

(Supreme Court of Washington. Aug. 6, 1920.)

1. Executors and administrators  $\S$  437(7)—Rules incident to negotiable paper not rendered inapplicable by presentation, when rejection or notice of rejection does not appear.

In an action against an executrix on a note secured by a mortgage, the contention that the note was no longer of any effect, and the rules incident to negotiable paper could not apply because of failure to sue on the note within the time fixed by statute after its presentation to the executrix, could not be sustained, where the record did not show rejection, or notice of rejection, of the claim, as required by Laws 1917, c. 156,  $\S$  109.

2. Banks and banking  $\S$  312½, New, vol. 6A Key-No. Series—Note and mortgage for trust company stock not without consideration, though stock proved to be of little value.

Note and mortgage given for stock in a trust company were not subject to the defenses of want or failure of consideration, though the company's assets were no more than sufficient to cover its liability and pay 2 or 3 per cent. to stockholders, where the purchaser had been vice president for one month, and had every opportunity to learn the company's conditions, and no representations regarding the value of the stock were made.

Department 2.

Appeal from Superior Court, Okanogan County; C. H. Neal, Judge.

Action by the American Savings Bank & Trust Company and another against Lena Gertrude Closky Peterson, executrix of W. M. Peterson, deceased. From a decree for plaintiffs, defendant appeals. Affirmed.

Kerr & McCord, of Seattle, and Johnson & O'Connor, of Okanogan, for appellant.

J. Henry Smith, P. D. Smith, and W. C. Brown, all of Okanogan, for respondents.

TOLMAN, J. This action was brought by respondents as plaintiffs to foreclose a mortgage upon certain real estate in Okanogan county, given by M. W. Peterson, since deceased, to secure the payment of a note for \$25,000 and interest, dated September 13, 1916. From a decree of foreclosure this appeal is prosecuted.

It appears that on August 10, 1915, one Phillips entered into a contract with respondent Murray to purchase from him 1,519 shares of the capital stock of the Bankers' Trust Company of Tacoma (being a majority of the stock of that company), at the agreed price of \$150,000. The stock being placed in escrow with the respondent, American Savings Bank & Trust Company of Seattle, and prior to the entry of Peterson into the transaction \$50,000 had been paid on this contract, and the remaining \$100,000 and accrued in-

terest was due. Peterson, who had been a lifelong banker of excellent reputation and standing, theretofore holding important positions with banks in Seattle and Portland, became connected with the Bankers' Trust Company as vice president about a month before he executed the note and mortgage, and assumed an active part in the management of its affairs, and had ample opportunity to ascertain its condition. Under these circumstances he entered into an agreement with Phillips to take over the contract of purchase of the stock from Murray for the amount then due Murray, plus \$25,000, or \$25,000 less than Phillips agreed to pay for the stock, and the note and mortgage in suit were executed by Peterson at the place of business of the American Savings Bank & Trust Company, to the order of Phillips, representing the payment to him, and were immediately assigned by Phillips to the respondents, first as collateral security for a note for \$10,000 owing by Phillips to the American Savings Bank & Trust Company, and, second, as collateral security on the Murray contract; the time for the payment of the remaining amount then due on the Murray contract being thereupon, in consideration of the giving of such collateral, extended for one year.

Thereafter both Phillips and Peterson appear to have been interested in providing funds to pay the balance still owing Murray. Phillips appears to have gone East, holding out the expectation that he would procure eastern capital to take up the stock, in which, however, he did not succeed. Peterson hoped to enlist a bank in Portland with which he had formerly been connected, but was disappointed, and thereafter at one time seems to have thought that he could effect such improvement in the affairs of the bank as to enable him to interest Tacoma capital, and later he appears to have placed his reliance upon obtaining the money from a mining venture in British Columbia, in which he was interested, but which proved a failure.

The affairs of the Bankers' Trust Company appear to have lacked something of being in a prosperous condition when Peterson made the purchase, and for some months under his management there was little, if any, change either way. Early in the year 1917 bank failures occurred in Seattle, and as a consequence deposits were withdrawn from the Bankers' Trust Company, its condition became critical, the Clearing House Association had to come to its assistance, and Peterson was forced out of the management. Still later it was taken over by, and consolidated with, the Scandinavian-American Bank of Tacoma. The record shows that its assets were no more than sufficient to cover its liabilities and pay to the stockholders perhaps 2 or 3 per cent. on the par value of their stock.

Before the year's extension expired, Peterson died testate, his will was admitted to pro-

bate, appellant was appointed executrix, and failing to pay either the amount due the respondent Murray or the interest on the mortgage note when it became due on September 13, 1917, Murray obtained a judgment against Phillips, sold the stock on execution, himself becoming the purchaser, and because of the failure to pay the annual interest, under an option contained in the note, the whole amount of the mortgage note was declared due. A claim for such amount was filed with the executrix, and upon her failure to act thereon this action was commenced.

The defenses pleaded and urged below were: (1) Want of consideration; (2) fraud, undue influence, and want of mental capacity on the part of Peterson to execute the note and mortgage; (3) failure of consideration.

[1] In addition to these questions it is urged here for the first time that the note is nonnegotiable, and therefore subject to defenses as though held by the original payee, and that a claim for the amount due was presented to the executrix, rejected by her, no suit was brought thereon within the time fixed by the Probate Code, and that therefore the note, as a negotiable instrument, is no longer of any effect; that the right to proceed under the mortgage alone remains, and that the rules incident to negotiable paper can no longer apply. We do not think either point well taken. The note is in the usual form, and when read as a whole presents nothing which would bar its negotiability. The record is silent as to any rejection, or notice of rejection, of the claim by the executrix, as required by section 109 of chapter 156, Laws 1917, and in any event the view we take of the evidence renders this point immaterial.

We have read with great care the conflicting evidence as to the mental condition of Peterson at, before, and after the time of the execution of the note and mortgage, and while his mentality might have been somewhat impaired at the time he entered into the obligation, as compared with what it had been when he was at his best, we are satisfied that he was then competent to do business and manage his affairs. The evidence as to incompetency, as we view it, is tinctured with the very human element sometimes called "hindsight," and, in view of the fact that afterwards, when the progress of the disease was such that he broke down physically, he also broke down mentally, it is easy to see how honest men, looking back to incidents regarding which, as they affected Peterson, they might not have been fully informed, may have honestly concluded that he was then so far mentally affected as to be incompetent to manage his affairs.

[2] As to the defenses of want of consideration and failure of consideration, we can-

not find that the proof sustains either. Peterson, a successful banker of lifelong experience, was without occupation, and, looking about for an opening, he went to the Tacoma bank as vice president a month before he purchased. He had every opportunity to learn the bank's condition for himself, and so far as the record shows no one, then or at any time, made any representations to him whatever regarding the value of what he afterwards bought. He may, with reasonable accuracy, have discovered the true condition of the bank at that time, and yet have believed that care and skill would quickly restore its prosperity, and that as a going concern the stock was worth much more than its book value, and would prove a profitable investment on the terms offered. That he had insufficient capital to handle the matter alone, and must interest others to take over the obligation, in whole or in part, within the year before the main portion of the purchase price became due, would not necessarily cause a capable man of affairs to hesitate. Fortunes are often made by taking such chances, and, could he have sold at par within the year, he would have gained a clear profit of \$25,000, or an even 100 per cent. on the amount which he hazarded. We are satisfied that, under the evidence fairly and dispassionately considered, the result reached by the trial court was right. The judgment is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(112 Wash. 93)

IN RE ADIN'S ESTATE. SELLARS et al. v. ROOT et al. (No. 15823.)

(Supreme Court of Washington. Aug. 6, 1920.)

1. Appeal and error  $\S$  337(3)—Appeal held not prematurely taken, notwithstanding motion for new trial by adverse parties.

Appeal from a portion of a decree was not prematurely taken, though adverse party thereafter filed motion for new trial, directed to the entire cause, where that portion of decree from which appeal was taken was favorable to such adverse parties, since parties cannot complain on motion for a new trial of portion of judgment in their favor, under Rem. Code 1915,  $\S$  399.

2. New trial  $\S$  116(2)—Motion held not timely, though made day following entry of judgment.

Motion for new trial, though made day following entry of judgment, was made too late, under Rem. Code 1915,  $\S$  402, requiring motion two days after notice of decision, where movants had been given notice in writing of the decision of the court long prior to motion, and findings of court were filed more than two days before motion.

Department 2.

Appeal from Superior Court, Skagit County; Ed E. Hardin, Judge.

In the matter of the Estate of George Adin, deceased. Proceedings by Lucy Sellars and others to contest will against Anna Evelyn Root, Severene Olson, Edward Crandell and others. From a portion of the decree rendered, defendants other than two last-named defendants appeal. On motion to dismiss appeal. Motion denied.

Robt. Devers, of Seattle, R. V. Welts, and Coleman & Gable, all of Mt. Vernon, and Edw. Judd, of Seattle, for appellants.

Shrauger & Henderson and Thos. K. Chambers, all of Mt. Vernon, for respondents.

FULLERTON, J. On September 16, 1916, one George Adin, then a resident of Skagit county, died, leaving an estate therein consisting of real and personal property. Adin left a will in which he named one Milo A. Root as one of his principal beneficiaries, naming him also as the executor of the will. The will was duly probated, and letters were issued to Root, appointing him and confirming him as executor of the estate. Root took up his duties as such executor, and was proceeding with the administration of the estate in accordance with the terms of the will when he died; his death occurring on January 11, 1917. Thereafter Severene Olson and Edward Crandell were appointed administrators of the estate with the will annexed.

On September 29, 1917, the respondents, heirs at law of George Adin, instituted proceedings in the court where the administration was pending in contest of the will, averring in their petition want of mental capacity on the part of Adin to make a will, and undue influence exercised over him by Root and others of the devisees whereby he was induced to name them as devisees. The heirs at law of Root were made parties defendant as the representatives of his interests, and they, with others of the devisees, took issue on the allegations of the petition. The cause was tried before a judge called in from a neighboring county. At the conclusion of the trial the judge took the cause under advisement, and later on prepared findings of fact and conclusions of law, announcing his decision. Copies of these he caused to be mailed to counsel representing the several parties to the proceedings, accompanied by a letter to the effect that the original of the findings and conclusions would be filed with the clerk of the court on September 8, 1919. The original findings and conclusions were forwarded to the clerk, and that officer filed them as directed on the day named in the letter of the judge. Two days later the contestants filed exceptions to such

of the findings and conclusions as they deemed adverse to their interests. The findings confirmed the bequests as to all of the devisees, save the bequest to Root. A decree in accordance with the conclusions of the judge was entered in the cause on September 17, 1919, and at that time the heirs at law of Root gave notice in open court that they appealed from that part of the decree which held the devise invalid as to the devisee Root. On the next day the contestants filed a motion for a new trial, basing their motion upon certain of the statutory grounds found in section 399 of the Code (Rem.). The motion was directed to the entire cause; the issues therein determined in favor of the contestants, as well as the issues determined against them.

The appellants afterwards perfected their appeal in this court, and the contestants now move to dismiss the appeal on the ground that it was prematurely taken. In support of the motion the contestants argue that, since the statute grants the right to move for a new trial in causes of equitable cognizance as well as those legal, a motion therefor, timely made, stays the operation of the judgment, and prevents it from becoming final until the motion is disposed of, and that, since appeals may be taken only from final judgments, any appeal taken prior to the time the right to file such a motion expires is premature. But to this we think there are at least two sufficient answers:

[1] First, it is only a party aggrieved by a verdict or decision who may move for a new trial (Rem. Code, § 399), and the parties moving in this instance are not aggrieved by that part of the judgment from which this appeal is prosecuted. This part of the judgment is in their favor. The issues respecting it were determined in accordance with their contentions, and in accordance with the prayer of their petition. By a new trial they could obtain no more favorable relief than they now have, and plainly have no grievance because of the judgment of which they can legally complain.

[2] Second, the motion was not timely made. By the Code (Rem. § 402) it is provided that the party moving for a new trial must, within two days after notice in writing of the decision of the court where the action is tried without a jury, file with the clerk and serve upon the adverse party his motion for a new trial, designating the grounds upon which it is made. In this instance notice of the decision of the court and of the day the findings and conclusions evidencing the decision would be filed with the clerk was given the contestants long prior to the entry of the judgment. That they had actual notice of such filing in time to file such a motion prior to the entry of the judgment is evidenced by the fact that

within two days after the findings and conclusions were filed they took formal exceptions thereto in writing, and filed the same in the cause. It may be that they were entitled to delay the motion until the findings and conclusions were made certain by a formal filing with the clerk, but plainly they were required to file their motion for a new trial within two days after such time. State ex rel. Payson v. Chapman, 35 Wash. 64, 76 Pac. 525. It is true we have held that in actions of equitable cognizance formal findings of fact and conclusions of law, while proper, are not necessary, and have held also that where a judgment in such an action is filed without findings, or where findings are made, but are filed at the same time the judgment is filed, a motion for a new trial is in time if made within two days after notice thereof is given, although made after the entry of the judgment. But the principle involved in these cases does not aid the contestants here. The decisions are founded on the necessities of the case; it is so held that substantial rights granted by statute may not be denied a litigant. But where necessity ceases the rule ceases. Where a litigant can comply with the requirements of the statute he must comply.

For the reasons stated, we conclude that the motion to dismiss must be denied; and it is so ordered.

HOLCOMB, C. J., and MOUNT, TOLMAN, and BRIDGES, JJ., concur.

(113 Wash. 1)

**SAMPSON v. SAMPSON.** (No. 15767.)

(Supreme Court of Washington. July 26, 1920.)

1. Divorce  $\S$  254—Orders refusing to allow husband to sell community property, etc., not erroneous.

Orders which refused to confirm a husband's attempted sale of community property without notice under leave to sell granted in the original divorce decree, which decreed the property to belong to the infant child of the marriage, and which removed the husband as guardian of the child's estate, held not improper, or an abuse of the court's discretion.

2. Divorce  $\S$  299—Order refusing to allow husband to see child, except in juvenile court, not improper.

Where it appeared that previous attempts by the husband to visit his minor child had failed, because of difficulties and misunderstandings, the husband cannot complain of an order providing for the bringing of the child into the juvenile court for visiting.

3. Divorce  $\S$  286—De novo review on appeal.

On appeal from orders in divorce case relating to sale of property, etc., the appellate court hears the matter de novo.

## Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam and Boyd J. Tailman, Judges.

Action by Nancy V. Sampson against John W. Sampson, in which plaintiff obtained a divorce. From orders refusing to confirm appellant's attempted sale without notice under leave to sell in original decree, etc., John W. Sampson appeals. Orders affirmed.

Walter G. Kienstra, Winter S. Martin, and Ray M. Wardall, all of Seattle, for appellant.

HOLCOMB, C. J. The parties to this action were formerly husband and wife, and, commencing with the proceeding in which their divorce was decreed, they have been before the superior court a number of times on account of various controversies concerning their minor child, Mildred Louise Sampson, and certain property. Appellant is guardian of the estate, and respondent guardian of the person, of their child.

John W. Sampson brings this appeal from orders of the court refusing to confirm appellant's attempted sale without notice, under a leave to sell granted in the original decree, of community real property previously decreed to belong to the child, refusing to modify the decree of divorce, so as to give him the custody and guardianship of the child or to give him the right generally to sell the property for the child's benefit, should the necessity arise, and modifying the decree of divorce, so as to prohibit appellant from seeing the child, except through the medium of the juvenile court, and remove him as guardian of the child's estate.

The parties intermarried in 1904 in the state of West Virginia, and have since 1906 resided in King county, Wash. The minor child is the only issue born of the marriage. The real property consists of two lots in the city of Seattle and the structures thereon, these being a five-room cottage on the front of the premises and a small three-room cottage, originally intended as a woodshed, on the rear of the lots. Respondent and the child were living in the smaller house during most of the time the difficulties of the parties were before the court; while the larger house on the front of the lots was rented, and the rental used to make payments on a mortgage and for taxes. The property seems to have been acquired largely by the earnings of appellant, who is a laborer. The court found the real property to be of the value of about \$2,000, with a mortgage thereon of about \$200, and the household goods and equipment to be worth about \$500.

Counsel for appellant suggests that the following three questions are to be determined: Whether respondent is morally fit to have the custody of the child; whether

the court should have confirmed the sale of the real property attempted to be made by appellant; and whether the court should have removed appellant as guardian of the child's estate.

[1] A careful scrutiny of the record reveals much testimony in which there is sharp conflict on practically every question. Assertions on the one side are met with denials on the other; and, as is too often true in such cases, there are many accusations and recriminations. Several affidavits were filed to substantiate certain allegations made. Since the original decree of divorce, the mother has had custody of the child, and, although several judges of the trial court saw the parties and heard the testimony in the various proceedings that were instituted, none of them saw fit to modify the original decree to the extent of taking the child away from its mother and giving it to the father. True, respondent was charged with certain acts of an improper or immoral nature; but we do not think the charges were substantiated by the evidence. It was alleged that she remained away from home late nights and left the child alone in the house; but respondent explained that there were times when, because of appellant's failure to promptly pay the monthly sums of money toward the support of the child, which the court had ordered him to do, she found it necessary to go out nights to work in various capacities and places, and her testimony went to show that on such occasions the child was left with a neighbor and was well cared for.

In support of his contention that the sale of the real property should have been confirmed, appellant urged the necessity of caring for the mortgage, taxes, and probable assessments for local improvements, such as paving, grading, and sewers; that the house was often vacant; that it was in need of repairs, which would be expensive; and other reasons why it would be advisable to sell the property and devote the proceeds to the care of the child. But respondent claimed that appellant by his acts interfered with the renting of the house, when she had a tenant ready and willing to pay a good rental, and that it would be poor business policy to sell the property and reinvest the money derived from its sale, when the return on such investment could not possibly equal the sums that ought to be secured by renting the property. She insisted that such income would enable her to take care of taxes and similar expenses. The trial court was evidently of the same opinion.

In regard to the removal of appellant as guardian of his child's estate, it is argued that this was done by the court contrary to appellant's wishes and without any proper showing that a change would be agreeable to him. However, there is evidence sufficient to

justify the court in finding that the interests of the child would best be safeguarded by putting the guardianship of her estate in the hands of some one other than appellant, and, after all, the child's interests must be the chief consideration. We are not convinced that the court abused its discretion in this respect, or that the appointment of a new guardian for the child's estate is likely to prove in any way detrimental to either the child or appellant.

[2] On the question of appellant's objection to being allowed to see his child only by having it brought to the juvenile court, it is clear that the trial court, in view of testimony showing that on several occasions attempts at visitation had failed because of difficulties and misunderstandings, was but endeavoring to find the most convenient way for appellant to see his child regularly.

[3] We are unwilling, nor do we think it is necessary, to set out in this opinion one or two more or less disagreeable details appearing in the record of this case, as in so many cases of a similar nature. No good can be done by the recital in an opinion of this kind of allegations concerning the frailties of human nature, especially when the truth of some of them must of necessity be doubtful. Each case like this is usually dependent upon its own particular facts for the proper solution of the problems it presents. The trial court has the advantage of an environment which no record can exactly reproduce here. This case is before us for trial de novo, and we have tried the whole case upon its merits. Our perusal of the record has failed to convince us that the evidence was insufficient to support the conclusions reached by the trial court.

We find no error, and the orders appealed from are accordingly affirmed.

FULLERTON, MOUNT, TOLMAN, and BRIDGES, JJ., concur.

(112 Wash. 26)

ERICKSON v. KENDALL. (No. 15886.)

(Supreme Court of Washington. July 28, 1920.)

**1. Mortgages  $\S$  249(2)—Mortgagor need not look beyond records for assignments.**

Since the passage of Rem. Code 1915,  $\S$  8781, a mortgagor is not legally bound to look beyond the records in the office of the county auditor for assignments of the mortgage there of record, and has a perfect right to presume that no assignment has been made, where not appearing there, so that payment to the original mortgagee is valid, in the absence of actual notice.

**2. Mortgages  $\S$  249(2)—Assignee of mortgage estopped to deny satisfaction.**

Assignee of mortgage, who clothed mortgagee with apparent indicia of title, held estopped to deny the satisfaction of the mortgage; mortgagee having extended the mortgage a number of years with the knowledge of the assignee, mortgagor not being bound to see that the money he paid to the agent and original mortgagee actually went to the lawful holder of the mortgage, the assignment of the mortgage not being recorded, and the mortgagor having every reason to believe that the original mortgagee was the lawful holder, in view of Rem. Code 1915,  $\S$  8781.

**Department 1.**

Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Albert Erickson against Sarah Kendall. Judgment for plaintiff, and defendant appeals. Affirmed.

Roberts & Skeel and J. J. Geary, all of Seattle, for appellant.

Milo J. Loveless, of Seattle, for respondent.

HOLCOMB, C. J. On June 28, 1910, Harley H. Wells and wife, being then the owners of lot 22, block 9, Madison Park addition to Seattle, borrowed \$750 from one P. C. Ellsworth. To secure the indebtedness, evidenced by a note, they gave Ellsworth a mortgage on the property. This mortgage, which was payable 2 years after date, or June 28, 1912, was recorded on July 1, 1910. On July 8, 1910, Ellsworth assigned the mortgage to Dr. Sarah Kendall, which assignment was not recorded until nearly 9 years later, or February 21, 1919. On September 27, 1911, plaintiff purchased the property from Wells and wife, the consideration being \$1,600, \$850 of which was payable in monthly payments; the grantee to assume the mortgage of \$750. Ellsworth at this time informed Erickson that he was the owner of the mortgage. From the date of the maturity of the mortgage debt, Erickson asked and secured of Ellsworth several extensions of the mortgage; final payment being made by Erickson to Ellsworth on January 8, 1919, when Ellsworth gave Erickson a receipt showing payment in full of the mortgage, and written on the receipt were the words, "To be satisfied of record." He also assured Erickson at that time that the mortgage would be satisfied of record within 10 days. On February 19, 1919, Ellsworth went into bankruptcy, and 2 days later Dr. Kendall filed of record her assignment of the mortgage. Plaintiff brought this action for satisfaction and cancellation of the mortgage, on the theory that payment had been made to Ellsworth. From the judgment of the court in favor of plaintiff, defendant has appealed.

From the evidence it appears that respondent did not know that the mortgage had been assigned to appellant. It further appears that Ellsworth was the trusted agent of appellant, who had from time to time invested a considerable amount of money in real estate mortgages through him; that she received payments of interest through him, and had in a number of instances received payment of the principal of other mortgages through him. Appellant admits that in every case she took possession of the note, mortgage, and assignment; that, when a mortgage would become due her, Ellsworth, as her agent, would notify her that the debtor was about to pay, and she would then go to his office with the note, mortgage, and assignment, and deliver those papers, together with formal satisfaction of the mortgage, to Ellsworth, upon receiving payment either in money or in the form of a new mortgage. No part of the principal of the mortgage in question was ever paid by Ellsworth to appellant.

[1] When respondent bought the property in September, 1911, he caused an abstract of title to be prepared, and had it examined by a firm of attorneys, who informed him that their examination of the abstract disclosed that title to the property was at that time in Harley H. Wells, and that it was subject to the mortgage of Ellsworth and certain special assessments. In having the title searched, respondent did all that the ordinary person would have done, or could have been expected to do, under the circumstances. It will be remembered the mortgage was assigned to appellant some time in July, 1910, more than a year before respondent purchased the property. If at any time within that period appellant had filed her assignment of record, that fact would have appeared in the abstract which respondent procured, and would have been notice to him that she was the owner of the mortgage. Section 8781, Rem. Code, provides that:

"All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world."

Prior to the enactment of the above statute, we held in *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, and in *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742, as contended for by appellant, that, record of assignments of mortgages not being required, a bona fide assignee of a note secured by mortgage, by an unrecorded assignment, would not be estopped from asserting the validity of his mortgage lien against a subsequent incumbrancer for value and in good faith. But clearly that is not the law

since the passage of section 8781, Rem. Code. And in *Gottstein v. Harrington*, 25 Wash. 508, 65 Pac. 753, we so held, and further said:

"It would seem from the above provision of the statute that the respondents were not legally bound to look beyond the records in the office of the county auditor for assignments of the mortgage there of record, and that they had a perfect right to presume that no such assignment had been made."

To the same effect is *Christenson v. Raggio*, 47 Wash. 468, 92 Pac. 348, a case relied upon by appellant, although that case depended upon actual notice of an unrecorded assignment of a mortgage before purchase and payment of the purchase price by a bona fide purchaser, who caused the assignment to be recorded and the mortgage then satisfied of record by that assignee, there being another unrecorded assignment of the same mortgage extant, of which the purchaser had no notice or knowledge, by record or otherwise. That Erickson remained in ignorance of the fact that appellant was the real owner was due to her failure for nearly 9 years to record Ellsworth's assignment of the mortgage to her. She made it possible for Ellsworth to perpetrate the wrong, for which either she or respondent must now suffer, and we think equity is on the side of respondent.

[2] Ellsworth was clothed with the apparent indicia of title, through the act of appellant. Stated another way, he had not, by the assignment to appellant, been divested of the rôle of agent or collector, or intermediary through whom she purchased mortgages, through whom payments were to be made, and by whom mortgages were satisfied, so far as those vitally concerned were led to believe. Ellsworth collected the payments of interest, and, in a number of cases, the principal, and remitted to appellant, although in the present case he failed to remit to her the payments made to him by Erickson on the principal of the mortgage. As further apparent authority of this agent, the mortgage was due and payable in 1912, but was by him extended more than once, on request of respondent, until final payment in 1919. Appellant knew of such extensions. She admits possession of the papers at all times. She stood by and permitted the extensions; therefore she will not now be heard to complain because of the failure of her agent to account. She is estopped to deny the satisfaction of the mortgage, in view of her placing it within her agent's power to extend the mortgage. *Bayley v. Paris*, 106 Wash. 248, 179 Pac. 795. Ellsworth could not have done this without authority, actual or implied. If there was not actual authority, because she did not positively direct such extensions, yet there was implied authority by reason of her failure to act when the mortgage fell due in 1912;

and, having remained silent when she should have spoken, she will not now be heard to speak when she should remain silent.

Appellant argues that it was the duty of respondent, as the debtor assuming the mortgage, when making payment to Ellsworth, to see that Ellsworth was in possession of the security, or, in other words, that he was bound to see that the money he paid to Ellsworth actually went to the lawful holder of the mortgage. But, from what has been said, it is plain that respondent had every reason to believe that Ellsworth was the lawful holder of the mortgage. That he was mistaken as to this was due to the acts of appellant, for which, under the circumstances, she, rather than respondent, must bear the consequences. Under these circumstances, to uphold appellant in the position now taken by her would be contrary to equity and good conscience.

Judgment affirmed.

MITCHELL, PARKER, TOLMAN, and MAIN, JJ., concur.

(112 Wash. 18)

**MOTT v. PAYNE. (No. 15774.)**

(Supreme Court of Washington. July 28, 1920.)

Chattel mortgages §122—Mortgage held to include furniture and fixtures not specifically described.

A chattel mortgage of "all the furniture and fixtures contained in the building known as the Fred R. Hawn building, \* \* \* together with all merchandise therein contained and more specifically described as follows, to wit," etc., held to cover other property than that specifically described, as between the mortgagee and third persons, mortgage being given to secure the full purchase price of all property in the building.

Department 2.

Appeal from Superior Court, Yakima County; Harcourt M. Taylor, Judge.

Action by B. E. Mott, doing business in the name and style of Mott Candy Company, against H. M. Johnson, in which J. V. Payne intervened. From judgment for intervenor plaintiff appeals. Affirmed.

Davis & Morthland, of Yakima, for appellant.

Frank J. Allen, of Yakima, for respondent.

TOLMAN, J. On December 19, 1918, the defendant, H. M. Johnson, purchased a pool room and cigar store in the town of Granger, for the agreed price of \$1,750, paying nothing down but giving his note for the full purchase price, and securing the same by a duly exe-

cuted chattel mortgage in which the property pledged is described as follows:

"All the furniture and fixtures contained in the building known as the Fred R. Hawn Building and located on the east 25 feet of lots 13, 14, 15 and 16, in block 22, town of Granger, Washington, together with all merchandise, therein contained and more especially described as follows, to wit: Four billiard and pool tables with cues, balls and racks; one stove and one set scales; counters both front and back; all chairs. Also all of the stock of goods, wares and merchandise, including candies, cigars, tobaccos and fountain goods"

—which mortgage was duly filed of record. Thereupon Johnson went into possession of the going business so purchased, which then included, not alone the items specified in the mortgage, but contained considerable additional furniture and fixtures. On March 22, 1919, appellant began this action in the court below against Johnson, sued out a writ of attachment, and caused it to be levied upon all of the property in the place of business referred to. Shortly after the levy, respondent intervened, and by his complaint in intervention set up the assignment of the note and chattel mortgage by the mortgagee therein named to the Union Bank of Granger, and a like assignment, both for a valuable consideration, by the bank to himself, and sought the foreclosure of the chattel mortgage as a first lien upon all of the property which had been attached. At the trial respondent abandoned his claim to the stock of merchandise in trade, and by stipulation the essential facts were agreed upon. From a judgment in favor of respondent, establishing and foreclosing his lien upon all of the property except the merchandise, this appeal is taken.

It appears that at the time of the levy of the attachment there was property in the storeroom, and used as a part of the business, which was so there and used when the mortgage was made, in addition to the articles specifically described in the mortgage, as follows:

"One piano player, one draught stand, one milk-shaking machine, one cash register, glass dispenser, roll top desk, syrup bottles, ice cream cabinet, cigar case (6 feet in length), candy case (4 feet in length), four-foot show case, six-foot bottom case, six-foot counter show case, and four large palms."

Appellant's contention here is that the articles last described were not affected by the mortgage, and that the language used, "all furniture and fixtures" is limited by the words, "and more especially described as follows" to the specific articles enumerated. The question is not altogether as simple as might appear at first thought. A general description has in many jurisdictions been held sufficient, except perhaps as to after-



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acquired property, when the intention that it shall so apply is not made clear and certain, and, had the scrivener been content to stop with the first clause of the description, we would have no difficulty in holding with the trial court; had he continued by words clearly limiting the general description, as "more particularly set forth and described in the following schedule," we would be equally clear that the judgment is wrong, but as it reads, the intent cannot be clearly gathered from the instrument itself. Chief Justice Cooley, in *Willey v. Snyder*, 34 Mich. 60, says:

"Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect; the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as may be needful to his protection, and he purchases in view of that knowledge."

See, also, *Furgerson v. Twisdale*, 137 N. C. 414, 49 S. E. 914; *Miller v. Hart*, 32 Hun, 639; *Harding v. Coburn*, 12 Metc. (Mass.) 333, 46 Am. Dec. 630.

If, then, we may interpret this description in the light of the facts which were in the minds of the parties at the time, it is self-evident that, the mortgage being given to secure the full purchase price of all property in the building, the parties intended that it should cover all that property, and except as they failed to include essentials to perfect their intention as to the merchandise, the mortgage should be held to cover all of the property intended.

Judgment affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(112 Wash. 172)

**BANKERS' TRUST CO. v. AMERICAN SURETY CO. (No. 15903.)**

(Supreme Court of Washington. Aug. 10, 1920.)

**Insurance** §396(4) — Fidelity insurer held not to waive provision of bank employé's bond by calling for proofs of loss.

Fidelity insurer did not impliedly waive provision of bank employé's bond, requiring disclosure of loss during continuation of suretyship or within specified period after termination thereof, and notice to surety within specified period after discovery, by calling for proofs of loss and furnishing blanks therefor on discovery of loss subsequent to expiration of specified period following termination of suretyship, where such acts of the insurer did not cause bank expenses or inconvenience.

Department 1.

Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by the Bankers' Trust Company against the American Surety Company. Judgment for defendant, and plaintiff appeals. Affirmed.

S. Warburton and H. G. & Dix H. Rowland, all of Tacoma, for appellant.

C. E. Dunkleberger and Bates & Peterson, all of Tacoma, for respondent.

MACKINTOSH, J. The appellant was engaged in the banking business in Tacoma. In November, 1913, the respondent issued to it a policy, covering one of its employes. This policy provided for the payment to the bank of any money which it might lose by any act of fraud or dishonesty or theft or embezzlement of the employé. The policy continued in full force until it was canceled by agreement of both parties on February 23, 1916. The policy provided that the respondent should not be liable thereon, unless "the loss be disclosed during the continuation of the suretyship \* \* \* or within 15 months after the termination thereof and notice delivered \* \* \* within 10 days after such discovery." On the 21st of November, 1917, which it will be noted was practically 21 months after the termination of the suretyship, the appellant telegraphed the respondent's home office in New York that there was a loss under the policy. Upon receipt of this telegram the home office telegraphed its manager in Seattle, advising him that the Tacoma bank had notified the company of the loss, and telling him the company was sending him the papers, and in the meantime "to get in touch with the employer, furnish claim blanks, and advise us particulars." On the following day, November 22d, the Seattle agent wrote to the appellant as follows:

"Seattle, Wash., Nov. 22, 1917.

"Bankers' Trust Company, Tacoma, Wash.—Gentlemen: My home office has advised me of your report there of a shortage in the accounts of E. J. McDonald. I am inclosing herewith claim blanks in duplicate, form F-33, for your convenience in stating up any claim which you may have to make against this company by reason of our bond for Mr. McDonald. Under items of default you will please indicate the date of shortage, a description thereof, and the amount, while under credit indicate what the bank may be owing Mr. McDonald, if anything. It is desired that you complete both of these blanks, sending one direct to the home office of the company and the other to me.

"Yours truly,

"[Signed] S. H. Melrose, Manager."

On November 24th the appellant wrote to the home office of the respondent as follows:

"Tacoma, Washington, Nov. 24, 1917.

"American Surety Co. of New York, New York City—Gentlemen: We beg to confirm the following telegram sent to you on November 21st: 'You have loss under C eleven thousand seven Evan J. McDonald twenty five hundred dollars, short in his account Bankers' Trust Company seventeen thousand one hundred sixty-six and sixty-eight cents.' In reply to which we received from Mr. S. H. Melrose, your general manager at Seattle, under date of November 22d, a letter acknowledging receipt of our notice of claim and inclosing the necessary blanks for the purpose of submitting same in detail. In this connection you are advised that two days after the shortage and the falsification of the accounts by Mr. Evan J. McDonald, we employed the firm of Price, Waterhouse & Co., certified public accountants, and they have been at work on the books for several days. As soon as the work has been completed, which will be in the course of a week or so, we will have the claim submitted to you on forms furnished by Mr. Melrose.

"Yours very truly,

"[Signed] M. M. Ogden, Cashier."

On December 4th the respondent wrote the appellant the following letter:

"New York, Dec. 4, 1917.

"Mr. M. M. Ogden, Cashier, Bankers' Trust Company, Tacoma, Washington—Dear Sir: We are in receipt of your letter of the 27th ult., addressed to our manager at Seattle, Wash., Mr. S. H. Melrose, together with the inclosure therein mentioned. In reply we would respectfully call your attention to the fact that bond covering Mr. McDonald was in effect from September 1, 1913, to February 23, 1916, on which latter date it was canceled; the liability having been taken up by the Maryland Casualty Company, as we understand it. Under the terms of the bond issued by this company, you had 15 months after the cancellation thereof in which to discover loss. Such 15-month period would expire May 23, 1917. You, however, did not discover shortage until some time in November of this year, or about 6 months after our liability had expired. Under the circumstances, you will of course perceive that there is no liability on our part, and we have accordingly filed papers without taking any action therein.

"Yours truly,

"[Signed] B. J. McGinn, Asst. Secretary."

The respondent refused to recognize the existence of the policy or any liability thereunder, and the appellant began this action, and has brought this appeal from a judgment against it. It is claimed in support of appellant's right of recovery that, although the policy had been canceled in February, 1916, and by its terms the respondent was not liable for a loss which was discovered more than 15 months thereafter, the respondent, by its conduct, had impliedly waived that provision of the policy, and is estopped from now denying liability under that provision.

Many questions are presented upon this appeal, but in view of the conclusion to which

we are about to arrive it is necessary to notice but two of them. A great deal of confusion arises in cases of this kind from the interchangeable use of the terms "waiver" and "estoppel," as though they were synonymous. There are cases of express waiver, where the insurer is bound without any additional acts by either insured or insurer, and cases of implied waiver, where the insurer is bound by reason of estoppel. The appellant argues that the conduct of the respondent in calling for proofs of loss and furnishing blanks on which to make claim impliedly waived the provision in the policy that it would not be liable for loss discovered after 15 months from the termination of the policy, and argues that the respondent, having participated in the cancellation of the policy, is to be presumed to have acted with full knowledge of the facts, and, knowing that the policy had been terminated in February, 1916, and that its liability thereunder ended 15 months from that date, must be held to have waived the benefit of the policy's provision by its conduct as shown in the correspondence, and in support of this cites a great many authorities to the effect that an insurer of any kind will be held to waive such provisions in the policy by this or similar conduct.

The respondent, however, argues that, although there may be a waiver by the insurance company, such waiver is simply of defenses available upon existing policies, and that the authorities do not go to the extent of holding that an insurance company, by calling for proofs of loss, recreates an insurance policy, the term of which has already expired by cancellation or otherwise. The argument is that there is a difference between a waiver that is merely the foregoing of certain rights arising from breaches of condition or warranties, or other matters which might give the insurance company a defense, and a waiver which would write entirely new policy in the place of that which had been canceled or had expired; in other words, that there cannot be a waiver in this case, for the reason that the liability of the company had terminated by the cancellation of the policy in February. It is not necessary to thoroughly investigate this phase of the case, and for the purpose of this opinion it may be assumed that the appellant's argument is sound, and that a waiver might be made by the respondent, such as would extend the operation of the provision of the policy which we have quoted, so that the company might become liable for losses which were discovered after 15 months from the date of the cancellation of the policy. But, although insurance companies may be held to have impliedly waived the provision of the policy, the real ground upon which the liability had been impressed is that by their conduct in waiving the provisions they have

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estopped themselves from relying upon those provisions; in other words, that the basis of their liability is an estoppel, and not the mere implied waiver; that, having waived the provisions, they have placed the other parties at such a disadvantage, or occasioned them such expense, that it would now be inequitable for the insurance companies to deny the waiver. We are not in this case dealing with an instance of express waiver. As was said by the Supreme Court of California in *McCormick v. Orient Ins. Co.*, 86 Cal. 260, 24 Pac. 1003:

"In strictness, the term 'waiver' is used to designate the act, or the consequences of the act, of one side only, while the term 'estoppel' (in pais) is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts; but in the law of insurance the terms are ordinarily used indiscriminately."

"The party who pleads an estoppel must be one who in good faith has been misled to his injury." 16 Cyc. 777, 778.

"Where the act does not result in damage or disadvantage it does not create an estoppel." *Hughes v. N. Y. Life Ins. Co.*, 32 Wash. 1, 72 Pac. 452.

As was said in that case:

"The doctrine of estoppel is of equitable origin, and is founded upon principles of equity and justice. It is applied to conclude a party who, by his acts or admissions, has influenced the conduct of another, only when in good conscience and honest dealing he ought not to be permitted to gainsay them. When an admission is relied upon to work an estoppel, and it has been made by mistake, or without any intent to injure another, it is only in extreme cases that the law will not permit the party making the admission to show the truth. Before that result will follow, it must appear that the admission was made under circumstances showing gross, if not culpable, negligence, and the other party must have acted thereon to his material injury. The reply of the appellant does not make a case within these principles. While she alleges she abandoned a contemplated action for a larger sum, and commenced the present one on the strength of the respondent's admission, she does not allege that her contemplated action was a valid action, nor one in which she had reasonable cause to believe that she could recover; nor does she allege that the same is not now open to her. Her only injury, therefore, has been the costs of the present action, and costs incurred in litigation are insufficient to constitute the basis of an estoppel."

In the case of *Butler v. Supreme Court of Foresters*, 53 Wash. 118, 101 Pac. 481, 26 L. R. A. (N. S.) 293, we said:

"Some definitions of estoppel are cited by the respondent, to the effect that, in the broad sense of the term, estoppel is a bar which precludes a person from denying the truth of a fact which has, in contemplation of law, become settled by the acts and proceedings of ju-

dicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, in pais, and further 'because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.' But while this is true of what an estoppel is, in the abstract, the party pleading it must show that he has been injured by reason of the acts of the party which he claims to be an estoppel, by reason of having relied on the representations of the person sought to be estopped, so that his position with reference to the matter in hand has been changed to his disadvantage."

The cases relied on by the appellant to prove what it calls a waiver, but which we have indicated is properly designated as an estoppel, bear out our conclusion. In *Titus v. Insurance Co.*, 81 N. Y. 410, it was held that when there was a breach of condition contained in an insurance policy, it was in the option of the insurance company to take advantage of such breach or to overlook it; that is, if it saw fit, it might waive the forfeiture, and that this waiver might take place expressly or by acts from which a waiver could be inferred, or from which a waiver would be held to follow as a matter of law—the court saying:

"But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived."

14 R. C. L. 1197, lays down the general rule that when an insurance company has knowledge of acts which work a forfeiture, and yet enters into negotiations with the insured in the form of requests for proofs of loss, it thereby recognizes the continued validity of the policy, and will be bound if it has thus induced the insurer to "incur expense under the belief that the loss will be paid." In *Graham v. American Fire Insurance Co.*, 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707, it was held that an insurance company, with knowledge of facts which might forfeit the policy, having led the insured to believe it still recognized the validity of the policy by encouraging it to incur expense, would be estopped from insisting on the forfeiture. *Mutual Protective League v. Walker*, 163 Ky. 346, 173 S. W. 802, is to the same effect as is *Western Ins. Co. v. Ashby*, 53 Ind. App. 518, 102 N. E. 45, and *Keys v. National Council*, 174 Mo. App. 671, 161 S. W. 345. In *Cannon v. Home Ins. Co.*, 53 Wis. 585, 11 N. W. 11, the Supreme Court of Wisconsin said:

"\* \* \* That as the defendant, in its correspondence with the attorneys of the plaintiff, after full knowledge of the forfeiture, saw fit to call for additional proofs of loss, recognizing by this act the continued validity of the

policy, it could not, after the plaintiff had gone to the expense and trouble of furnishing these proofs, change its ground, and claim that the policy was no longer in force."

See, also, *Planters' Ins. Co. v. Loyd*, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136; *Pace v. American Ins. Co.*, 173 Mo. App. 485, 158 S. W. 892; *Rundell v. Anchor Fire Ins. Co.*, 128 Iowa, 575, 105 N. W. 112, 25 L. R. A. (N. S.) 20; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 39 N. W. 571, 15 Am. St. Rep. 275; *Prudential Ins. Co. v. Hummer*, 36 Colo. 208, 84 Pac. 61; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; *Berry v. Ins. Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; *Hatcher v. Sovereign Fire, etc., Co.*, 71 Wash. 79, 127 Pac. 588.

Throughout all these cases the point is emphasized that the implied waiver must have resulted in some loss to or expenditure by the insured, which would make it inequitable for the insurer to now deny its waiver. It therefore becomes necessary in this case to determine whether the evidence shows anything which would operate as an estoppel against the respondent; in other words, whether, admitting that the insurance company by its conduct impliedly waived the provision of the policy in question, by that act it had caused the appellant to incur expense or suffer loss.

The evidence shows that for some time prior to November 21, 1917, the appellant was in such financial condition that some arrangement was necessary for its relief, and that another bank in Tacoma was negotiating for the purpose of taking over its business, and in pursuance of those negotiations the books of the appellant were being examined for the purpose of determining its financial status. The evidence also shows that upon the cancellation of respondent's policy in February, 1916, another bonding company had taken the place of the respondent, and had written a bond covering the same employee mentioned in the policy before us, and that the experts who were called in, and who are referred to in the appellant's letter, made the investigation for the purpose of determining the liability under this other policy, and that no investigation was made of the books of the company for the purpose of supplying the proof of loss under the policy of the respondent company; the testimony upon that point being as follows (the witness was an expert representing the accountant company):

"Q. Have you examined the books of that date to ascertain what they were? A. As of February 21, 1916?

"Q. No; September 1, 1913. A. No.

"Q. Your examination began along in February, 1916? A. Yes, sir.

"Q. February 21st, and continued on down? A. Yes, sir; periodically; yes. \* \* \*

"Q. You did not examine preceding that date? A. No."

From this it will be seen that there was no proof that, relying upon the waiver of the respondent, the appellant proceeded to furnish the information necessary to make the proof of loss by incurring any expense, and that nothing has been done which places the appellant in a more disadvantageous position than it would have occupied, had there been no purported waiver, and that appellant had foregone no valuable right or changed its position to its prejudice in reliance upon the acts of the respondent. The evidence merely establishes that, under a mutual mistake, the two parties for a few days have proceeded upon the presumption that there was an existing policy, and that no act of the respondent led the appellant to do anything which added to its expense or inconvenience.

"Ordinarily a waiver is an intentional release of some right, and it is generally held that provisions of this character in insurance policies are deemed to be waived only when an intention to waive is apparent, or where the conduct of the company is inconsistent with an intention to declare a forfeiture, or has placed the other party at a disadvantage, or gained for itself an advantage which it should not in justice and good conscience be permitted to assert." *Elhart v. Pac. Mut. Ins. Co.*, 47 Wash. 859, 92 Pac. 419.

"While the later decisions all hold that such waiver need not be based upon a technical estoppel, in all the cases where this question is presented, where there has been no express waiver, the fact is recognized that there exist the elements of an estoppel." *Armstrong v. Agricultural Ins. Co.*, 180 N. Y. 560, 29 N. E. 991.

See, also, *Brink v. Insurance Co.*, 80 N. Y. 108; *Goodwin v. Insurance Co.*, 73 N. Y. 480; *Prentice v. Insurance Co.*, 77 N. Y. 483, 33 Am. Rep. 651.

"Where the facts are equally known to both parties, there can be no estoppel." *Knights and Ladies of Columbia v. Shoaf*, 166 Ind. 367, 77 N. E. 788.

"The whole doctrine depends on estoppel, and the essential feature of it is loss or injury to the other party by the act of the party to be estopped. In this respect there is nothing peculiar about actions upon insurance policies. They stand on the same footing as other litigation. Waiver is essentially a matter of intention, and to establish it there must be some declaration or act from which the insured might reasonably infer that the insurer did not mean to insist upon a right which, because of a change of position induced thereby, it would be inequitable to enforce." *Freedman v. Providence-Washington Ins. Co.*, 175 Pa. 350, 34 Atl. 730.

"It is admitted that both parties acted in good faith up to the commencement of the suit. It is to be observed that there is no question of any conduct of the defendant which induced the

plaintiffs to omit anything essential, or to do anything prejudicial, to the validity of the policy, either before or after the loss. \* \* \*

An essential element of estoppel of this character is that one party should have relied upon the conduct of the other, and been induced by it to put himself in such a position that he would be injured if the other should be allowed to repudiate his action." *McCormick v. Orient Ins. Co.*, supra.

There being no evidence upon which an estoppel can be predicated, the trial court was correct in dismissing the case, and its judgment is hereby affirmed.

HOLCOMB, C. J. and MAIN, MITCHELL, and TOLMAN, JJ., concur.

(112 Wash. 160)

O'NEIL v. O'NEIL. (No. 15829.)

(Supreme Court of Washington. Aug. 10, 1920.)

**Divorce ¶312**—On reversing judgment awarding wife custody of minor daughter, court will remand, where daughter is hostile to father.

On husband's appeal from judgment awarding custody of 16 year old daughter to divorced wife, the Supreme Court, on determining that the wife is not a suitable person to have the custody and control of the daughter, will not award daughter to father, where daughter had hostile attitude toward father at time of trial, held many months previous to Supreme Court's disposition of case, but will reverse judgment and remand cause for a further hearing, to enable the trial court to give custody of daughter to persons other than wife, preferably the husband, if there has been a reconciliation.

Department 2.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by Maud O'Neil against Garrett W. O'Neil. Judgment for plaintiff. From a judgment rendered on defendant's petition for modification, defendant appeals. Reversed and remanded, with instructions.

Arthur H. Hutchinson, of Seattle, for appellant.

Tucker & Hyland, of Seattle, for respondent.

**BRIDGES, J.** In 1914 the appellant and respondent were divorced by decree of the superior court of King county, Wash. The decree awarded to the respondent the care, custody, and control of the two minor daughters—Gwyneth, then aged 12 years, and Natalie, then aged 10 years. By its terms the property was divided between the parties, and the appellant was required to pay to the respondent, for the use and benefit of the minor daughters, \$4,200, at the rate of

\$40 per month, until the further order of the court. The decree impressed a lien upon the property of the appellant as security for these payments.

In 1918 the appellant petitioned the court for a modification of the original decree of divorce, wherein he alleged that the respondent was an unfit person to have the care, custody, and control of the minor daughters, and sought to have them taken from her and awarded to him, or to some one else suitable to the court. The petition also sought to have the original decree so further modified as to require the monthly payments to be made to some person other than the respondent. In April, 1919, this petition came on for hearing and a large amount of testimony was taken. The actual decision of the matter was by the court postponed until December, 1919, at which time some further testimony was taken. The delay in making the final judgment appears, in part, at least, to have been the result of an effort upon the part of the trial court personally to bring about some amicable adjustment of this dispute, or, at any rate, some satisfactory disposition of these matters. Previous to the hearing on the petition the minors had been, at least temporarily, taken from the respondent, and had become wards of the juvenile court, under whose directions they were placed in the House of the Good Shepherd, in Seattle. Before the conclusion of this matter in the trial court, the minors had been taken by the court from the House of the Good Shepherd and returned to the custody of respondent, their mother, pending final determination of the petition. The judgment on the petition for modification of the original decree affirmed all the terms and provisions thereof, except it required that the appellant make his monthly payments to the clerk of the court of King county, instead of to the respondent. From this judgment, appeal was taken.

It would not serve any good purpose, but, on the contrary, would probably be detrimental to those interested, for us to here recite the testimony in this case. Suffice it to say we have very carefully read and considered the whole record, and have concluded that the respondent is not a suitable person to have the care, custody, and control of the minor daughter, Natalie. She is now about 16 years old; her sister, Gwyneth, is past 18 years of age, and has therefore reached her majority, and this appeal no longer materially affects her. We are satisfied that a fortunate solution of this unfortunate problem would be to award the minor daughter to her father, the appellant here, were it not for the feeling of the daughter toward her father. The testimony shows that when this case was tried she had become embittered against him and would have nothing to do

with him. If such situation still exists, it would probably be unwise to undertake to place her in the custody of her father. We have also concluded that the monthly payments of \$40 should be made exclusively for the benefit of the minor daughter until the further order of the court. Under the present condition of the record it is exceedingly difficult, if not quite impossible, for us to advise the lower court of the exact disposition that should be made of the minor daughter. It has been many months since the testimony in this case was taken, and it is not impossible that by this time the situation has changed. The taking of additional testimony may, and probably will, assist the trial court in carrying out the directions and the spirit of this opinion.

The judgment appealed from is reversed and remanded, with instructions to the trial court to have a further hearing and taking of testimony only for the purpose of assisting the court in determining what disposition should be made at this time of such minor daughter, and upon such hearing being had it is directed that the trial court set aside the judgment appealed from and make and cause to be entered another judgment, which shall so modify the original decree as to take from the respondent the care, custody, and control of such minor daughter, and give such care, custody, and control to some person or persons, other than respondent, preferably to the appellant, if there has been a reconciliation, or make such other disposition of her as shall appear best to the trial court; and said judgment shall also so modify the original decree as to require that all future monthly payments be made to some person to be designated by the court, other than respondent, and that all such payments shall henceforth be for the sole use and benefit of such minor daughter until she shall come of age, or until the further order of the court. Neither party hereto shall recover any costs herein.

HOLCOMB, C. J., and FULLERTON, MOUNT, and TOLMAN, JJ., concur.

(112 Wash. 191)

**VAN DELINDER v. RICHMOND.**  
(No. 15778.)

(Supreme Court of Washington. Aug. 11, 1920.)

1. Witnesses  $\S$ 414(1)—Circumstances, to be corroborative of denial, must be inconsistent with testimony denied.

The fact that defendant's house was under lease for a year was not inconsistent with the testimony of plaintiff, in breach of promise suit, and her witness, that when witness asked defendant about renting it he said that when

the people moved out he did not want to rent it, but he was going to fix it up and "we (indicating plaintiff) intend to live there later"; so there was no error in refusal to allow him to prove such fact as a circumstance corroborative of his denial of the conversation.

2. Trial  $\S$ 56—Repetition of testimony properly refused.

Refusal of defendant's offer to prove by his testimony facts to which he had just testified was not error.

3. Appeal and error  $\S$ 1056(1)—Exclusion of evidence held harmless, in view of other party's testimony.

Refusal to allow defendant in a breach of promise case, in which plaintiff had testified that when they were first engaged she had expressed desire to have marriage postponed till after trial of her pending suit against another, to show that the issues in such suit were not made up, and that it was never ready for trial, was harmless; other of her testimony showing that she supposed the case was ready for trial, and that, after finding there could not be an early trial, they agreed on a time for the marriage.

4. Appeal and error  $\S$ 205—A party on objection to question to his witness must make offer of what is expected to be proved.

A question addressed to a party's own witness, not indicating clearly the evidence to be elicited, nor by its terms referring to evidence submitted by the adversary, being objected to the party must make an offer of what is expected to be proved by the answer, that he may complain of exclusion.

**Department 1.**

Appeal from Superior Court, Clarke County; R. H. Back, Judge.

Action by E. P. Van Delinder against J. A. Richmond. Judgment for plaintiff, new trial denied, and defendant appeals. Affirmed.

Yates & Yates, McMaster, Hall & Drowley, and Miller & Wilkinson, all of Vancouver, for appellant.

H. W. Arnold, of Vancouver, for respondent.

MITCHELL, J. Plaintiff recovered a verdict and judgment for damages against the defendant, upon a breach of promise of marriage. A motion for a new trial being denied, defendant has appealed.

[1, 2] Appellant paid his addresses to the respondent regularly from February, 1918. They became engaged in the early summer of that year, and remained so until he married another woman on November 21, 1918. In detailing the attentions of appellant, and in proof of his promise of marriage, respondent and several of her witnesses testified to a conversation between a Mrs. Campbell and the appellant, wherein Mrs. Campbell asked him about renting a house he owned in the

city of Vancouver, and wherein he answered that when the people moved out he did not intend to rent it again, he was going to fix it up, and further said, "We intend to live there later," and nodded toward the respondent, near by. Mrs. Campbell's version was that upon asking him if he would rent the house he said:

"Mrs. Campbell, I don't think that I want to rent my house; there is a party living in it. If the parties move out, I am going to clean the house up, and she and I are going to live in it [referring to Mrs. Van Delinder]."

Another witness testified similarly. In the defense, when appellant was testifying in chief, after denying having had any conversation about renting the house, a controversy arose over the propriety of certain questions relating to the testimony of respondent's witnesses and the condition of the house. Objections to the materiality and relevancy of the questions were sustained. Those rulings together constitute the first assignment of error. To make a record and protect his rights with reference thereto appellant offered as follows:

"We offer to prove by the witness Richmond that his house in Vancouver on the corner of Eighteenth and O streets was leased on the 9th of February, 1918, for twelve months from that date, and was not at any time during the summer of 1918 vacant or for rent, and that there was no time during 1918 after the 9th day of February, 1918, when he could have rented the house to Mrs. Campbell or any one else."

The offer, upon objection of respondent's attorney, was refused by the court. It is argued by appellant that, having denied making any statements about the house, his offer was a strong showing that he could not have made use of the building in the manner in which respondent's witnesses testified that he intended to use it, and was a corroborating circumstance of his denial of those statements. Appellant's rights in this particular were limited by the contents of his offer of proof, from which it is clear there was nothing inconsistent with the statements of respondent and her witnesses upon the same subject. Besides, just prior to the offer, appellant, referring to the house, testified as follows:

"Q. And what's the fact as to whether or not it was rented then?

"Arnold (attorney for respondent): Objection.

"A. It was rented for a year at that time.

"Q. When did you rent it? A. February.

"Arnold: Objection.

"Court: Sustained.

"Q. Did you have a house in Vancouver at that time you could have rented if you wanted it?

"Arnold: Objection.

"Court: He may answer.

"A. No, sir."

The assignment of error is without merit.

[3] The next assignment of error argued is the refusal of the court to permit testimony showing that the issues had not been made up in what is referred to as the Lieser Case, and that it was at no time ready for trial. During the courtship and the engagement of these parties there was pending in superior court of Clark county a suit wherein Mrs. Van Delinder was plaintiff and one Lieser was defendant. In that suit she was represented by her present attorney, Mr. Arnold. At the time of their engagement the appellant preferred an early marriage, but the respondent, for some reason not explained by the record, expressed the desire to put the wedding off until after the trial of the Lieser Case, which he agreed to. The trial of that case had been put off for reasons which she said she did not understand, and that she thought it would be heard at the September jury session. She so told the appellant. It happened that there was no jury session in September, and she mentioned it to the appellant in subsequently discussing the fixing of a date for their marriage. In his defense appellant offered to prove by the records of the clerk's office that the Lieser Case was not at issue at any of the times she claimed to have mentioned the matter to him. Upon a proper objection the offer was refused by the trial court. The weakness of appellant's contention that the evidence offered would have a tendency to disprove her statements as to the condition of the Lieser Case, and the weakness of the offer itself, is obvious in the failure to include or attribute knowledge on her part of the actual condition of the issues in that case. In the cross-examination of respondent in passing upon an objection to a question as to the condition of that case for trial the court had directed that she might testify as to her understanding regarding the matter, whereupon she testified:

"Q. Now at that time you didn't understand that this (Lieser) case was even ready for trial did you? A. As far as I knew, yes. I supposed it was coming up whenever the jury was sitting, which was in July or September."

Then immediately she further testified under cross-examination that in September, after learning there would be no jury session that month, they then agreed to get married in December. It is plain that in her conversations with appellant concerning the trial of the Lieser Case she relied, as most litigants do, upon the advice of her lawyer; and, after her disappointment at the trial not taking place in September, the parties then agreed to get married in December. The refusal of the testimony offered was without prejudicial error.

[4] The next assignment is "the refusal of the court to permit the defendant to testify to a conversation had between him and

the respondent, referring to the matters in controversy." While testifying in chief in his defense appellant said he had received a letter from Mrs. Van Delinder's attorney, Mr. Arnold, and that he had called on him with reference to it. He was not allowed to testify to his conversation with the attorney. He afterwards spoke to respondent about the conversation he had had with her attorney. An objection to the question that he relate the conversation with her was interposed. His counsel said:

"It throws light upon the relations of these parties, your honor."

The court replied:

"Upon the showing that has been made at this time, the objection is sustained."

The witness then answered affirmatively that the conversation had to do with his relations to the respondent and would throw light upon those relations. On motion the answer was stricken. Then the witness was asked:

"I will repeat again, did you or will you tell the conversation, after having asked the previous questions."

An objection, as being immaterial and irrelevant was sustained. The witness then testified that the conversation referred to with the respondent occurred in the spring or early summer of 1918. That ended the inquiry upon this particular point. The trial court was left in the dark as to the materiality of the evidence, and so are we. Respondent or any of her witnesses had not testified to any such conversation; neither had she or any of her witnesses or the appellant himself testified to any business or trouble between her and the appellant wherein she was represented by Mr. Arnold or any other attorney prior to appellant's marriage in November. In the instance of the present assignment of error a noticeable departure is observed in the procedure adopted by appellant from that as to the two first assignments, viz. in this one there was no offer of proof. In such cases, that is, where the question itself does not indicate clearly the evidence to be elicited, or by its terms refer to evidence submitted by an adversary, the rule is that a question addressed to a party's own witness—in this case the party himself—if objected to, must be followed by an offer of what is expected to be proved by the answer, if it is desired to complain of a ruling sustaining the objection and excluding an answer. *Gaffield v. Scott*, 33 Ill. App. 318; *Nonotuck Silk Co. v. Levy*, 75 Ill. App. 55; *State ex rel. v. Cox*, 155 Ind. 593, 58 N. E. 849; *Boisyert v. Ward*, 199 Mass. 594, 85 N. E. 849; *McCormick v. St. Louis*, 166 Mo. 315, 65 S. W. 1038; *Herzig v. Sandberg*, 54 Mont. 538, 172 Pac. 132; *Juby v. Craddock* (Mont.)

185 Pac. 771; *Riley v. Missouri Pac. R. Co.*, 69 Neb. 82, 95 N. W. 20; *F. & M. Ins. Co. v. Dobney*, 62 Neb. 218, 86 N. W. 1070, 97 Am. St. Rep. 624; *Green v. Tierney*, 62 Neb. 561, 87 N. W. 331; *Madson v. Rutten*, 16 N. D. 281, 113 N. W. 872, 13 L. R. A. (N. S.) 554; *Ashmun v. Nichols*, 92 Or. 223, 178 Pac. 234, 180 Pac. 510; *Mullin v. Flanders*, 73 Vt. 95, 50 Atl. 813; 38 Cyc. 1329, par. "b."

Lastly, it is contended there was misconduct of the judge at the trial of the case. From the abstract, the statement of facts, including the affidavits used on the motion for a new trial, the briefs and arguments of counsel, we are satisfied this contention is also without merit.

Affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and BRIDGES, JJ., concur.

(112 Wash. 280)

McCLAIN et ux. v. SUPERIOR COURT OF CHELAN COUNTY et al. (No. 15696.)

(Supreme Court of Washington. Aug. 23, 1920.)

1. Infants  $\Leftrightarrow$  16—Juvenile Court Act to be construed to promote delinquent children's welfare.

The purpose of Juvenile Court Act is the welfare of dependent or delinquent children, and its various provisions should be construed with that purpose in view.

2. Infants  $\Leftrightarrow$  16—Juvenile court held to have lost jurisdiction by awarding child to children's home.

Juvenile court, by awarding delinquent child permanently to a children's home with authority and power to consent to its adoption by any suitable person, under Rem. Code 1915, §§ 1700, 1987—8, 1987—10, and 1987—14, lost its jurisdiction over the child, notwithstanding sections 1987—1, 1987—9, 1987—15.

Department 2.

Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Petition by Eugene R. McClain and wife to Superior Court of Chelan County for the adoption of Mollie Hodel. Petition dismissed, and petitioners appeal. Reversed and remanded, with directions.

L. J. Nelson and Herman Howe, both of Leavenworth, for appellants.

BRIDGES, J. In August, 1918, Mollie Hodel became a ward of the juvenile court of Clark county, Wash. In January, 1919, that court awarded the temporary custody and control of the child to the Washington Children's Home Society, of Seattle, Wash. In March, 1919, the juvenile court made a



judgment, ordering that the said minor "be and hereby is committed to the permanent custody of the Washington Children's Home Society, of Seattle, Wash., and the said society is hereby authorized and empowered to consent to the adoption of the said child by such person, or persons, as shall, by the said society, be found competent and desirous of so doing." Thereafter the society intrusted to the appellants, Eugene R. McClain and Minnie G. McClain, his wife, the temporary care, custody, and control of the child. The appellants are residents of Chelan county, Wash. In August, 1919, they presented to the superior court of that county their petition for the adoption of said minor. The petition for adoption recited, in substance, the facts here set out, and attached thereto was the written consent of the Washington Children's Home Society for the legal adoption of the child by the appellants. Thereafter the father and mother of the child were duly brought into the adoption proceedings by publication of notice as provided by law in such cases.

On October 30, 1919, the Chelan county court, upon reading the petition for adoption, made an order, dismissing the petition for want of jurisdiction; such order being in part as follows:

"The court now finds from said petition that it is without jurisdiction to grant the relief prayed for, for the reason that the juvenile court of Clarke county, Wash., has continuing jurisdiction of said Mollie Hodel, a minor child, for which reason the court declines to consider or pass upon the said petition. It is therefore ordered, adjudged, and decreed that said petition be, and the same is hereby, denied.  
\* \* \*

The appeal is from this order.

The only question for our determination is whether the superior court of Chelan county has jurisdiction to hear this petition.

Section 1987—1, Rem. Code, being a part of the Juvenile Court Law, provides that for the purpose of the act all delinquent and dependent children within the state shall be considered wards of the state, and their persons shall be subject to the custody, care, guardianship, and control of the court. Section 1987—8 provides that the juvenile court may at any time make an order, committing any delinquent or dependent child "to some suitable institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or industrial school as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent, neglected, or delinquent children; provided such order may be temporary or permanent in the discretion of the court and may be revoked or modified as the circumstances of the case may thereafter require."

Section 1987—9 provides that, where the court shall award a child to any such person or association, such child shall become the ward and subject to the guardianship of such association or person, and that "such association shall have authority, with the assent of the court, to place such child in a family home, either temporarily or for adoption." This section further provides that the court may, under certain circumstances, make a decree of adoption, transferring to any suitable person all the rights of the parent or guardian to such child, and that "the jurisdiction of the court shall continue over each child brought before the court, or committed pursuant to this act, and the court shall have power to order a change in the care or custody of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change."

Section 1987—10 provides, among other things, that—

"After acquiring jurisdiction over any child, the court shall have the power to make an order with respect to the custody, care or control of such child, or any order, which in the judgment of the court, would promote the child's health and welfare. \* \* \* Or the court may commit the child to the care and custody of some association that will receive such child. \* \* \*

Section 1987—14 provides that the act shall be liberally construed, to the end that its purpose may be carried out, and that "in all cases where it can be properly done, the dependent or delinquent child as defined in this act shall be placed in an approved family and may become a member of the family, by adoption or otherwise."

Section 1987—15 provides that—

"Any order made by the court in the case of a dependent or delinquent child may at any time be changed, modified or set aside, as to the judge may seem meet and proper."

Section 1700, Rem. Code, provides that any benevolent or charitable society, incorporated under the laws of the state for the purpose of receiving, caring for, or placing but for adoption, or improving the condition of orphaned, homeless, neglected or abused minor children, "shall have authority to receive, control, and dispose of children under eighteen years of age, \* \* \*" and that such corporation shall have authority to consent to the adoption, under the laws of the state of Washington, of such child.

[1, 2] The purpose of the Juvenile Court Act is the welfare of dependent or delinquent children, and its various provisions should be construed with that purpose in view. In the instant case the juvenile court of Clarke county awarded this child permanently, to the Washington Children's Home Society, with authority and power to consent to its adoption by any suitable per-

son. To hold that by this act the juvenile court did not release all of its jurisdiction over the child would be, in substance, to hold that such court had no power to release its jurisdiction during the minority of the child. Such a construction would, it seems to us, manifestly be in violation of the spirit and purpose of the act. Certainly, the juvenile court could consent to the legal adoption of its ward or to its marriage, and under those circumstances the court must of necessity lose its jurisdiction over the child. If it can do these things and lose its jurisdiction, it can surrender the entire control of a child to a society incorporated for the purpose of receiving such children and finding homes for them. Unquestionably the Clarke county court, by its order giving to the society the permanent custody and care of this child, and authority to consent to its legal adoption, intended thereby to relieve itself of any further obligation to the child, and to rid itself of all jurisdiction as a juvenile court over it. Indeed, the juvenile court laws expressly authorize the court to do the very thing which it has done in this instance, for it is provided that—

"Such association shall have authority, with the consent of the court, to place such child in a family home, either temporarily or for adoption."

The fact that the act provides generally that the court shall not lose jurisdiction, but shall have power and authority to review or rescind any order theretofore made concerning the welfare of the child, does not violate the idea that such court may, if it see fit and under proper circumstances, entirely rid itself of jurisdiction. The idea of the Legislature was that the court should retain jurisdiction under all circumstances to administer to the needs and for the protection of the child, but this does not mean that the court may not in the exercise of its discretion permanently dispose of the child so as to entirely lose jurisdiction of it. But if the juvenile court has retained jurisdiction and the consent to the adoption must be obtained, we find such consent in the order awarding the child to the society and authorizing it to consent to the adoption by suitable persons.

The case of *State ex rel. Dorothy Alden De Bit v. Superior Court*, 103 Wash. 183, 173 Pac. 1014, is not contrary to the conclusion to which we have come, for in that case the court made an order for the custody of the child, but reserved jurisdiction of and control over it.

Nor is the case of *In the Matter of Louise Chartrand*, 103 Wash. 36, 173 Pac. 728, in point. In that case the child was a ward of the juvenile court of Chelan county, and that court made an order, temporarily plac-

ing the child in the care, custody, and control of the House of the Good Shepherd, in the city of Seattle, Wash. Later the child petitioned the superior court of Chelan county for a writ of habeas corpus. That court refused jurisdiction because the child was no longer within Chelan county. Thereafter a similar petition was presented to the superior court of King county, which held that it was without jurisdiction. On an appeal from both of these judgments this court held that the Chelan county court had jurisdiction, and that the King county court had not.

Nor is the case of *In the Matter of the Adoption of La Vaunnie Rising*, 104 Wash. 581, 177 Pac. 351, in point.

No decision of this court has been cited, nor have we found one, involving the question here for decision. Our conclusion is that the superior court of Chelan county has jurisdiction of this petition, and that it was in error when it refused to hear it.

The judgment is reversed, and the cause remanded, with directions to that court to proceed to the hearing of the petition for adoption.

HOLCOMB, C. J., and TOLMAN, MOUNT, and FULLERTON, JJ., concur.

(112 Wash. 256)

**WOOLFOLK v. MULLINS SAWMILL CO.  
et al. (No. 15811.)**

(Supreme Court of Washington. Aug. 24, 1920.)

**Appeal and error  $\Rightarrow$  1011(1)—Findings on conflicting evidence conclusive.**

Findings of the trial court on conflicting evidence will not be disturbed, when amply supported by the evidence.

Department 2.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by L. H. Woolfolk against Mullins Sawmill Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Vince H. Faben, of Seattle, for appellant. Walter Fulton and R. G. Wright, both of Seattle, for respondents.

BRIDGES, J. The plaintiff brought this action to compel the issuance to him of 200 shares of the capital stock of the defendant Mullins Sawmill Company, a corporation, 198 of which shares at the time of suit were in the name of W. J. Mullins, the president of the corporation, and 1 share held each by D. Morgan and M. Mullins. The trial court found for the defendants, and entered judgment dismissing the action, from which the plaintiff has appealed.

The following facts are substantially undenied: In 1916 the Seattle Sawmill Company became insolvent, and was thrown into the hands of a receiver. The respondent W. J. Mullins was financially interested in and was a stockholder of that company. Prior to its insolvency it had become and thereafter remained indebted to the Scandinavian-American Bank of Seattle, as well as to various other persons. The assets of the Seattle Sawmill Company were finally sold by the receiver to one Prescott for \$8,000. It appears that Prescott probably purchased at the receiver's sale for the benefit of W. J. Mullins. At any rate, Mullins purchased the property from Prescott at the price the latter had paid. The Mullins Sawmill Company was then organized with a capital stock of \$30,000, divided into 300 shares, each share of the par value of \$100. Thereafter Mullins transferred the property so obtained by him to the Mullins Sawmill Company in full payment of all of the capital stock of that company. There was at once issued to him 299 shares, and to the appellant 1 share. Mullins obtained from the Scandinavian-American Bank the \$8,000 which he paid for the Seattle Sawmill Company's property. During all of this time, and for some time before and after, the appellant was the assistant cashier of the above-mentioned bank, and had charge of the indebtedness due it from the Seattle Sawmill Company, and also took a more or less active part in all of the transactions heretofore mentioned.

On June 6, 1916, the stock of the Mullins Sawmill Company, as originally issued, was redistributed and issued as follows: 100 shares to W. J. Mullins, 100 shares to the appellant, 99 shares to the appellant as trustee, and 1 share to E. E. Ballinger. The capital stock of the company remained in this condition until August, 1918, when the appellant transferred the 199 shares held by him in person and as trustee to the respondent Mullins, to whom such shares were thereafter reissued.

The appellant contended that he personally advanced or borrowed from the Scandinavian-American bank the \$8,000 with which Mullins purchased the assets of the Seattle Sawmill Company; that it was agreed that he should own two-thirds of the capital stock of the Mullins Sawmill Company, which he helped to organize, and of which he was a trustee and officer; that he finally surrendered all of his stock to Mullins as an accommodation to the latter, with the understanding that it was to be returned to him, and that at all times he was personally the owner of said 200 shares.

The respondent denied that the appellant ever personally owned any of the capital stock of the last-named company, or ever

had any financial interest therein or ever advanced any money to it or to Mullins for its use and benefit, and that whatever he did in connection with the affairs of the Mullins Sawmill Company was as assistant cashier and for the benefit of the Scandinavian-American Bank. Upon these disputed facts the testimony of the two principal parties was in all things, material and immaterial, absolutely contradictory. The findings of fact of the trial court were to the effect that the appellant had held certain of the stock of the Mullins Company for the use and benefit of the Scandinavian-American Bank, of which he was the assistant cashier, and that he acted for that bank solely in all transactions with reference to the Mullins Company, and at no time was the owner of any of its capital stock.

The only questions involved in this case are questions of fact. The witnesses were personally before the trial court, and it was in better position to weigh the contradictory testimony than we are. We have very carefully read the abstract of the testimony and also important parts of the statement of facts, and conclude that there was ample testimony to support the findings of the trial court. In fact, it seems to us that the weight of the testimony is with respondent. It would serve no good purpose to here recite it in detail, and we are satisfied to affirm the judgment. It is so ordered.

HOLCOMB, C. J., and TOLMAN, MOUNT, and FULLERTON, JJ., concur.

(112 Wash. 153)

LUBY v. INDUSTRIAL INS. COMMISSION  
OF WASHINGTON. (No. 15818.)

(Supreme Court of Washington. Aug. 10, 1920.)

Master and servant — 365 — Compensation Act held to exclude employees of independent contractor engaged in maintaining interstate railroad.

An employé is not entitled to compensation under the Workmen's Compensation Act, as amended in 1917 (Laws 1917, p. 96), § 19, for injuries received while engaged in cleaning and painting bridges, situated in the state on the line of a railroad engaged in interstate commerce, although working for an independent contractor, and not directly for the railroad.

En Banc.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Proceeding by Mary Jane Luby under Workmen's Compensation Act to obtain compensation for the death of her husband, John A. Luby, opposed by August Gerske, the employer. There was an award of the

Industrial Insurance Commission; denying compensation, and, from a judgment of the superior court dismissing her complaint, brought in review of the order of the Industrial Insurance Commission, the applicant appeals. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, all of Tacoma, for appellant.

Allen, Winston & Allen, of Spokane, amici curiae.

Lindsay L. Thompson, of Olympia, for respondent.

**FULLERTON, J.** This is an appeal by the plaintiff, Mary Jane Luby, from a judgment entered by the superior court of Lewis county, dismissing her complaint, brought in review of an order of the Industrial Insurance Commission. The commission appeared by general demurrer, which the trial court sustained, entering the judgment appealed from after the plaintiff had elected to stand on her complaint and had refused to plead further. The ultimate question before us therefore is, Does the complaint state facts sufficient to constitute a cause of action?

The facts stated in the complaint are, in substance, these: On May 26, 1919, the Director General of Railroads, then operating the lines of the Northern Pacific Railway Company under the provisions of the federal statute relating to government control and operation of railroads entered into a contract with one August Gerske, of Chicago, Ill., by the terms of which Gerske for a stated consideration agreed to clean and paint some 25 bridges situated on the line of the railroad of the railway company named within the state of Washington. The contract provided that Gerske should personally superintend the work, that he should furnish all of the labor and materials necessary for carrying it on, should have full control of all the employees engaged upon it, and should be solely responsible for any liability which might arise because of personal injuries suffered by any of the workmen whom he should employ upon it.

After entering into the contract Gerske came to the state of Washington for the purpose of entering upon its performance. He brought with him from Chicago a number of experienced bridge painters to perform the labor of painting, among whom was John A. Luby, the husband of the plaintiff. After reaching the state and before entering upon the work, Gerske communicated in writing with the Industrial Insurance Commission, in which he stated to them the nature of his contract and the fact that he was about to commence work thereunder, and inquired whether the work came within the provisions of the Workmen's Compensation Act (Laws 1911, p. 345). He was informed that it did, and thereupon returned to the com-

mission an estimate of his pay roll, and paid into the state treasury the percentage thereof required by that act.

Gerske thereupon entered upon the performance of his contract, and while engaged in cleaning and painting a bridge extending over the Chehalis river in Lewis county, his employé, Luby, fell therefrom, receiving injuries from which he died a short time later. Due proofs of the death, and the cause thereof, were made to the Industrial Insurance Commission in the manner prescribed by their rules.

The bridge from which Luby fell was a bridge included within the contract of Gerske, and formed at the time of the work a part of the line of railway of the Northern Pacific Railway Company, and was then being used in the operation of trains carrying both interstate and intrastate passengers and freight.

In due time the plaintiff, as the widow of John A. Luby, on behalf of herself and her minor children, filed a claim with the Industrial Insurance Commission for compensation for the death of her husband, under the provisions of the Workmen's Compensation Act. The claim was rejected for the stated reason that—

"August Gerske, the employer of John A. Luby, and the men employed by said Gerske, including said John A. Luby, in the work of painting bridges on said line of railroad, were engaged in interstate commerce, and were not therefore under the scope and provisions of the Workmen's Compensation Act of the state of Washington."

The trial court rested his decision on the authority of the case of *State v. Bates & Rogers Construction Co.*, 91 Wash. 181, 157 Pac. 482, and the learned counsel representing the plaintiff concedes in his brief that if the court is to adhere to the principle of that case it is conclusive against the plaintiff's right of recovery, devoting an argument to a showing that the case was incorrectly determined. But the trial court in its decision does not notice the very radical change in the statute made by the Legislature subsequent to the decision of the case cited and prior to the transaction out of which the present controversy arises. This change we think presents the vital question in the case, and requires an affirmance of the judgment, regardless of any conclusion that may be reached on the question of the soundness or unsoundness of the cited case.

The section of the Industrial Insurance Act which the court had in review when the decision cited was rendered is found at 6604—18 of the Code (Rem.), and reads as follows:

"The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compen-

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sation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state may, with the approval of the department, and so far as not forbidden by any act of Congress, voluntarily accept the provisions of this act by filing written acceptances with the department. Such acceptances, when filed with and approved by the department, shall subject the acceptors irrevocably to the provisions of this act to all intents and purposes as if they had been originally included in its terms. Payment of premium shall be on the basis of the pay roll of the workmen who accept as aforesaid."

The court, in the case cited, construed this statute as exempting from the operation of the act all employers and workmen engaged in interstate or foreign commerce for whom a rule of liability or method of compensation had been established by the Congress of the United States, and held that such a rule of liability had been established by the Congress by the fifth section of the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). From this the conclusion was drawn that since the facts of the case disclosed that the work involved therein was work in repair of a railroad bridge used by a railroad company in the carriage of interstate commerce, the workmen were without the provisions of the act, notwithstanding they were not direct employers of the railroad company, but employers of an independent contractor.

The amendatory statute referred to is found in the act of the Legislature of 1917 (Laws of 1917, c. 28, p. 96, § 19). It provides that the section of the statute above cited shall be amended to read as follows:

"Inasmuch as it has proved impossible in the case of employes engaged in maintenance and operation of railways doing interstate, foreign and intrastate commerce, and in maintenance and construction of their equipment, to separate and distinguish the connection of such employes with interests or foreign commerce from their connection with intrastate commerce, and such employes have, in fact, received no compensation under this act, the provisions of this act shall not apply to work performed in the maintenance and operation of such railroads or performed in the maintenance or construction of their equipment, or to the employes engaged therein, but nothing herein shall be construed as excluding from the operation of this act railroad construction work, or the employes engaged thereon: Provided, however, that common carriers by railroad engaged in such interstate or foreign commerce and in intrastate commerce shall, in all cases where liability does not exist under the laws of the United States, be liable in damages to any person suffering injury while employed by such carrier, or in case of the death of such employe to his surviving wife and child, or children, and if no surviving wife or child or children, then to

the parents, sisters, or minor brothers, residents of the United States at the time of such death and who were dependent upon such deceased for support, to the same extent and subject to the same limitations as the liability now existing, or hereafter created, by the laws of the United States governing recoveries by railroad employes injured while engaged in interstate commerce."

This section, it will be observed, especially and in direct terms provides that the provisions of the Industrial Insurance Act shall not apply to work performed in the maintenance of railroads engaged in interstate, foreign, and intrastate commerce, nor to employes in such work. It makes no distinction with regard to the manner in which the railroad company performs the work; that is, whether it performs the work directly by employes hired and paid by it, or whether it performs the work through an independent contractor, who undertakes the work for a stated consideration with the understanding and agreement that he is to employ and pay for the necessary laborers—in either event the employes are without the provisions of the act. In other words, it is the character of the work that excludes, not the method by which the work may be performed.

The facts in the record show that the unfortunate workman for whose death compensation is claimed was at the time of his death employed in maintenance work upon a railroad engaged at the time in interstate, foreign, and intrastate commerce. This is not only the necessary conclusion from the recitals of the facts contained in the complaint, but it is also made a direct and positive allegation thereof. They show further that he was employed, and his death occurred after the enactment of the statute of 1917. The plaintiff's rights therefore must depend upon that statute, and cannot be affected in any manner by the construction this court may have given to the former one which it supersedes. The question therefore whether the cited case was correctly, or incorrectly decided is moot in so far as the present controversy is concerned, and no useful purpose would be subserved by entering upon such an inquiry.

The appellant's counsel, as well as the Attorney General, appreciating the differences in the statutes, calls attention to the fact that the exclusion of railway employes from the benefits of the provisions of the Industrial Insurance Act will result in relegating them in many instances to a common-law action to recover for injuries received by them in which the common-law defenses will be applicable on the part of employers, and argues that a better construction of the statute than the one we have indicated would be to hold that the exemption applies only in those instances where the workman is in the immediate employment of the railroad

company, and not in instances where he is the employé of an independent contractor. But, while we appreciate the human side of the argument, it is not our opinion that the statute is of doubtful meaning, and thus open to interpretation. We cannot read it otherwise than that the Legislature has thereby exempted from the operation of the Industrial Insurance Act all employés engaged in maintenance work upon railroads engaged in interstate and intrastate commerce without regard to the fact whether they are employed to perform the work by the railway company itself or by an independent contractor. For the court therefore to read into the statute such an exception would be to legislate and not to construe.

The judgment is affirmed.

HOLCOMB, C. J., and MAIN, MOUNT, MITCHELL, TOLMAN, PARKER, MAOKINTOSH, and BRIDGES, JJ., concur.

(112 Wash. 64)

SMITH v. SEATTLE SCHOOL DIST. NO. 1 et al. (No. 15797.)

(Supreme Court of Washington. Aug. 3, 1920.)

1. Counties  $\S$  146—Not liable for official act of superintendent of schools.

A county is not liable, under the doctrine of respondeat superior, for acts of the superintendent of schools, who is an elected public officer, in the conduct of teachers' institutes required by Rem. Code 1915,  $\S$  4575-4583.

2. Schools and school districts  $\S$  89—County superintendent, permitted to use school building, is licensee.

Though the holding of teachers' institute in a school building is authorized by Rem. Code 1915,  $\S$  4481, the county superintendent, in holding such institute, is a mere licensee, not even an invitee of the school district, and the district owes him no duty to protect him against obvious dangers.

3. Schools and school districts  $\S$  89—District need not safe guard elevator for employé of school superintendent.

An employé of a county superintendent, who was holding a teachers' institute in school building, has no greater rights therein than the superintendent has against the school district, but is a mere invitee, and the district is not liable for injuries to the employé resulting from defective condition of the elevator shaft.

Department 1.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Manley Smith, an infant, by Berse Martin, his guardian ad litem, against Seattle School District No. 1 and others. Judgment for defendants on demurrer to the complaint, and plaintiff appeals. Affirmed.

Meyers & Couden and Edward H. Wright, all of Seattle, for appellant.

Fred C. Brown and Wm. Farmerlee, both of Seattle, for respondents.

HOLCOMB, C. J. Plaintiff, a minor, brought this action by his guardian ad litem against defendants to recover for personal injuries sustained by him because of the alleged negligence of defendants in the operation of a freight elevator while plaintiff was employed in a lunchroom maintained at the Broadway High School building in Seattle. This appeal is from orders of the trial court sustaining separate demurrers, by defendants Seattle school district No. 1 and King county, to plaintiff's amended complaint, and dismissing his action upon his refusal to plead further.

The alleged facts may be summarized as follows: Respondent Seattle school district No. 1 had caused a lunchroom to be installed in the Broadway High School building, and during regular sessions of the school it was operated for the convenience of teachers and pupils of that school; but on August 28, 1917, at the time of appellant's injury, the lunchroom was in operation for the benefit of teachers attending an institute being conducted in the building by the county school superintendent with the permission of respondent Seattle school district No. 1. This lunchroom was on the fifth floor of the building, and the electric freight elevator upon which appellant was injured ran between the fifth floor and the basement. On the 28th day of August, 1917, appellant, a boy 12 years of age, was employed by the manager of the lunchroom to assist in kitchen work in connection with the operation of the lunchroom, and in the performance of such duties he was directed by the manager to do an errand in the basement. He used the elevator to reach the basement, and in attempting to return the same way he stepped into the open space between the edge of the elevator and the wall of the shaft, and sustained the injuries for which recovery is sought.

The complaint charged that the elevator was negligently maintained, because: First, there was a space of from four to six inches between the floor of the elevator and the front wall of the elevator shaft, with no guard to prevent a person riding on the elevator from stepping therefrom into the open space between the edge of the elevator floor and the wall of the shaft; and because, second, no notice was posted in or near the elevator calling attention to its construction or to the fact that its operation by a person of tender years was dangerous and constituted a menace to life and limb. Respondents were charged by the complaint with notice of the alleged dangerous condition of the elevator.

Portions of paragraphs 5 and 6 of the amended complaint read as follows:

"That the said lunchroom was constructed and equipped in said high school building for the purpose of furnishing healthful food to the pupils and teachers of said Broadway high school while they are in attendance at the sessions of said school. That said lunchroom was not constructed or maintained for profit, but solely for the purpose of contributing to the physical welfare of the pupils in attendance at said school."

"That for the convenience of the teachers and others who were required to attend the session of the said teachers' institute the said county school superintendent made arrangements for the operation of the lunchroom and its equipment, which was in said high school building during the period when said institute was in session. That said lunchroom was operated during said period with the knowledge and consent of said school district, by direction of the said county school superintendent of King county, Wash., not for the profit of said county, but solely in connection with the holding of said institute."

[1] The holding of institutes is required by statute (sections 4575 to 4583, Rem. Code); and the use of "the schoolroom" for certain public gatherings is authorized by section 4481, Rem. Code. So the school district was empowered to permit the county superintendent of schools to conduct a teachers' institute in Broadway High School building. But we do not think authority can be shown for the conducting of this lunchroom for the convenience of persons in attendance at the institute. The holding of teachers' institutes is not a county function. That is manifestly a function of the county school superintendent under the statute.

Appellant contends that a municipal corporation, including a county, is impliedly liable under the maxim of respondeat superior for the negligence of its servants and agents in the discharge of its purely corporate powers as distinguished from those of a governmental nature, and that, the fact of agency being established, the liability of the municipality is determined by the rules which govern the relation of master and servant unless it is expressly exempted by statute from the application of the rule. But this presupposes that the county superintendent in this case is the agent of the county, and that as such the county must respond under the maxim of respondeat superior for the tort or negligence of the county superintendent. The relation of principal and agent does not exist, however, between a municipality and the agents it appoints or employs in the execution of its governmental powers; for they are generally considered public agents or agents of the state and not of the corporation. Its officers directly elected by the people are not its agents. An officer whose duties are prescribed by statute, whose authority is not derived

from the corporation, and who is not subject to its control, is not its agent for whose negligence it is liable. *Shearman & Redfield on the Law of Negligence* (8th Ed.) vol. 2, § 291; *Northwestern Improvement Co. v. McNeill*, 100 Wash. 22, 170 Pac. 338; *Township of Vigo v. County of Knox*, 111 Ind. 170, 12 N. E. 305; *Dillon on Municipal Corporations* (5th Ed.) vol. III, § 974; *Thompson on Negligence*, vol. 5, §§ 5818, 5822; *Dillon on Municipal Corporations* (5th Ed.) vol. 4, §§ 1640, 1655. The county superintendent being therefore a public officer, and not a municipal agent or employé, whatever may be his liability in such case as this, the county has no liability under the maxim respondeat superior.

[2] As to the school district a somewhat different question is presented. Appellant admits that as to the school district the county superintendent (although appellant contends that it was the county through the county school superintendent) in holding the teachers' institute was the invitee or licensee of the school district and that—

"The owner of premises owes no duty to a mere licensee as to the condition of such premises save that he should not knowingly let him run upon a hidden peril or wantonly or willfully injure him."

[3] But, while admitting this legal proposition, appellant contends that he was not such a mere licensee. Neither the county school superintendent nor the county was in any sense an invitee of the school district, not having been solicited nor invited to use the building; but the county school superintendent was, by permission, a mere licensee under the statute (Rem. Code, § 4481). It must be conceded that the appellant was the employé of the licensee, and we are unable to find any principle of law which would put him in a different status, such as that of an invitee of the school district itself, or a servant or employé of the school district, or a person of tender years, invited either expressly or tacitly to use a dangerous apparatus, or a child using an attractive nuisance, or a volunteer. He comes within none of these classes. The only class he could possibly be placed under would be that of an agent, servant, or employé of the licensee of the school district's premises. That being the case, the duty owed toward him was exactly that owed toward the licensee; and that duty and the rule of liability surrounding same is well established by an almost universal array of authorities. We quote and cite a few:

"The general rule is, that the licensee goes upon land at his own risk, and must take the premises as he finds them. An open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril." *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369.

"\* \* \* The complaint, at most, shows that appellant was no more than a bare licensee, and in such case respondent owed him no duty, except to avoid willful wrong and wanton carelessness and neglect." *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 528.

"\* \* \* An owner owes to a licensee no duty as to the condition of the premises, except that the owner should not knowingly permit the licensee to run upon hidden dangers, or willfully cause him harm." *Hanson v. Spokane Valley Land & Water Co.*, 58 Wash. 6, 107 Pac. 863.

"In determining respondent's negligence, we must determine the duty it owed to appellant, since negligence occurs only where there is a breach of legal duty. That duty, in the case of licensees and volunteers, is not to willfully or wantonly injure. Not failing in this duty, responsibility for appellant's injury cannot be fastened upon respondent." *Shafer v. Tacoma Eastern R. Co.*, 91 Wash. 164, 157 Pac. 485, L. R. A. 1916F, 114.

See, also, *Kroeger v. Grays Harbor Const. Co.*, 83 Wash. 68, 145 Pac. 63; *Gasch v. Rounds*, 98 Wash. 317, 160 Pac. 962.

"It may be assumed, and the assumption is justified by decided cases, that as to persons standing in certain relations to the defendant a duty rested upon the company to exercise reasonable care in the maintenance and reparation of the machine, and that a failure to perform it would subject the defendant to liability to persons occupying such special relations, who should sustain injury from the omission. But the plaintiff stood in no such relation to the defendant, as imposed upon it the duty to keep the machine in repair. He was, at the time of the accident, in every legal sense, a stranger to the defendant. \* \* \* But in the case before us there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous; the plaintiff was a mere licensee. \* \* \*" *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718.

See, also, *Foster v. Portland Gold Min. Co.*, 114 Fed. 613, 52 C. C. A. 398; *Rhode v. Duff*, 208 Fed. 115, 125 C. C. A. 343; *Weaver v. Carnegie Steel Co.*, 223 Pa. 238, 12 Atl. 532, 21 L. R. A. 466; *Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436; *Muench v. Heinemann*, 119 Wis. 441, 96 N. W. 800.

Such being the case, under the foregoing authorities the school district cannot be held liable for such alleged conditions of the elevator as furnished to the county school superintendent.

The trial court correctly sustained the demurrers, and dismissed the case.

Judgment affirmed.

MITCHELL, PARKER, MACKINTOSH,  
and MAIN, JJ., concur.

(111 Wash. 564)

**BROWN v. HUNT & MOTTET CO. et al.**  
(No. 15756.)

(Supreme Court of Washington. July 15, 1920.)

**1. Receivers § 77(1)—Appointment does not alter rights of parties as to property.**

Appointment of receiver does not alter or affect the rights of the parties to property, or give or take from them any lien they have acquired and are entitled to, and does not prevent one from filing his claim of lien against the property of a corporation under receivership.

**2. Mechanics' liens § 128—Materialmen failing to file claims held not entitled to preference.**

Where persons who had furnished material to an exposition company stood by after ceasing to furnish the material, until the court in protection of the rights of other creditors of the insolvent corporation appointed a temporary receiver until a permanent receiver was appointed through whom sale was made through direction of the court, without having filed materialmen's claims in the auditor's office, as required by Rem. Code 1915, § 1134, such materialmen are not entitled to preference in payment of funds derived by the receiver from the sale of the buildings of the corporation erected on certain streets of the city and removed therefrom by purchasers at sale by the receiver under order of court.

**Department 1.**

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Arch D. Brown against Northwest Peace Jubilee, an insolvent corporation. From order denying Hunt & Mottet Company, a corporation, and the City Lumber Agency, a copartnership, preference in payment out of the receiver's funds, such parties appeal. Affirmed.

Burkey, O'Brien & Burkey and W. W. Keyes, all of Tacoma, for appellants.  
Stiles & Latham, of Tacoma, for respondent.

MITCHELL, J. This is an appeal from an order denying to Hunt & Mottet Company, a corporation, and to the City Lumber Agency, a copartnership, preference in payment claimed by them out of funds derived by the receiver of the Northwest Peace Jubilee, an insolvent corporation, from the sale of buildings and structures erected by that corporation upon certain streets and alleys in the city of Tacoma for the purpose of conducting a public celebration during the week of July 4, 1919.

The facts are not in dispute, and are substantially as follows: The Northwest Peace Jubilee was organized under the laws of this state in April, 1919, as a corporation, not for carrying on trade or business for profit, but,



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as expressed in its articles of incorporation, for the purpose of "putting on and staging of the Northwest Peace Jubilee and Fourth of July celebration in the city of Tacoma, Washington, and such other attractions and celebrations as in the opinion of the majority of all concerned shall best promote the interests of the city and community, and especially for the purpose of raising funds for the Tacoma Sailors' and Soldiers' auditorium to be built by the citizens of the city of Tacoma in memory of the soldiers and sailors of the northwest, living or dead, who served our country in defending us, our homes and the world civilization in the late World War." Upon its organization it procured from the city council of Tacoma permission to exclusively occupy portions of certain designated streets and alleys in the city with wooden structures during eight days commencing June 30 and ending July 7, 1919, to enable it to carry on the celebration, which included various shows, exhibitions and amusements. In giving its permission the city council required that immediately after July 7 all fences and other structures should be removed, of which permission and condition the appellants had no actual notice. Pursuant to the plans of the corporation and permission given by the city certain buildings, booths and fences were erected by the corporation upon the streets and alleys designated. Upon request of the corporation the City Lumber Company and the Hunt & Mottet Company during the month of June furnished material that was used in the buildings and fences, for which they have not been fully paid. The only sources which the corporation had for the payment of its obligations was its receipts for admission to the show grounds and other fees and charges collected from exhibitors, and, those being insufficient, it became insolvent, and at the suit of a creditor a temporary receiver was appointed on July 9, 1919, and it appears a permanent receiver was appointed on July 16, 1919. In the month of July the receiver, under direction of the court, sold the structures and fencing for \$1,682.75 (greater than appellants' two claims) to sundry persons, who tore down and removed them from the streets and alleys. The receiver has on hand, belonging to the insolvent estate, more than enough money to pay appellants' claims in full. Neither of the appellants filed in the office of the auditor of Pierce county any claim of lien upon the structures and building, but each did file its claim with the receiver within 90 days after the cessation of the delivery of the material furnished by it, claiming a preference right out of the funds realized from the sale of the buildings and structures.

The lands upon which the structures were erected were parts of the streets of Tacoma, upon which no lien could be asserted, but it

was otherwise with the structures, under section 1146, Rem. Code, which provides:

"When, for any reason the title or interest in the land, upon which the property subject to the lien is situated cannot be subjected to the lien, the court may order the sale and removal from the land of the property subject to the lien to satisfy the lien."

It is the contention of appellants that the court through its receiver having sold the buildings to persons who tore them down in order to remove the material, within the 90 days in which appellants were entitled to file their claims with the county auditor, entitled them thereafter, if within the statutory period of 90 days, to file their claims with the receiver against the fund derived from the sale of the buildings, with the like effect of priority of payment out of that fund as if their claims had been filed with the county auditor prior to the appointment of a receiver.

Upon the subject of liens of mechanics and materialmen section 1184, Rem. Code, provides:

"No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof to be affected thereby, is situated."

The right of the lien being statutory, it is apparent, by the very terms of the law, that it shall not exist unless within 90 days after the cessation of the furnishing of the material a claim shall be filed for record with the county auditor, and hence in the present case no lien ever did exist. But, as already stated, it is claimed that, appellants' right of 90 days' time in which to file their claims with the county auditor having been intercepted by the court and its receiver's sale, "there was nothing for claimants to file against, other than the fund in the hands of the court realized from the sale of the structures," and that their priority of payment should be protected by the course they have taken. Appellants cite *Central Trust Co. v. Texas, etc., Ry. Co.* (C. C.) 23 Fed. 673, where, in a short opinion delivered orally, it was said:

"Where parties are entitled to a lien, and can secure it by certain proceedings under the statutes of the state, they are not required to go to the expense of such proceedings, but this court will treat it as though all needful steps had been taken to establish the lien."

The lien law of Missouri under consideration in that case did not contain any prohibitory language such as is found in our statute, and in addition, while the opinion

is not clear upon the subject, it appears that the court in a receivership case was but approving the master's action in allowing a preference at a date when if disallowed the claimant, yet had time to file his notice of claim within the time provided by statute upon property still in existence upon which the material had been furnished.

Next, the case of *Commonwealth Roofing Co. v. North American Trust Co.*, 135 Fed. 984, 68 C. C. A. 418, is relied on by appellants. It was a case under the New Hampshire statute. The statute provided that the furnishing of material ipso facto gave the lien, wherefrom the lienor did nothing to enforce his rights until and except by attachment proceedings within a specified time. Prior to the expiration of the time within which attachment proceedings might have been had a receiver was appointed, who took charge of the property, and the court held the proper remedy of the lienor to protect his priority was in the receivership proceedings, under the rule that the appointment of a receiver does not divest the property of prior existing liens, but affects them only in the manner and time of their enforcement. It was a case in which "there were existing, completed liens on April 20, 1903, when the receiver was appointed." In the opinion it was remarked:

"It should be observed that the statute which we have quoted makes no requirement, as do the statutes of some states, to the effect that giving or filing a notice is a condition precedent to the creation of a lien. What might be the effect of such a requirement we have no occasion to consider."

The case of *Berwind-White Coal Mining Co. v. Metropolitan S. S. Co.* (C. C.) 166 Fed. 782, cited by appellants, was a case of a maritime lien created under a statute of New Jersey, which provided for a completed lien upon any ship or vessel, her tackle, etc., simply upon the doing of any work or the furnishing of material or supplies for the building, repairing, fitting, furnishing, or equipping such ship or vessel, and providing the lien should continue until paid.

The cases of *Totten & Hogg Iron, etc., Co. v. Muncie Nail Co.*, 148 Ind. 372, 47 N. E. 704, and *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155, 51 N. E. (Ill.) 179, cited by appellants, simply hold, as stated in the first of those cases:

"If appellant had acquired a lien upon the mill and other property of appellee, such lien could not be lost by the subsequent appointment of the receiver."

But such cases are not in point here, where no lien had been acquired, or, as our statute puts it, "existed," at the time of the appointment of the receiver. The only authority found for the lien in this state is contained

in the statutes; and, in order to entitle one to the lien at all, the same must be perfected according to the statute.

[1] "The appointment of a receiver does not alter or affect the rights of the parties to property, or give to or take from them any liens they have acquired or are entitled to." *Withrow Lumber Co. v. Glasgow Investment Co.*, 101 Fed. 863, 42 C. C. A. 61, and cases cited. It in no way prevents one from filing his claim of lien in the office of the county auditor. It only changes the procedure, and possibly postpones the collection.

[2] In the present case, appellants' loss of priority of payment out of the insolvent estate is traceable to neglect to take care of themselves. The losses they suffer are those which ordinary care would have prevented. Lack of actual knowledge of the condition imposed by the city that the structures on the streets should be removed immediately after July 7 is not so important, for manifestly inquiry of the officers of the corporation staging the celebration, or inquiry at the city hall, would have disclosed the condition, and, besides, the very fact that the structures were built upon public streets of the city was a constant and lively suggestion that the occupancy was transient and fleeting. Nevertheless, appellants stood by, after ceasing to furnish material on June 30, until the court in protection of the rights of other creditors of the insolvent corporation appointed a temporary receiver on July 9, until a permanent receiver was appointed on July 16, through whom a sale was afterwards made by direction of the court, without having filed their claims in the auditor's office. The right of the city to the use of its streets and the rights of other creditors are not to be thus subordinated to the delay and will of appellants, who seek to have a court of equity relieve them from their failure to comply with the mandatory terms of the statute in the face of ample unimproved opportunity to do so. Appellants' situation, under the circumstances existing here, is analogous to that of one who, having the right and ample opportunity to take steps essential to create a lien, fails to do so because of the appointment of a receiver, through which proceedings alone he attempts to assert a priority, of which situation it was well said upon a rehearing in the case of *Withrow Lumber Co. v. Glasgow Investment Co.*, 106 Fed. 863, 45 C. C. A. 321.

"The court cannot, upon the theory of keeping alive a right to secure an inchoate or incipient lien, create one. \* \* \* Petitioner's contention would lead to this result—that it would be entirely unnecessary to file a mechanic's lien in any case where a suit was instituted involving the administration of property upon which a lien was sought to be established. This would be a dangerous precedent to set, and would be far-reaching in its effect."

Upon the whole record we are satisfied the judgment denying appellants any priority, but establishing their claims as those of common creditors, was right, and the judgment is affirmed.

HOLCOMB, C. J., and PARKER, MACKINTOSH, and MAIN, JJ., concur.

(112 Wash. 45)

BAILEY et al. v. HENNESSEY. (No. 15766.)

(Supreme Court of Washington. Aug. 3, 1920.)

**1. Easements ⇐15—How easements by implication are created; "Implied easement."**

Easements by implication arise where property has been held in a unified title, and during such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, and such servitude, at the time that the unity of title has been dissolved by a division of the property or a severance of the title, has been in use and is reasonably necessary for the fair enjoyment of the portion benefited by such use.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Implied Easement.]

**2. Easements ⇐15—Considerations in determining whether easement by implication has arisen.**

In determining whether there is an easement by implication, it is necessary to determine the extent of the use, the character and the surroundings of the property, the relationship of the parts separated to each other, and the reason for giving such construction to the conveyances as will make them effective according to what must have been the real intent of the parties.

**3. Easements ⇐16—Owner held to have implied easement in use of driveway in rear of adjoining building.**

Where common grantor of adjoining lots erected store buildings on the lots, without providing front entrances for trucking, and left driveway in rear to be used for such purpose, and where driveway was so used for 14 years after ownership of the buildings became vested in different persons, owner of one building, who was engaged in the hay, grain, and feed business, had implied easement in use of driveway in rear of adjoining building; such driveway being reasonably necessary to the convenient and comfortable enjoyment of his property.

**Department 1.**

Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Action by E. J. Bailey and others against Ellen M. Hennessey. Decree for plaintiffs, and defendant appeals. Affirmed.

Leo McCarty, of Lewiston, Idaho, and H. L. Post, of Asotin, for appellant.

E. J. Doyle, of Clarkston, for respondents.

MACKINTOSH, J. The facts in this case as they are disclosed by the record can be no better stated than they are in the findings of the trial judge, and we will therefore quote findings Nos. 4 to 15, inclusive:

"(4) That on February 13, 1902, Nellie S. Ramsey became the owner of lot 1, block 9, Clarkston, Asotin county, state of Washington.

"(5) That prior to March 22, 1904, she erected on said lot, facing Sycamore street, on the south line of said lot, two store buildings and a hotel, each of which buildings extended back to within 10 feet of the north boundary line of said lot, leaving a 10-foot alley or driveway along the entire north boundary line of said lot.

"(6) That on and prior to March 22, 1904, this 10-foot strip was used by the lessees and occupants of said building and the owner as a driveway to reach the rear of said buildings, and in the unloading of merchandise and furniture at the back entrance of said buildings.

"(7) That said buildings were erected with regular store and front entrances on Sycamore street, and that said store buildings were erected with rear doors and platforms with reference to said 10-foot alleyway, and that the floors of said buildings were constructed for the use of the entrances on Sycamore street, as store entrances, and the entrances on the alley for receiving and unloading merchandise and furniture from said store buildings.

"(8) That said driveway was apparent and obvious and has been continually used from the time that the first building was erected, up and to October 3, 1918, when the defendant constructed a fence and obstruction across said alleyway, immediately following which this action was instituted to restrain the defendant from interfering with the use of said alley way as such alley.

"(9) That said driveway is necessary for the convenient and comfortable enjoyment of said store buildings as they existed on and prior to March 22, 1904, and has continued as necessary for the convenient and comfortable enjoyment of the same ever since said time.

"(10) That on March 22, 1904, the said Nellie S. Ramsey deeded the east 40 feet of lot 1, block 9, Clarkston, to William McCarroll, the predecessor in title to the plaintiffs in this action.

"(11) That in October, 1908, said Nellie S. Ramsey deeded the west 87½ feet of said lot 1, being the remainder of said lot, to J. E. Hennessey, the predecessor in title to the defendant in this action.

"(12) That since some time prior to March 22, 1904, and up to October 3, 1918, said driveway was continuously used by the plaintiffs and their predecessors in interest as such driveway, and was at all times necessary to the convenient and comfortable use and enjoyment of the said buildings.

"(13) That on October 3, 1918, the defendant obstructed said driveway by building across the same, and has since continued to obstruct the same.

"(14) That for 14 years prior to the obstruction of said driveway the plaintiffs and their predecessors in interest have openly used and continuously used the said driveway in loading

and unloading merchandise and furniture at the rear entrance of said building and hauling such goods by such conveyances out of said buildings through said alley.

"(15) That since the erection of said buildings all of said buildings have been used as store and business buildings."

The court having entered a decree, in conformity with the prayer of the complaint, that the respondents have the use of the alleyway, and that the appellant be forever enjoined and restrained from placing any obstructions therein, or preventing the free use thereof, the defendant has appealed.

Much of the discussion in the briefs and oral argument of the appellant can be disposed of, if we first clearly establish in our minds exactly what is being contended for in this action. This is not an action claiming a private way of necessity, nor is it an action seeking to establish a public way by open, notorious, and continued public use for over 7 years, nor is it an action to establish a private easement by prescription; but it is a claim by the respondents of a right to use this alleyway as an easement "necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made," and that the common owner, in 1904, erected buildings on the entire lot then owned by her with reference to the use of this disputed strip as an alley—the buildings having been constructed so that they would require a complete lowering of all the floors if the alley could not be used, and thereafter sold the buildings with the use of the alleyway as an inducement entering into the sale, and as an advantage connected with the property sold, that thereby an easement had been created of which the plaintiffs can assert the benefit. In other words, we are here dealing with only an easement by implication, to which rules of law different from those of easement by prescription, or public easements, or private rights of way of necessity, are applicable.

[1] Easements by implication arise where property has been held in a unified title, and during such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, and such servitude, at the time that the unity of title has been dissolved by a division of the property or a severance of the title, has been in use and is reasonably necessary for the fair enjoyment of the portion benefited by such use. The rule then is that upon such severance there arises, by implication of law, a grant of the right to continue such use.

[2] In determining whether the facts of a particular case bring it within the application of this rule, it is necessary to determine the extent of the use, the character, and the surroundings of the property, the relationship of the parts separated to each other,

and the reason for giving such construction to the conveyances as will make them effective according to what must have been the real intent of the parties; the foundation of the rule being that there shall be held to have been included in the conveyances all the rights and privileges which were incident and necessary to the reasonable enjoyment of the thing granted, practically in the same condition in which the entire property was received from the grantor.

Some courts have said that these easements are granted on the principle of estoppel; that is, that the grantor cannot derogate from his own grant. Other courts have based the right upon the presumption that the parties have made and received the conveyance, having in view the condition of the property as it actually was at the time of the sale, and that therefore neither, without the consent of the other, can change the open and apparent condition to the detriment of the other. *Cogswell v. Cogswell*, 81 Wash. 315, 142 Pac. 655.

"If the owner of land has artificially created upon the property a condition which is favorable to one portion of his property, and then sells that portion, the grantees will take it with the right to have that favorable condition continued. \* \* \* Upon the severance of the heritage a grant will be implied of all those continuous and apparent easements which had in fact been used by the owner during the unity." *Nicholas v. Chamberlain*, 2 Croke's K. B. Rep. 121.

Three things are regarded as essential to create an easement by implication:

First, "a separation of the title; second, that before the separation takes place the use, which gives rise to the easement, shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and, third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained." 9 R. C. L. 757.

[3] Examining the testimony in this case to determine whether these three requirements have been made, we find: First, that there was a unity of title. In 1902 Mrs. Ramsey acquired title to what are now the dominant and servient tenements. In 1904 she conveyed a portion which is now the property of the respondents, and in 1908 conveyed the balance, which is the property of the appellant. Second, that Mrs. Ramsey, during her ownership, erected buildings upon both portions of the property; their erection being with a view to the use of the alleyway, and the testimony shows that such use could not have been intended as a temporary convenience, but that the servitude impressed was intended to be of a permanent character, and was notorious and plainly visible. From this the court has the right to determine that Mrs. Ramsey intended the servitude to be preserved, and it was

evidently necessary to the convenient enjoyment of the property. The evidence also discloses that this had been continuous from 1904 until 1918. Third, the evidence discloses that the easement is necessary to the beneficial enjoyment of the lands granted. Though the courts are not unanimous, the majority rule is that the necessity need not be a strict necessity, but need only be a reasonable necessity, and that degree of necessity is sufficient which merely renders the easement essential to the convenient or comfortable enjoyment of the property as it existed when the severance took place.

We have not heretofore been called upon to determine, in questions of easements by implication, what degree of necessity is required; but the question has arisen in cases involving other sorts of easements, and we have adopted the interpretation just stated, and there is no reason why a stricter one should be applied in cases of this nature. *Schumacher v. Brand*, 72 Wash. 543, 130 Pac. 1145; *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 904; *State ex rel. Stephens v. Superior Court*, 180 Pac. 234, and cases there cited. We have held that a right of way by implication arises only from necessity, and never from convenience, but have not established heretofore the measure of such necessity. *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 104 Pac. 820, 30 L. R. A. (N. S.) 926, 19 Ann. Cas. 1199; *Roe v. Walsh*, 76 Wash. 148, 135 Pac. 1031, 136 Pac. 1146.

The testimony shows that the business of respondents cannot properly be carried on by using the sidewalk in front for the purpose of taking in and out hay, grain, and feed (the respondents being engaged in that line of business); that the buildings were not so constructed as to permit of proper ingress and egress through the front entrance for trucking; that, if respondents were compelled to use the front entrance, they would be handicapped in their dealings with the public; that the buildings can be conveniently used only by a rear entrance, and were constructed for the purpose of using the alleyway in connection with such entrance, and that closing the alleyway would result in a detriment to the public and a depreciation of the value of the building; and that it is essential to the respondents' business to have certain facilities for carrying it on, and that a rear entrance is one of those facilities.

Under all the testimony, it is clear that a reasonable necessity exists for the perpetuation of a condition existing at the time of the severance of the estate, and which has been in continuous, open, and apparent use, and acquiesced in by all parties interested, for a long term of years. The facts of the case bring it within the requirements of the

rule we have stated, and the trial court was correct in determining that an easement by implication existed and was impressed upon the servient tenement owned by the appellant.

The judgment and decree will be affirmed.

HOLCOMB, C. J., and PARKER, MAIN, and MITCHELL, JJ., concur.

(112 Wash. 150)

# DOONAN v. ROSSI. (No. 15831.)

(Supreme Court of Washington. Aug. 10, 1920.)

## 1. Bills and notes $\S$ 523—Evidence held to establish prima facie case in action on travelers' checks.

In an action by a transferee on travelers' checks, in which payee, being substituted as defendant in place of bank which had issued checks, claimed that he had lost them, and for that reason had stopped payment, evidence showing that payee had indorsed such checks or similar checks to plaintiff's transferor held to establish prima facie case for plaintiff.

## 2. Intoxicating liquors $\S$ 329(1)—Person taking travelers' checks in payment for liquor may recover thereon.

That seller of intoxicating liquors knew or should have known that liquor was to be taken into other state and sold in violation of law did not preclude him from recovering on travelers' checks accepted in payment for liquor, on the ground that the transaction was against public policy.

## Department 2

Appeal from Superior Court, Spokane County.

Action by W. F. Doonan against R. Rossi, substituted by order of court for the Old National Bank of Spokane, Wash. Judgment of dismissal, and plaintiff appeals. Reversed and remanded, with directions.

Allen, Winston & Allen, of Spokane, for appellant.

Chas. P. Lund, of Spokane, for respondent.

TOLMAN, J. Appellant, as plaintiff, brought this action against the Old National Bank to recover \$500 evidenced by seven travelers' checks issued by it to R. Rossi. By stipulation Rossi was substituted for the bank as defendant, and he, and not the bank, will be hereinafter referred to as the respondent. At the close of plaintiff's case the trial court sustained a motion to dismiss the action because of the insufficiency of the evidence, and this appeal followed.

It fairly appears from the evidence introduced that on October 17, 1918, the Old Na-

tional Bank issued to respondent seven travelers' checks, three for \$100 each, and four for \$50 each, all payable to the order of respondent. A little later in the same month these same checks were, by one Frank Warren, delivered to appellant at Troy, Mont., as part of the purchase price of certain whisky then sold and delivered by appellant to Warren. Appellant was engaged lawfully in the liquor business in Montana, having a license under the laws of that state then in force, and neither inquired nor knew that the liquor was to be brought to Washington in violation of its laws, though there is enough in the record to indicate that he might very well have suspected Warren of such intent. Thereafter respondent stopped payment on the checks, and, when presented in due course, payment was refused.

[1] At the time in question Warren was conducting a garage in the city of Spokane, and respondent either kept his automobile there or had it there for repairs. Two witnesses testified that respondent was frequently at Warren's garage and for several days had tried to get different men to take his automobile and go to Montana for liquor, and finally, after several attempts, he induced Warren to agree to go, on the understanding that respondent would furnish the car and the money, and the profits derived from a resale of the liquor would be equally divided. Both of these witnesses testified in detail that respondent, in the garage office, produced these or similar checks, indorsed or countersigned them, and, having done so, said, in effect, that he had signed his name on the wrong line, but that the checks would be good anyway, and delivered them all to Warren for the purpose already indicated. Another witness testified to a portion of this conversation heard by him and further testified that, after Warren returned from Montana, he and respondent had a dispute over their settlement, and respondent told Warren that, unless he received \$150 more, he would stop payment on the checks. To state these facts is sufficient to show that there was ample evidence in connection with the checks themselves, and the signatures which they bear, to make a prima facie case and put upon the respondent the burden of establishing his affirmative defense, which was that he did not deliver, assign, or countersign the checks to any person, or at all, and that while the checks were in his possession, payable to himself, he lost them from his pocket, and immediately, and for that reason, stopped payment.

The respondent urges that, even though the evidence was sufficient, appellant cannot recover, because he knew or should have known that the liquor was to be brought into Washington and there sold in violation of

the law, and therefore the transaction was against public policy and void.

[2] We have already had occasion to review the authorities upon this question, and, after finding that the great weight of authority is to that effect, have laid down the rule:

"We are therefore of the opinion that, where property is sold absolutely and unconditionally, mere knowledge on the part of the vendor that the property will thereafter be sold illegally, or applied to some illegal or immoral use, will not bar an action to recover the purchase price, unless it is a part of the contract of sale that the property shall be so sold or used, or unless the vendor aids or participates in the illegal objects otherwise than by the mere act of making the sale." *Washington Liquor Co. v. Shaw*, 38 Wash. 398, 80 Pac. 536, reported also in 3 Ann. Cas. 153, where an exhaustive note will be found.

We see no sufficient reason at this time for a departure from the rule there stated.

The judgment of the trial court is reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(111 Wash. 594)

JOHN R. O'REILLY, Inc., v. TILLMAN et ux.  
(No. 15845.)

(Supreme Court of Washington. July 16, 1920.)

1. Appeal and error  $\S$  959(3)—Pleading  $\S$  236(3)—Trial amendments matter of discretion with trial court.

Permitting an answer to be amended when a cause is called for trial is a matter which is largely in the discretion of the trial court, and, unless the appellate court can say that that discretion has been abused, it will not be interfered with.

2. Pleading  $\S$  236(3) — Trial court did not abuse discretion in permitting amendment of answer.

In an action to have a deed declared a mortgage, wherein defendants in their answer admitted that they made a loan to the plaintiff, *held*, that the court did not abuse its discretion in permitting defendants to amend the answer when cause was called for trial so as to withdraw the admission when the cause was called for trial; there being no showing that the plaintiff was misled by the answer as amended, or that it made any application for additional time to prepare for its defense thereto.

3. Mortgages  $\S$  32(2) — Question whether deed is a mortgage one of intent.

When it is sought to establish that a deed is in fact a mortgage, the primary question is the true intent as it is to be gathered from the whole transaction.

4. Mortgages  $\Leftrightarrow$ 32(5)—There must be debt capable of enforcement to create relation of mortgagor and mortgagee.

To create the relation of mortgagor and mortgagee, it is essential that there should be a debt capable of enforcement by action and which was intended to be secured by a mortgage.

5. Mortgages  $\Leftrightarrow$ 1—Once a mortgage always a mortgage.

An instrument once a mortgage is always a mortgage.

6. Frauds, statute of  $\Leftrightarrow$ 74(2)—Oral agreement that grantor could redeem unenforceable.

An oral agreement between grantor and grantee in a deed that the grantor should be allowed one year in which to redeem or take back the property was one relating to real property and unenforceable under the statute.

#### Department 1.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by John R. O'Reilly, Incorporated, against Bert O. Tillman and Martha M. Tillman, his wife. Judgment for defendants, and plaintiff appeals. Affirmed.

James Kiefer, of Seattle, for appellant.

Poe & Falknor, of Seattle, for respondents.

MAIN, J. As indicated by the allegations of the complaint, this was an action to compel the reconveyance of certain real estate and for an accounting for the rents, issues, and profits thereof. The action was in effect one to have the defendants, who were in possession of the property under a deed, declared to be mortgagees. In the answer the defendants had admitted making a loan to the plaintiff. When the case was called for trial, they asked permission to amend their answer by withdrawing this admission, which was granted. The case proceeded to trial before the court without a jury, and at the conclusion of the plaintiff's case the defendant moved to dismiss the action because a case had not been made out. This motion was sustained, and the judgment of dismissal entered. From this judgment the plaintiff appeals. The appellant is a corporation organized under the laws of this state, and for convenience will be referred to here as O'Reilly. The respondents are husband and wife.

Appellant was the owner of certain real estate in the city of Seattle which was incumbered by two mortgages. On December 18 it, having further obligations to meet, made a note in the sum of \$675, payable to Tillman, due 30 days after date. At the same time the appellant executed a statutory warranty deed naming the respondents as grantee therein. The note and deed were not delivered to the respondents, but placed in escrow with the Dexter Horton Trust & Savings

Bank. The escrow agreement recites that the deed and note are to be delivered to O'Reilly, the appellant, on or before January 17, 1919, upon the condition that the note be paid according to its tenor. The directions to the escrow holder contained the following:

"You will carry out instructions as stated above, and, if not complied with at maturity, return said deed to B. O. Tillman and said note to T. R. O'Reilly, Inc."

This agreement was executed on December 19, 1918, and signed by O'Reilly and Tillman. The note, when it became due, was not paid, and a 30-day extension was granted. On February 18, when the time covered by the extension expired, the parties withdrew the escrow, the note was returned to O'Reilly, and the deed delivered to Tillman. On the same date the deed was filed for record. When these papers were withdrawn, a second escrow agreement was made under date of February 18, 1919. O'Reilly at this time made a note for the sum of \$725 payable to Tillman. Tillman and wife executed a quitclaim deed covering the same real estate which was covered in the prior deed from O'Reilly to them. The note and quitclaim deed were placed in escrow with the same holder as in the former agreement. This escrow recites that the note and deed on or before March 18, 1919, was to be delivered to O'Reilly upon condition that the note was paid according to its tenor. The direction to the escrow holder was as follows:

"You will carry out instructions as stated above, and, if not complied with at maturity, return said note to John R. O'Reilly, Inc., and said deed to Burt O. or Martha M. Tillman on demand."

On March 17, 1919, a third escrow agreement was entered into. At this time a note for \$700 executed by O'Reilly and payable to Tillman was made. The note was placed in escrow, together with the quitclaim deed above mentioned. The escrow agreement recites that the note and deed are to be delivered to O'Reilly on or before May 18, 1919, upon the condition that the note is paid according to its tenor. The direction to the escrow holder was as follows:

"You will carry out instructions as stated above, and, if not complied with at maturity, return said note to John R. O'Reilly, Inc., and said deed to Burt O. or Martha M. Tillman."

This last note was not paid. A day or two before May 18, 1919, when it became due, the parties withdrew the papers from escrow, returned the deed to Tillman, and the note to O'Reilly. Soon thereafter Tillman went into possession of the property, paid off the second mortgage, expended money in its repairs and improvements, and collected the rents. It is to be noted from the facts stated that un-

der no one of the three escrow agreements was any of the three notes at any time to be delivered to any one other than O'Reilly, the maker. Under the first escrow the note was to be returned to O'Reilly, if paid, also the deed. It not being paid when the extension granted expired, the note was returned to O'Reilly and the deed delivered to Tillman. Under the second escrow, if the note was paid, the note and deed were to be delivered to O'Reilly. If not paid, the note was to be returned to O'Reilly and the deed to Tillman or wife. Under the third escrow the same disposition of the note and deed was to be made as under the second; that is, the note, if paid, was to be returned to O'Reilly and the deed delivered to him; if the note was not paid, it was in this event to be returned to O'Reilly and the deed delivered to Tillman or wife.

[1,2] Error is first assigned upon the ruling of the court permitting the answer to be amended as above stated when the cause was called for trial. This is a matter which is largely in the discretion of the trial court, and, unless the appellate court can see that that discretion has been abused, it will not be interfered with. In the case of *Gould v. Gleason*, 10 Wash. 476, 39 Pac. 123, the amendment there permitted operated to mislead the plaintiff. In the case of *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789, the amended answer was filed after the issues had been joined, and it was there held that the trial court had not abused its discretion in permitting the amended answer. In that case it was said:

"Much discretion is vested in the superior court in this particular, and, unless the appellate court can see that that discretion was abused, it will not be interfered with. In addition to this, there was no application for additional time to prepare for the defense to what are termed new allegations in the answer."

In the present case there is no showing that the appellant was misled by the answer as amended, or that it made any application for additional time to prepare for its defense thereto. The trial court, in permitting the amendment, did not abuse its discretion.

[3-5] Upon the merits the question is whether the relation between the parties as disclosed by the facts was that of mortgagor and mortgagee. If this were the relation, it may be admitted that the proper judgment was not entered. If the relation of mortgagor and mortgagee did not exist, then the case was rightly decided by the superior court. When it is sought to establish that a deed is in fact a mortgage, the primary question as pointed out in *Hoover v. Bouffleur*, 74 Wash. 382, 133 Pac. 602, is "the true intent as it is gathered from the whole transaction." In determining whether the transaction did in fact create the relation of mortgagor and mortgagee, as stated in *Plummer*

*v. Ilse*, 41 Wash. 5, 82 Pac. 1009, 2 L. R. A. (N. S.) 627, 111 Am. St. Rep. 997, "the principal test to be applied is whether the relation of the parties towards each other of debtor and creditor continued after the execution of the deed." To create the relation of mortgagor and mortgagee, it is essential that there should be a debt capable of enforcement by action and which was intended to be secured by a mortgage. In *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61, upon this question it is said:

"To have created the relation of mortgagor and mortgagee between the parties, it was essential that there should have been a debt capable of enforcement by action, and which was intended to be secured by the mortgage. There could be no debt when there was no liability therefor. A mere privilege to pay did not impose an obligation so to do."

In the present case the facts stated show that the parties were careful to avoid creating a debt which could be enforced by action and which was intended to be secured by a mortgage. At no time under any of the escrow agreements were the promissory notes or any of them to be delivered to the respondents. If an action had been brought claiming that there was a debt capable of enforcement and which was intended to be secured by the deed as a mortgage, the appellant would well have answered that it was not thus liable because by the agreement of the parties, if the note was not paid, it was to be returned to the maker, the appellant, and the respondents' only right was to the possession of the deed. The whole transaction shows that the true intent was not to create the relation of mortgagor and mortgagee. It is true, as pointed out in *Beverly v. Davis*, 79 Wash. 537, 140 Pac. 693, that the rule is "once a mortgage always a mortgage," but under the facts in the case now before us the relation of mortgagor and mortgagee have at no time existed. A careful examination of all the cases cited by the appellant to sustain its position shows that in each of them there was an intent to create a debt capable of enforcement by action and which was intended to be secured by the mortgage. The present case does not fall within the rule of those cited, but comes within the rule of the case of *Reed v. Parker*, supra.

[6] It is said, however, that when the papers in the third and last escrow agreement were withdrawn, there was an oral agreement between the parties that the appellant should be allowed one year in which to redeem the property. If there were such an agreement, it was one relating to real property, and under the statute of frauds unenforceable.

The judgment will be affirmed.

HOLCOMB, C. J., and MACKINTOSH, PARKER, and MITCHELL, JJ., concur.



(191 P.)

(111 Wash. 576)

**VICKERS v. MACHINERY WAREHOUSE & SALES CO. et al. (No. 15528.)**

(Supreme Court of Washington. July 15, 1920.)

**1. Evidence ⇨21 — Judicial notice taken of custom of attaching drafts to bills of lading.**

The courts will take judicial notice of the almost universal custom of attaching bills of lading to drafts, and thus passing the drafts along for collection.

**2. Banks and banking ⇨127—Rights of bank to draft not affected by attachment of a bill of lading.**

The rights of a bank in a draft, which was indorsed over to it by a depositor, are not affected by the attachment to the draft of a bill of lading.

**3. Banks and banking ⇨127—Bank receiving draft may become either agent, owner, or conditional owner.**

Where a bank receives from a customer or depositor the draft of one residing at a distance, it becomes an agent for collection, the absolute owner by way of purchase or discount, or the conditional owner, and the status depends on the circumstances and the intention of the parties.

**4. Banks and banking ⇨127—Where depositor checks against amount of instrument indorsed, bank becomes absolute owner.**

Where a depositor indorses a negotiable instrument as a draft to bank absolutely, and the amount is put to the depositor's credit subject to his check, the bank becomes the unqualified owner of the draft, and this is so regardless of the fact that the bank in event of nonpayment would have charged the amount against the depositor's account; that merely being the bank's means of exacting payment from the indorser.

**5. Banks and banking ⇨127 — Interest arrangement does not prevent bank from becoming absolute owner of draft.**

Where bank advanced the full amount of draft, it became the unconditional owner, though it was understood it would collect interest on the amount advanced, depending on the time it took for collection.

**6. Garnishment ⇨56—Proceeds of draft owned by bank may not be garnished on claim against drawer.**

Where a bank became absolute owner of a draft, the proceeds could not be garnished on a claim against the drawer, for the drawer had no interest in the proceeds.

**7. Appeal and error ⇨1008(1)—Findings on evidence not conclusive.**

While the appellate court will pay great deference to the fact findings of the trial court, it is its duty to draw its own conclusions.

**8. Banks and banking ⇨127—On payment of draft, bank becomes owner of proceeds.**

Where a bank gave the drawer of a draft credit for the amount, it became the absolute owner of the proceeds on payment, even though

it was but a conditional owner prior thereto; hence, where the drawee paid the draft, he cannot attach the proceeds in the hands of the bank's correspondent on a claim against the drawer.

**En Banc.**

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by C. L. Vickers, as Vickers, Son & Co., against the Machinery Warehouse & Sales Company and others. From the judgment granting only part of the relief sought, the named defendant appeals, and plaintiff cross-appeals. Reversed and remanded, with instructions.

Kerr & McCord, of Seattle, for appellant.

S. H. Kelleran, of Seattle, for respondent and cross-appellant.

**BRIDGES, J.** In January, 1918, the defendant Machinery Warehouse & Sales Company, which we will hereafter speak of as the "machinery company," doing business in the state of Illinois, sold to Vickers & Sons Company, respondent and cross-complainant, of Seattle, Wash., often spoken of herein as the purchaser, a 15-ton crane for the sum of \$8,800. The machinery company made certain warranties of the crane and, among the rest, one that it would pass Seattle inspection. The purchaser was to pay down before shipment \$2,800, and thereafter within due course the crane was to be shipped to the purchaser at Seattle, and at the time of shipment the machinery company was to make a sight draft on the purchaser for the balance of the purchase price, to wit, \$6,000. In compliance with this contract the purchaser paid \$2,800 in cash to the machinery company. This sum was paid by sending a Seattle draft to the machinery company through the Continental & Commercial National Bank of Chicago. Shortly after the receipt of the first payment the machinery company loaded and shipped the crane to the purchaser at Seattle. It drew a sight draft against the purchaser, payable to the order of the Continental & Commercial National Bank of Chicago, of which it was a regular customer, for the balance of \$6,000. The bill of lading was attached to the draft. This draft, with the bill of lading attached, was taken to the Chicago bank, and the latter, following its custom, deposited to the credit of the machinery company the whole of the \$6,000, which deposit was at all times subject to the private check of the machinery company. The Chicago bank then indorsed the draft to the National Bank of Commerce, in Seattle, the appellant, as follows:

"Pay to the order of National Bank of Commerce without recourse on this bank, either as principal or agent, as to the quantity, quality or delivery of any goods covered by this draft,

bill or bills of lading of other documents attached hereto, or herein referred to. Continental & Commercial National Bank of Chicago. W. W. Lampert, Cashier."

The draft so indorsed, together with the attached bill of lading, was immediately sent on to the appellant for collection. When the crane reached Seattle the respondent examined it while it was still on the car, and found that it would not pass Seattle inspection because of certain defects. Notwithstanding the information thus obtained, the respondent paid the draft of \$6,000 to the appellant, and took up the bill of lading. Before the appellant had remitted the \$6,000 to the Chicago bank, respondent brought suit in the superior court of King county, Wash., against the machinery company to recover \$2,500 damages on account of the breach of warranty that the crane would pass Seattle inspection. At the same time it caused to be issued out of the superior court of King county writs of garnishment and attachment, and served the same upon the appellant while it had in its hands the identical \$6,000 which the respondent had so recently paid to it. Thereafter respondent found certain additional defects in the crane, and amended its complaint against the machinery company, alleging additional breaches of warranty, and seeking to recover damages in the sum of \$5,000. Additional attachments and garnishments were issued on this amended complaint, and served upon appellant while it still had the \$6,000 paid to it in exchange for the draft and bill of lading. Very soon after the commencement of this suit both the Chicago bank and the machinery company were notified thereof. Respondent took judgment against the machinery company in the sum of \$5,000, and now seeks to hold sufficient of the \$6,000 paid appellant to satisfy that judgment. The appellant answered the writs of garnishment and attachment to the effect that it was not indebted to the machinery company in any sum, and that it did not have in its possession or under its control any personal property or effects belonging to it. The assistant cashier of the Chicago bank testified that, at the time the bank took the draft and bill of lading, there was no agreement or conversation between the machinery company and the bank concerning the terms or conditions upon which the latter should take the draft; that, following its custom, it discounted the draft, paying the full face thereof, and put the money to the credit of the account of the machinery company subject to its private check. He further testified that the bank bought the draft and became the owner of it; that had the draft or any portion of it not been paid, the bank, in accordance with universal custom, had and would have exercised the right to charge back the amount to the machinery company or look to that company for reim-

bursement. At the time the Chicago bank received notice that the \$6,000 had been garnished, the machinery company had on deposit with it \$3,000. It does not appear whether this balance of \$3,000 was a part of the \$6,000 which the bank had previously paid for the draft. The Chicago bank did not at any time charge any portion of the \$6,000 back to the machinery company. The Chicago bank intended to charge back to the machinery company an amount equal to the interest on the \$6,000 deposited to its credit for such period as might elapse between the time of such deposit and the payment of the draft. The trial court made findings substantially as we have set them out, but in addition thereto found that the Chicago bank extended a conditional credit to the machinery company in the full amount of the draft, with the understanding that the bank would act as agent for the machinery company in the collection of the draft, and that it received the draft, not to be treated as cash, but merely as collateral, and that at no time did the bank or the machinery company have any intention that the bank would become the purchaser or owner of the draft. The court's conclusion was that \$3,000 of the \$6,000 in the hands of the appellant were subject to the garnishment, and judgment was thereafter entered in accordance with such conclusions. From this judgment the garnished defendant has appealed. The respondent has cross-appealed.

The question involved in both the appeal and the cross-appeal is: How much, if any, of the \$6,000 in the hands of the appellant was subject to garnishment, and properly applicable on respondent's judgment against the machinery company? A correct answer to this question depends upon the answer to another question: To whom did the money belong at the time of the service of the writ of garnishment?

[1, 2] There is a maze and tangle of authorities on this question. Much has been said in the briefs concerning the fact that the bill of lading was attached to the draft. We have come to the conclusion that the bill of lading does not, and cannot, in any way, affect the decision of the case. The custom of attaching bills of lading to drafts, and thus passing the drafts along for collection, has become so universal that the court must take judicial notice of the procedure. A bank has power to purchase a draft, but ordinarily it has not power to purchase machinery, and the purchase of a bill of lading would be the purchase of the machinery represented by it. Nor is a bank, even if it had the power, engaged in the business of purchasing machinery or other property the title to which is represented by a bill of lading. After all is said and done, the bill of lading is nothing more nor less than a bill of sale, and is attached to the draft purely

as a matter of convenience in the transaction of business, and in order that the bill of lading, which is the evidence of the title, will not be delivered before the draft is paid. *Lewis Leonhardt & Co. v. Small & Co.*, 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. (N. S.) 887, 119 Am. St. Rep. 994; *California National Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; *Marble v. Harvey*, 92 Tenn. 115, 20 S. W. 427, 18 L. R. A. 252, 36 Am. St. Rep. 71. The fact that a bill of lading was attached to the draft cannot alter the legal relationship between the Chicago bank and the machinery company, concerning their rights or privileges in the draft.

[3, 4] When a bank takes a draft drawn on a person who resides at a distance, it becomes one of three things: (1) A simple collector or agent of the drawer; (2) an absolute purchaser and owner of the draft, or (3) a conditional owner thereof. When the bank acts only as agent of the drawer, it becomes a collector and nothing else. The maker of the draft is its unconditional owner till it is paid. When it is paid the bank becomes the owner of the proceeds, and the debtor of the maker of the draft. If, however, the bank takes the draft and discounts it, and pays to the drawee the amount thereof, then and under those circumstances it is manifest that the bank has become something more than a collector or agent, and has either a qualified or absolute ownership of the draft. When we speak of one being the qualified owner, we mean any interest less than that of complete ownership, which would include the idea of a lien on the draft, or holding it as security for moneys advanced.

Generally speaking, whether a bank becomes a simple agent for collection, an absolute owner, or a qualified owner, will depend on the circumstances surrounding the deal and the agreement between, and the intention of, the parties. Much the greater number and weight of authorities is to the effect that, where one brings a check or draft to his bank, and such check or draft is made payable to the bank, or is unrestrictedly indorsed to it, and requests that the amount thereof be put to his credit subject to his private check, and the bank complies therewith, and nothing else is said or done, it will be conclusively presumed that the bank has become the unqualified and absolute purchaser and owner of the check or draft, and consequently the absolute and unqualified owner of any proceeds to be derived therefrom. We think the theory is sound. It agrees with the idea and view generally accepted by business; it is the natural and unstrained construction of the action of the parties, and has the additional virtue of definitely fixing and at once defining the legal relationships of the parties in many check and draft transactions. Of course, this rule

would not apply where the bank pays or advances an amount materially less than the face of the check or draft, and it is understood that the bank is to pay an additional sum when it has made collection. The correct rule, we think, is stated in 3 R. O. L. 524:

"When a check or other commercial paper is deposited in a bank, indorsed for collection, or where there is a definite understanding that such is the purpose of the parties at the time of the deposit, there is no question that the title to the paper remains in the depositor. \* \* \* If, on the other hand, there is a definite understanding at the time of the deposit that such paper is deposited as cash, it is clear that the title passes to the bank. But where a check indorsed in blank is deposited without any definite understanding as to the way it is to be treated, but is credited by the bank to the depositor as cash, and is so entered upon the depositor's passbook, the question frequently arises whether the title to the check passes immediately to the bank, or remains in the depositor. *Prima facie* according to the weight of authority, the passing, to the credit of the depositor, of a check bearing an indorsement not indicating that it was deposited for collection merely, passes the title to the bank. Still, according to the weight of authority, the rule above stated is not an absolute rule, and is *prima facie* merely, and yields to the intention of the parties, expressed or implied from the circumstances."

The Supreme Court of the United States has fully passed upon this question in the case of *Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482. There Mr. Justice Peckham said:

"There was no oral or special agreement made between the defendant and the bank at the time when any one of the checks was deposited and credit given for the amount thereof. The defendant had an account with the bank, took each check when it arrived, went to the bank, indorsed the check, which was payable to his order, and the bank took the check, placed the amount thereof to the credit of the defendant's account, and nothing further was said in regard to the matter. In other words, it was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank, and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. From the time of the delivery of the check by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it in the fire, or made any other use or disposition of it which it chose, and no right of defendant would have been infringed."

The court in that case further held that the trial court erred in submitting to the jury the question as to whether or not the bank became the absolute owner or purchaser of the check, stating that the testimony

showed that it did become such owner, and that there was nothing to submit to the jury. The following are a few of the cases supporting the doctrine which we have announced: *Thompson v. Riggs, etc.*, 5 Wall. 663, 18 L. Ed. 704; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Metropolitan National Bank v. Loyd*, 90 N. Y. 530; *Taft v. National Bank*, 172 Mass. 363, 52 N. E. 387; *Noble v. Doughten*, 72 Kan. 336, 83 Pac. 1048, 3 L. R. A. (N. S.) 1167; *Re State Bank*, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454; *Lewis Leonhardt v. Small & Co.*, supra; *Goetz v. Bank of Kansas*, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515; *Walker & Brock v. Ranlett*, 89 Vt. 71, 93 Atl. 1054; *Scott v. McIntyre*, 93 Kan. 508, 144 Pac. 1002, L. R. A. 1915D, 139; 5 Cyc. 497.

It has been argued that the fact that the Chicago bank took this draft, considering that it had the right to charge the same back to the machinery company if it were not paid, shows that the bank did not become the absolute owner of the draft; that it could not maintain the dual position of being the absolute owner and at the same time reserve the right to charge back if the draft were not paid. This argument is fully answered by the Supreme Court of the United States in *Burton v. United States*, above, when it says:

"The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank, when a check was not paid, of charging it up against the depositor's account, did not in the least vary the legal effect of the transaction; it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more."

In the case of *Noble v. Doughten*, above, the court, in a case where the facts were very similar to those here, held that the bank became the absolute owner of the draft, and, commenting on the argument that the power to charge back would change the character of the ownership, said:

"It may be conceded that if, after due and legal effort to collect the check, it should be dishonored, the bank would have the right to charge the amount of it to the depositor's account. Whether this right may be said to rest merely on the custom of banks, or whether the custom has been crystallized into a rule, and the right now may be said to be an implied condition attaching to the transfer of the paper, makes no difference. It is nevertheless, in strictness, the right of an indorsee against an indorser, and hence is not in any sense inconsistent with ownership."

In the case of *Scott v. McIntyre Co.*, 93 Kan. 508, 144 Pac. 1002, L. R. A. 1915D, 139, above, discussing this exact question, the court said:

"We cannot regard the right of a bank, receiving a draft for deposit, to charge the amount back to the depositor if payment is re-

fused, as having a determinating influence. Such a right on the part of the bank would seem to be an ordinary incident even of a deposit which is accepted as cash. The transaction is based upon the supposition that the draft is going to be paid. A guaranty of payment often results from the indorsement, but, however evidenced, it should not militate against the theory of a passing of title."

To the same effect see: *Ayres v. Farmers' & Merchants' Bank*, 79 Mo. 421, 49 Am. Rep. 235; *First Nat. Bank v. Armstrong* (C. C.) 39 Fed. 231; *Walker & Brock v. Ranlett*, above; *Brooks v. Bigelow*, 142 Mass. 6, 6 N. E. 766; *Am. Trust & Savings' Bank v. Guelder, etc.*, Mfg. Co., 150 Ill. 336, 37 N. E. 227.

[5] The fact that the bank intended to collect from the machinery company an amount equal to interest on the sum advanced by the bank to the machinery company, during the period from such advancement until the payment of the draft, could not have the effect of making the bank a collector or conditional owner of the draft. The bank paid the machinery company the full amount of the draft. If it had deducted a reasonable sum for the use of the money, instead of waiting until the draft was paid, it could not be argued that such would have had the effect of lessening the bank's ownership of the draft. That the bank did not take out this discount when it bought the draft was for the convenience of the parties, for the reason that at that time no one could tell how long it would be before the draft would be paid.

We frankly concede that the conclusion to which we have come and the reasons for such conclusions are opposed to the theory and reasoning of some of the earlier decisions of this court. In the case of *Washington Brick, Lime & Mfg. Co. v. Traders' National Bank*, 46 Wash. 23, 89 Pac. 157, 123 Am. St. Rep. 912, this court, in substance, held that, under facts similar to those involved in this case, the bank did not become the owner of the draft; that it could not logically maintain the position of absolute owner and at the same time have the right to charge back. In the case of *Morris-Miller v. A. Von Pressentin*, 63 Wash. 74, 114 Pac. 912, we held that the claim or the exercise of the right to charge back was not consistent with the theory of ownership. Substantially the same holding is found in the case of *Am. Savings Bank & Trust Co. v. Peter Dennis*, 90 Wash. 547, 156 Pac. 559. But the more recent case of *Old National Bank v. Gibson*, 105 Wash. 578, 179 Pac. 117, expressly overruled the case of *Am. Savings Bank & Trust Co. v. Dennis*, above, and, in our opinion, overruled the theory upon which the other Washington cases cited were decided. In the *Old National Bank Case* the facts were that Gibson gave one White his check on the Fidelity National Bank of Spokane. White took the check to the Old Na-

tional Bank of Spokane, and the amount thereof was deposited to his private account at that bank. But the deposit slip on which the check was listed provided that—

“Items other than cash are received on deposit with the express understanding that they are taken for collection only.”

The court held that the deposit so made by White was a conditional credit and that the bank took the check not as owner but for collection. Later, however, White presented his private check for the whole amount of his private account, and the bank paid the same. We held that while the deposit in the first instance was a conditional credit and the bank did not become the owner of the check, yet, when later the depositor presented his check for the whole amount, and the bank elected to and did pay it, the original relationship was changed, and the bank became the owner of the check. While the facts of that case are not identical with the facts of this case, yet the reasoning there is the reasoning we have applied here.

In what we have said we do not necessarily hold that those earlier cases were wrongly decided; we go no further than to hold that much of what is said in them is contrary to the great weight and number of decided cases, and is not in harmony with the views of the business public in such transactions, which views have ripened into a general commercial custom.

[6, 7] Having decided that the Chicago bank became the unqualified owner of the draft, it must follow that the money which was paid to its agent and correspondent, the appellant herein, to take up the draft, was the property and money of the Chicago bank, and that the machinery company had no interest therein, and that the attempted garnishment was futile. We have not overlooked the fact that the trial court found that the Chicago bank received the draft simply for collection, and that it did not become the purchaser thereof. That so-called finding was a conclusion. While we always pay great deference to the findings made by the lower court based upon the evidence, it is the duty of this court to draw its own conclusions. We think the learned trial court erred.

[8] But had we followed the reasoning of our earlier cases on this subject the ultimate result in this particular case must have been its reversal. If it be conceded that the Chicago bank did not become the owner of the

draft, then it must be held that the transaction amounted to an equitable assignment to it of such portion of the proceeds of the draft as was necessary to repay it the amount it had advanced to the machinery company, which, indeed, was the full face of the draft and the total amount it had collected. The bank would have been the conditional owner of the draft, and the machinery company the conditional owner of the money which had been paid to its credit in that bank. Till the draft was paid the bank would have had the right to charge back to the machinery company the amount it had advanced, and the machinery company would have had the right to recall the draft. But this conditional relationship would have terminated when the draft was paid. At that time the bank would become the absolute owner of the proceeds of the draft and the machinery company its unconditional creditor. After the payment of the draft the bank would have had no right to charge back anything to the machinery company. The loan or advancement the bank had made would have been paid when the draft was paid. But it is argued that when the Chicago bank learned of this litigation, the machinery company had on deposit with it the sum of \$3,000, and that it was the duty of the bank at that time to charge back that sum. But the bank had no right so to do, because the machinery company was not at that time indebted to the bank in any sum, the draft money having paid any indebtedness which it theretofore owed. *Fourth National Bank v. Mayer*, 89 Ga. 108, 14 S. E. 891; *Central Mercantile Co. v. State Bank*, 88 Kan. 504, 112 Pac. 114, 33 L. R. A. (N. S.) 954.

Suppose that after the draft was paid the Chicago bank had undertaken to charge back to the machinery company, the latter could rightfully have answered that it owed the bank nothing, and that the loan or advancement made by the bank had been paid by the very money which it then had in its hands. When this garnishment was served, neither the appellant nor the Chicago bank was indebted to the machinery company, or had any money in its hands in which the machinery company had any interest.

The judgment is reversed, and the cause remanded, with instructions to dismiss the appellant out of the case.

HOLCOMB, C. J., and FULLERTON, MAIN, MOUNT, MITCHELL, TOLMAN, PARKER, and MACKINTOSH, JJ., concur.

(112 Wash. 217)

**CLEMENTS et al. v. COOK et al.**  
(No. 15878.)

(Supreme Court of Washington. Aug. 18, 1920.)

1. Evidence  $\Leftrightarrow$ 596(1)—Burden of proof must be sustained by fair preponderance of evidence.

Generally the burden of proof must be sustained by a fair preponderance of the evidence.

2. Trial  $\Leftrightarrow$ 139(1)—Fair preponderance of evidence for jury.

What is a fair preponderance of the evidence in a law case tried by a jury is for the jury to determine.

3. Contracts  $\Leftrightarrow$ 247—Evidence of waiver or modification of written contract should be certain.

Evidence to show waiver or a modification of a contract required to be in writing should be certain, positive, unambiguous, and definite in its terms; the rule that such evidence must be clear and convincing having reference to the quality instead of the quantity.

4. Contracts  $\Leftrightarrow$ 248—Province of court and jury as to evidence of modification or waiver of written contract.

In action involving question of whether written contract has been waived or modified, it is court's duty to determine whether there is positive, definite, and unambiguous evidence as to waiver or modification tending to sustain the burden of proof, and, if there is such evidence, to submit the case to the jury.

5. Sales  $\Leftrightarrow$ 89—Parol agreement waiving right to cancellation of contract in consideration for guaranty of payments valid.

Seller's parol agreement to make further deliveries under unexecuted contract and to forbear from canceling the contract for buyer's default in making payments for past deliveries, in consideration of buyer furnishing security guaranteeing payment for deliveries up to specified amount, *held* valid.

6. Appeal and error  $\Leftrightarrow$ 1050(2)—Testimony as to buyer's payments to third person on other contract, in action for nondelivery of logs, *held* harmless.

In buyer's action for seller's breach of contract to deliver logs, where, subsequent to such default, buyer had defaulted under conditional sale contract of sawmill, the admission of testimony as to how much buyer had paid on the purchaser price of the mill *held* harmless as to seller.

7. Trial  $\Leftrightarrow$ 143—Issue for jury where evidence conflicts.

Where there was a direct conflict in the evidence, the court properly submitted issue to jury.

8. Sales  $\Leftrightarrow$ 172—Seller of logs could not justify failure to deliver because buyer's sawmill was taken from him.

Seller could not justify refusal to deliver logs on ground that, shortly after time of de-

livery, sawmill had been taken away from buyer for default in payments under conditional sale contract, since, if seller had not defaulted in delivery of logs, conditional seller of sawmill might not have taken steps to forfeit contract.

9. Evidence  $\Leftrightarrow$ 18—Judicial knowledge taken of prices fixed for timber by War Industries Board.

Court will take judicial knowledge of prices fixed for timber by the War Industries Board, an agency of the federal government in the prosecution of the war with Germany, during the time the federal government had control of the logging industry in the state.

10. Evidence  $\Leftrightarrow$ 18—Judicial knowledge taken of increase in demand for milling logs after release of government control.

Court will take judicial knowledge of the steady and increasing demand for all kinds of milling logs following the federal government's release of its control of the logging industry in the state, assumed because of war with Germany, so that it is presumed that the price increased.

11. Appeal and error  $\Leftrightarrow$ 1033(5)—Instruction submitting measure of damages favorable to appellant not reversible error.

In action for seller's nondelivery of milling logs under contract, instruction fixing the measure of damages as the difference between the contract price and the stipulated market price, plus the reasonable cost of transporting other timber to plaintiff's mill, *held* not ground for reversal, being favorable, and not prejudicial, to seller.

## Department 1.

Appeal from Superior Court, Snohomish County; Ralph C. Bell, Judge.

Action by D. A. Clements and others against W. W. Cook and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Cooley, Horan & Mulvihill, of Everett, for appellants.

Kerr & McCord, J. Speed Smith, and Henry Elliott, Jr., all of Seattle, for respondents.

HOLCOMB, C. J. In an action brought to recover \$18,000 damages for the alleged breach of a contract to deliver logs, plaintiffs recovered a verdict and judgment thereon for \$5,000, and defendants appeal.

There was a written contract entered into by the parties on December 19, 1920, and certain of its provisions, with which we are here concerned, are as follows:

"This memorandum of agreement, made and entered into by and between W. W. Cook, first party, and D. A. Clements, second party, witnesseth: That the first party agrees to log all of the merchantable timber now standing, lying, or fallen on the S. W. quarter of the N. E. quarter, the N. W. quarter of the S. E. quarter, the N. E. quarter of the S. W. quarter,

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and the E. half of the N. W. quarter, all in section 10, Twp. 27 N., of Rg. 6 E. W. M., in Snohomish county, Washington, and to sell the said logs when so logged from said land to the said second party, delivering the same to the party of the second part at his mill situated on the S. W. quarter of the N. E. quarter of said section, in the manner and at the time and upon the terms hereinafter set out, that is to say:

"The first party agrees to proceed diligently to log and the second party agrees to proceed to operate said mill at the earliest practical time, and to continue with all due diligence until the entire contract shall have been fulfilled: Provided, however, that first party agrees to deliver at the place herein stipulated and second party agrees to accept and pay for at least three hundred thousand (300,000) feet of logs, during each and every month, beginning with the month of January, A. D. 1918.

"The price to be paid for said logs shall be as follows, viz.: For all fir, \$9.50 per thousand feet; for all cedar, \$12 per thousand feet; for all spruce, \$9.50 per thousand feet; and for all hemlock, \$8 per thousand feet. \* \* \*

"On the 1st day of each month second party shall pay first party for fifty per cent. (50%), as nearly as can be readily ascertained or estimated, of the price of all logs delivered during the previous month, and on or before the 10th of the month shall render a statement of the logs delivered during the previous month and pay for any and all of such logs so delivered and not already paid for. \* \* \*

"Time is the essence of this contract and of each and every part thereof, and in case of the second party failing to comply with the terms and all of the terms thereof, first party shall have the right and option to forthwith cancel the same and each and every part thereof upon giving three days' written notice and such notice and terms so specified therein shall have not been complied with within said three days from the service of such notice upon second party. In case said second party shall absent himself so that it is not practical to serve such notice on him personally, then and in that case such notice may be served on any bookkeeper or managing agent in charge, or be served in the manner provided for the service of summons in civil actions."

On the day following the execution of this contract, respondent, under a conditional sale agreement, acquired from the owners, John Johnson and W. S. Keller, the mill referred to in the logging contract. Thereupon appellant commenced delivering logs under the contract, and respondent began to operate the mill. It appears from the record that almost from the start respondent experienced difficulty in promptly meeting payments, as they fell due, for the logs delivered by appellant; and on July 15, 1918, when respondent was delinquent in his payments to the amount of \$1,341.48, appellant refused to make further deliveries of logs, but suggested to respondent that, if he [respondent] would furnish security for the payments on his contract, appellant would

thereby be induced to carry out his part of the agreement. Thereupon the following agreement was entered into by W. S. Keller and his wife:

"This agreement, made this 15th day of July, 1918, witnesseth: That whereas, on December 20, 1917, D. A. Clements, doing business as the Clements Lumber Company, made and executed a contract with W. W. Cook to purchase from said Cook logs at the mill of said Clements Lumber Company, and to pay for said logs as delivered on the 1st and 10th days of each month, and certain payments are due and the said Cook refuses to deliver more logs until the payments are guaranteed:

"Now, therefore, the undersigned, W. S. Keller and Eula Keller, his wife, for a valuable consideration, do hereby agree and guarantee to make all payments provided for in said contract for the purchase of the logs therein sold or any logs sold pursuant thereto or in any manner up to and not exceeding the sum of thirty-five hundred dollars (\$3,500), by the said W. W. Cook to the said D. A. Clements, or the Clements Lumber Company, as provided for in said contract, or at all.

"And upon the failure of the said D. A. Clements or the Clements Lumber Company to make payments promptly as provided for in said contract, the said parties hereto agree to pay all of said sums promptly upon demand up to and not exceeding the sum of thirty-five hundred dollars (\$3,500) as aforesaid.

"It being understood that there is now due on said contract the sum of \$1,341.48, which became due on the 10th day of July, 1918, and it is agreed that said past-due payment may be made on or before the 25th day of July, 1918, and, if such payment is not made then this guaranty shall apply thereto. \* \* \*

Later respondent also delivered to appellant, as further security, two promissory notes, of \$500 each, made payable to him by the Specialty Lumber Company. Appellant then resumed deliveries of logs, and continued to make deliveries until about the 10th or 12th day of August, when, respondent being again in default in his payments, appellant refused to deliver any more logs. At this time there was due appellant \$800 for logs delivered prior to the 1st day of August. Between August 1st and 10th \$354.10 worth of logs were delivered. Appellant claims that the total amount of \$1,154.10 was due and payable on August 10, but respondent insists that, under the terms of the contract, only \$800 was due and payable on August 10, the remaining \$354.10 not being payable under the contract until the 1st of the following month, September. At any rate, appellant would not deliver any more logs until the \$1,154.10 was paid, and respondent said he would go to Seattle and try to get the money. He went to Seattle for this purpose on August 15. During his absence from the mill, appellant caused to be left there, with one of the laborers, a notice, in the following words:

"To D. A. Clements: You will please take notice that the payment in the amount of \$1,154.10 is past due and unpaid, under the contract made between you and the undersigned, under date of December 19, 1917. You are hereby notified that, unless said amount is paid within three (3) days of the date of the service of this notice upon you, the undersigned will cancel said contract and declare all rights thereunder forfeited. This notice is given to you pursuant to said contract, and upon your failure to comply with this notice the undersigned will consider said contract forfeited and canceled as provided therein.

"Dated this 15th day of August, A. D. 1918.  
"W. W. Cook."

Respondent paid appellant the \$1,154.10 on August 21, and, according to the testimony of respondent, appellant said he would go to Monroe, get his crew together, and start logging on the following morning. He did not do this, however, nor were any more logs delivered under the contract. On or about August 23, respondent having failed to make the payments due by the terms of the conditional sale agreement under which he purchased the mill, the vendors forfeited his rights thereto and took it back. Thereafter respondent brought this action for damages for the failure of appellant to deliver logs under the contract.

Much of the argument of counsel for appellant is in support of the contention that the original written contract for the delivery of logs could not be modified by the subsequent oral agreement just prior to July 15, 1918, when appellant is alleged to have promised that, if respondent would furnish security guaranteeing him payment for his logs, he would not forfeit the contract until any sum of money due him should exceed the amount of the security, and also the contention that the original contract could not be reinstated by appellant under an oral agreement on August 21 when it had already been (as appellant claims) canceled by the notice of August 15. We are convinced, however, that a determination of the question first presented will be decisive of the latter.

As to the steps leading up to the execution of the agreement by Keller and wife, guaranteeing to Cook payment up to \$3,500 for logs delivered to Clements, Cook testified:

"I made a proposal to him that if he put up security for the payments on this contract—I think put up security—it would induce me to carry out the contract."

And respondent testified:

"He [appellant] said, if we could furnish security, so that he would be sure to get his money, that he would not default his contract up to the amount of the security."

After the conversation with appellant, respondent went to Keller and told him that

appellant "was willing to let the contract run behind if he had security for the payment of the logs," and Keller then agreed to guarantee payment for the logs up to \$3,500. Appellant, respondent, and Keller then went to the office of an attorney, where the guaranty was drawn up and signed. Appellant objected to the testimony that went to prove the oral agreement which led to respondent's procuring the guaranty, but for the purpose for which this evidence was offered it was allowable. At the time the guaranty was executed, appellant had just refused to make further deliveries under the log contract, because respondent had failed to promptly pay for the logs delivered in accordance with the terms thereof; but appellant was willing to go on with his part of the contract if he had some assurance that he would get his money. He suggested as much to respondent, and acting upon his suggestion, respondent procured the guaranty from Keller and wife. This is no more than an agreement of further performance of an unexecuted contract, of which time is the essence, with further assurance and guaranty on the one part, and a forbearance, for a consideration, to enforce the contract rights upon the default of the party bound thereby at the expiration of the time limit, on the other part.

[1-3] Appellant contends that the court also erred in submitting the case to the jury under an instruction to the effect that the jury must find by a fair preponderance of the evidence that the contract in writing had been modified, or its provisions waived, and that they were entitled to have this issue submitted to the jury under instructions that the degree of proof required in showing such a waiver of a provision of a written contract should also be evidenced by writings, or of proofs of the clearest and most satisfactory kind, citing *Brown v. Winehill*, 3 Wash. 524, 28 Pac. 1037. The general rule in this state, in civil cases, is that the burden of proof must be sustained by a fair preponderance of the evidence, and what is a fair preponderance of the evidence in a law case tried by a jury is for the jury to determine. Of course, it is true that, in order to prove a modification or a waiver of a contract required by law to be in writing, the proof should show modification or waiver by writings or by clear and convincing evidence, or, as was said in the case cited, proof of the most satisfactory kind. But this means no more than that the evidence introduced to show a waiver or a modification of the writing should be certain, positive, unambiguous, and definite in its terms, rather than the contrary; or, in other words, it means quality of evidence rather than that it should be written, or overwhelming in quantity.



[4] It is first a question for the court to determine whether there is positive, definite, and unambiguous evidence as to the waiver or modification of the written contract tending to sustain the burden of proof required therefor; and if there is such evidence it is the duty of the court to submit the case to the jury, the jury to determine whether it preponderates over evidence to the contrary. That is all that has ever been required of trial courts and equity cases tried by the court alone where evidence of a clear, cogent, and convincing character is required to abrogate a contract for fraud and like cases. On the question now before us, this court used the following language in the case of *Gerard-Fillio v. McNair*, 68 Wash. 321, 123 Pac. 462:

"The second question, whether the verbal contract modifying the original written contract was within the statute of frauds, is of more difficulty. \* \* \* And this court has held that a contract modifying or abrogating a prior written contract required by statute to be in writing must itself be in writing to be obligatory. *Spinning v. Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225. \* \* \* These principles are relied upon to support the judgment of the trial court; but it seems to us that they do not meet the question presented. While it is the rule that a written executory agreement to sell or purchase real estate cannot be rescinded or abrogated by an oral executory agreement to rescind or abrogate, it does not follow that such an agreement cannot be modified or abrogated by an executed oral agreement. On the contrary, it is recognized by our own cases above cited, and it is the rule of all the cases in so far as we are advised, that an executed oral contract to modify or abrogate a written contract, required by statute to be in writing, can be successfully pleaded as a defense to an action on the original contract. To hold otherwise is to make the statute of frauds an instrument of fraud; for it would be a fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation. It is for this reason that equity allows a performance or a substantial part performance of a contract, invalid because not in writing, modifying or abrogating a valid contract to be pleaded as a defense to an action on the valid contract. To do otherwise would be to allow one of the parties to have the benefit of both contracts when in equity and good conscience he should have the benefit of but one." *Oregon & W. R. Co. v. Elliott Bay Mill & Lum. Co.*, 70 Wash. 143, 126 Pac. 406; *Stoner v. Fryett*, 91 Wash. 89, 157 Pac. 213.

[5] The case now before us comes within the rule we announced in the *Gerard-Fillio* Case, and, that being true, it follows that appellant had no right, after the \$1,154.10 was paid him on August 21, to treat the contract as canceled and refuse to carry out his part of it. At that time he had in his possession the guaranty by Keller and wife and

the notes. These were security to the amount of \$4,500, when, at the most, there was only \$1,154.10 owing to him; and, under the contract, but \$800 of this amount was due and payable on August 21, when, in fact, respondent paid the entire amount of \$1,154.10. The remaining \$354.10 was for logs delivered after the 1st of August, and under the contract was not due until September 1. Assuming that it was necessary for appellant on August 21 to make a new promise, it would seem that this payment of \$354.10 before due was sufficient consideration to support it. The court therefore properly admitted and rejected evidence under the issues involved therein, and properly submitted the case to the jury, and there is no error as claimed by appellant in the giving or refusing of such instructions.

[6] The admission of testimony by respondent as to how much money he had paid on the purchase price of the mill cannot be said to have had any tendency to injure the case of appellant; at least not to the extent that it constituted reversible error. It was a merely incidental and collateral matter, and could not have been regarded by the jury as of any importance.

[7] It is earnestly insisted by appellant that there was not sufficient evidence to submit to a jury that would justify a verdict for respondent. But it is clear that there was direct conflict in the testimony by the parties to the controversy upon the questions here at issue. There was no error in the refusal of the court to take the case away from the jury.

[8] Some attempt is made to justify the refusal of appellant to deliver any more logs after receiving the \$1,154.10 on the ground that a day or so after that time the mill was taken away from respondent, leaving him in no position to perform the contract. If appellant may be permitted to make such an assumption, it certainly may, with as much, or more, reason, be assumed that Keller and Johnson would not have taken steps to forfeit the conditional sale contract, if appellant had on August 21 resumed deliveries of logs to respondent. Respondent entered into the original agreement with appellant for the purpose of milling logs which appellant was to deliver, and when appellant failed to deliver logs he breached the contract, and respondent was entitled to damages.

Appellant earnestly contends that the court did not submit the proper measure of damages to the jury under the instructions given and refused, urging that there was no proof of the market value of logs at any other time than the 15th day of August, the date respondent alleged the contract was breached. There was a balance of 2,500,000 feet of timber to be delivered. This was to be delivered in installments of not less

than 300,000 feet per month; so that it was optional with appellant to deliver not more than this under the contract for delivery by installments, and, as there is no proof of the market value of logs at any date subsequent to August 15, it is contended that there was no proof to submit to the jury upon which they could base a verdict. *Alpha Portland Cement Co. v. Oliver*, 125 Tenn. 135, 140 S. W. 595, 38 L. R. A. (N. S.) 416, Ann. Cas. 1913C, 120, is quoted to this effect:

"The law is that where goods are to be delivered in installments, or as requested by the purchaser, the true measure of damages is the difference between the contract price and the market price or value at the times when such articles were required ordered." *Sagola Lumber Co. v. Chicago Title, etc., Co.*, 121 Ill. App. 298."

To the same effect are cited: *Crescent Hosiery Co. v. Mobile Cotton Mills*, 140 N. C. 452, 53 S. E. 140, 6 Ann. Cas. 164; *Hill v. Chipman*, 59 Wis. 211, 18 N. W. 160; *Johnson & Thornton v. Allen & Jamison*, 78 Ala. 387, 392, 56 Am. Rep. 34.

Appellant then says that this court cannot presume that the market value of these logs went up at any time after August 15, 1918. Neither can this court presume that the market value of these logs went down at any time after August 15, 1918. It can, however, presume that, since the parties stipulated the market value of the various grades of logs in controversy here as of certain prices on August 15, 1918, which stipulation was given to the jury, together with the prices fixed thereunder, and since no evidence of an increase or a decline in price was given by either party, that price remained stationary for the time that this contract would have been enforced as to the deliveries, namely, during about 8 months. There was evidence, also, before the jury, that the cost of hauling the nearest logs, other than the logs covered by this contract, to the mill of respondent, would have been in the neighborhood of \$3 per thousand, which, in other words, would have added to the price of such logs by that much, or would have reduced the value thereof to respondent that much, and upon 2,500,000 feet of logs would have amounted to \$7,500, or more than the verdict awarded by the jury. This, of course, is not the measure of damages which the court submitted to the jury, which was that:

"\* \* \* If \* \* \* the plaintiffs are entitled to recover a verdict at your hands, the measure of plaintiffs' damages will be the difference between the contract prices fixed for the different kinds and varieties of timber and the stipulated market prices or value of the different kinds and varieties of timber, plus what you shall find from the evidence would be the fair and reasonable cost of transporting other timber to the mill."

This instruction then gave the jury, for their information, the stipulation as to the amount of timber and the prices of different kinds and grades thereof.

[8-11] But from circumstances of which we can take judicial knowledge as to the prices fixed for such timber by the War Industries Board, an agency of the federal government in the prosecution of the war then being waged, from and after June 11, 1918, two months prior to the breach of this contract, to and including January 15, 1919, when the federal government released control of the logging industry in this state, the price for such logs in the Puget Sound district ranged from \$1 per thousand, for No. 1 and No. 3 fir, to \$2 per thousand, for No. 2 fir, more than the stipulated prices of timber here involved on August 15, 1918. We will also take judicial knowledge of the fact that after the federal government released control of the logging industry in this state on January 15, 1919, there was a steady and increasing demand for all kinds of milling logs in this state; so that under the circumstances it cannot be presumed that the price of such logs declined, but, on the contrary, it may be presumed that the price increased. We are therefore of the opinion that appellant is not prejudiced by the submission of the measure of damages, as it was submitted by the court, to the jury, and the recovery thereon by respondent, and in the absence of an affirmative showing of prejudice thereby on the part of appellant we are not now inclined to disturb it. We are inclined to think that the verdict was very moderate under the circumstances, and probably more favorable to appellant than he could expect from another trial.

We find no error in the record, and the judgment is affirmed.

PARKER and BRIDGES, JJ., concur.  
MAIN and MITCHELL, JJ., concur in the result.

(112 Wash. 106)

(191 P.)

**NATIONAL BANK OF COMMERCE OF  
SEATTLE v. DAVIES et al.  
(No. 15873.)**

(Supreme Court of Washington. Aug. 6,  
1920.)

**1. Taxation ⚡658(4)—Notice of tax sale held  
to sufficiently describe land.**

Notice of tax sale, describing the land to be sold as a quarter section, but referring to the tax number by which the land was designated in the assessor's tract book, under Rem. Code 1915, § 9113, was sufficient, though the land to be sold was in fact only one-half of the section described.

**2. Taxation ⚡749—Tax deed held not prematurely executed.**

Tax sale deed, dated the last day for redemption, but not acknowledged or delivered until the following day, was not prematurely executed.

**3. Taxation ⚡689(2) — Inadequacy of price  
not ground for setting aside sale.**

Mere inadequacy of price is not sufficient to justify setting aside of tax sale.

**Department 2.**

Appeal from Superior Court, Kittitas County; John B. Davidson, Judge.

Action by the National Bank of Commerce of Seattle against A. L. B. Davies and others. Judgment of dismissal, and plaintiff appeals. Affirmed.

Kerr & McCord, of Seattle, and O. R. Hovey, of Ellensburg, for appellant.

E. E. Wager, of Ellensburg, for respondents.

**TOLMAN, J.** In 1916 and prior thereto, the appellant was the owner of a tract of 20 acres of land in Kittitas county, Wash., described as the east half of the northeast quarter of the northwest quarter of section 29, township 18 north, range 18 east W. M., which land was within the limits of a duly organized irrigation district known as the "Kittitas Reclamation District." Prior to 1916 the district attempted to levy a tax on this property, describing it on the tax rolls as "N. E. ¼ N. W. ¼ Tax # 5, Sec. 29, Tp. 18 Rg. 19, 20 acres." The land was not described by metes and bounds, but was described in the assessor's tract book as "Tax No. 5, E. ¼ N. E. ¼ of N. W. ¼ Sec. 29, Tp. 18, Rg. 19, acres 20." The tax was not paid before delinquency, and a notice of tax sale was published, which gave the name of appellant as owner, described the property as it appeared on the tax rolls, and which was printed in a newspaper published at Cle Elum, within the county, but without the district, and 24 miles distant from the county seat; there being several newspapers of general circulation published at the county

seat. Pursuant to such published notice, the treasurer of Kittitas county proceeded at the time fixed for such sale as shown by the recitals in the deeds afterwards issued, as follows:

"And whereas, the treasurer and collector aforesaid, attended at the time and place fixed for sale, and proceeded with said sale, and the assessments upon the land hereinafter described not having been paid, and no owner or possessor of any of the lands hereinafter described having designated what portion thereof he wished sold for the assessments against any of the same, I proceeded to offer the same for sale, designating the least quantity of and the least portion of interest in the land that would be sold for the assessments and percentage which were by law a lien upon it, to wit: I offered for sale at public auction, separately, each lot, parcel or tract of land as hereinbelow described, and at said auction, and upon said offers of sale A. L. B. Davies, the party of the second part hereto, was the bidder who was willing to take the least quantity of, or smallest portion of interest in, each of said hereinbelow described lots, parcels and tracts of land, and pay the assessments and charges due on each of the same, and his was the highest and best bid for each of said lots, parcels and tracts, and each of said lots, parcels or tracts of land was separately struck off and sold by me to the said A. L. B. Davies, upon his separate bid for each and every lot, tract or parcel as it was aforesaid, and he paid the full amount of the assessment and charges due upon each of said lots, parcels or tracts of land and became the purchaser thereof; and in the three columns next following are contained: First, the names of the persons assessed as the owners of said lots, parcels and tracts; second, the particular description of each lot, parcel or tract of land sold, as aforesaid set opposite the name in which it was assessed; and, third, the amount for which said lot, parcel or tract of land was sold set opposite its description, the said three columns being marked at the top respectively, 'Names of Persons Assessed' under which appears the names aforesaid and 'Description of Land Sold,' under which appear the description aforesaid, and 'Amount Sold for,' under which appears the amounts aforesaid, to wit:

Names of Persons Assessed.	Description of Land Sold.	Amount Sold for.
National Bank of Commerce	Sec. 29 Tp. 18 Rg. 19 NE¼ NW¼ Tax #5, 20 Acres	\$2.20

"All of said lots, parcels and tracts of land situate, lying and being in Kittitas reclamation irrigation district, in the county of Kittitas, in the state of Washington."

The granting clause of the deed being:

"I, W. G. Damerow, treasurer and collector aforesaid, by virtue of and in pursuance of the statutes in such cases made and provided, have granted, sold and conveyed, and by these presents do grant, sell and convey unto aforesaid

A. L. B. Davies and to his heirs and assigns forever, all and every of the lots, parcels and tracts of land as aforesaid and hereinbefore described in this deed, as fully and absolutely as I, W. G. Damerow, treasurer and collector as aforesaid, may or can lawfully sell and convey the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining to each of said lots, parcels or tracts of land."

This deed was dated February 24, 1919, and acknowledged February 25, 1919, and was filed with the clerk on the last-named day, and afterwards recorded. Appellant by its second amended complaint sets up these facts, alleges a subsequent tender of all sums paid as taxes by the purchaser, with interest; that the land is reasonably worth \$1,500; that the amounts, with interest, paid by the purchaser aggregate less than \$100, and prays for a decree canceling the deed. To this complaint a demurrer was sustained, and, appellant electing to stand on its complaint, a judgment of dismissal followed, from which it appeals.

No point is made in the briefs or the oral argument based upon the publication of the delinquency list or notice of sale in a paper published outside of the irrigation district, and not at the county seat, and as the publication appears to be substantially as required by Rem. Code, § 6440, we pass that question without further comment.

[1] It is strenuously argued that there is no authority in law for the description of this property as it was described in the tax rolls and in the published notice. It will be seen that the description "N. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  Tax No. 5, Sec. 29, Tp. 18, Rg. 18, 20 acres" as compared with the east half of the northeast quarter of the northwest quarter of section 29, leaves something to be desired, unless "Tax No. 5" supplies the deficiency and directs attention to this particular property. The statute with reference to this subject, Rem. Code, § 9113, so far as here applicable, reads:

"The assessor shall list all real property according to the largest legal subdivision as near as practicable. The assessor shall make out in the plat and description book in numerical order a complete list of all lands or lots subject to taxation, showing the names and owners, if to him known, and if unknown, so stated; the number of acres and lots or part of lots included in each description of property and the value per acre or lot: Provided, that the assessor shall give to each tract of land where described by metes and bounds a number, to be designated as Tax No. — which said number shall be placed on the tax rolls to indicate that certain piece of real estate bearing such number, and described by metes and bounds in the plat and description book herein mentioned, and it shall not be necessary to enter a description by metes and bounds on the tax roll of the county, and the assessor's plat and description book shall be kept as a part of the tax collector's records."

It is true that the statute directs the adoption of a tax number for each tract described by metes and bounds, and we may assume for present purposes that the assessor is not authorized to go beyond the plain letter of the law, yet the assessor's tract book is made a part of the tax collector's record by the statute, and by the use of the words "Tax No. 5," one whose attention was called to an incomplete description within which he owned half the area described, and the notice advised him that one-half the tract was to be sold, and that he was the owner of the property affected, could hardly be heard to say that he did not have notice. The law in providing for this kind of notice assumes conclusively that by the lawful publication the owner will see and take notice, so, in effect, we have the same question here as though the record showed that the owner read the published notice. Many cases have been decided by this court upon the sufficiency of the description contained in such a notice. Appellant relies upon *Miller & Sons v. Daniels*, 47 Wash. 411, 92 Pac. 268, where the tax deed described the property as 25 acres in a certain section; this court very properly held that if the deed described the particular 25 acres in question, then it likewise described any other 25 acres in the same section; *Welch v. Beacon Place Co.*, 48 Wash. 449, 98 Pac. 923, where the description of a lot in Syndicate addition, without giving the name of any city or town, in a county where were several Syndicate additions, was held insufficient; *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462, where the tract in question was entirely omitted from the published notice; *Kennedy v. Anderson*, 88 Wash. 457, 153 Pac. 819, where there was no such tract in existence as that described, and the purchaser claimed a tract wholly outside the description, because the treasurer pointed out such tract at the time of the sale; *Moller v. Graham*, 101 Wash. 283, 172 Pac. 226, where the property was described in the summons as being in "Bowman's Plat," and on the tax roll as being in "Bowman's Central Ship Harbor Water Front Plat." Clearly none of these are of assistance here. More nearly in point, however, is *Stanchfield v. Blessing*, 55 Wash. 620, 104 Pac. 800, where the description of the northeast quarter of the southwest quarter was published as the northeast quarter "or" the southwest quarter, followed by "forty acres"; this was held sufficient; *Old Republic Mining Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018, where the description "Cecelia Lode" was held a sufficient description of the "Cecelia Fraction"; *Northern Pacific R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057, where the description "Township 10 West," instead of "Township 10 North," was held to be a mere clerical error. We conclude that the notice, as published, was sufficient.

[2] The contention that the deed was prematurely executed cannot be sustained. While dated February 24, which was the last day for redemption, it was not acknowledged or delivered until February 25.

[3] We have so often held that mere inadequacy of price is not sufficient to justify the setting aside of a tax sale that there is no occasion to again discuss the subject. *Rothchild Bros. v. Rollinger*, 32 Wash. 307, 73 Pac. 387; *J. K. Lumber Co. v. Ash*, 104 Wash. 388, 176 Pac. 550.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(112 Wash. 218)

**HINKHOUSE et ux. v. WACKER et ux. (INLAND EMPIRE LAND CO., Intervener). (No. 15850.)**

(Supreme Court of Washington. Aug. 18, 1920.)

1. Husband and wife  $\S$ 267(3)—Unacknowledged lease of community land good for only one year.

Unacknowledged lease of community land for six-year period, signed by husband, and not wife, was valid only one year.

2. Landlord and tenant  $\S$ 94(5)—Notice to quit waiver of prior notices.

Landlord, by giving tenant a sufficient notice to quit, waives all prior notices.

3. Landlord and tenant  $\S$ 94(4)—Notice to quit must be mailed to tenant not personally served.

Where notice to quit is served by leaving copy of notice with suitable person at rented premises, a copy must also be mailed to tenant at his place of residence, to constitute sufficient notice, under Rem. Code 1915,  $\S$  814, subd. 2.

4. Landlord and tenant  $\S$ 94(5) — Notice to quit, not properly served, not a waiver of prior notices.

A notice to quit, which was ineffective, because not served as required by Rem. Code 1915,  $\S$  814, did not constitute a waiver of prior notices.

5. Landlord and tenant  $\S$ 291(1)—Notice demanding possession on expiration of lease held basis for unlawful detainer.

Landlord's notice to tenant to surrender premises at the end of specified year for which land had been leased held sufficient basis for unlawful detainer action; it being unnecessary that such a demand for possession comply with statutory requirements as to notice to quit.

6. Frauds, statute of  $\S$ 144 — Landlord held not estopped to deny validity of lease for more than one year.

Landlord, by selling tenant horses, feed, and grain, was not estopped from denying that lease

was valid for more than one year, where the sale thereof was an accommodation to tenant to enable him to farm the land the first year.

7. Chattel mortgages  $\S$ 139 — Mortgage of crops, with notice of termination of mortgagor's lease, not an innocent purchaser.

Mortgagee, who took mortgage on crops to be grown during certain year with knowledge that mortgagor's lease was not valid as to such year, and that landlord had notified mortgagor that lease would terminate prior thereto, had no rights as against landlord, not being an innocent mortgagee.

Department 2.

Appeal from Superior Court, Grant County; Sam B. Hill, Judge.

Action by Frank Hinkhouse and wife against C. Wacker and wife, in which the Inland Empire Land Company intervened. Judgment for plaintiffs, and defendants appeal. Affirmed.

F. A. McMaster, of Spokane, for appellants.  
O. P. Barrows and Barrows, Hanna & Lebeck, all of Wenatchee, for respondents.

MOUNT, J. This is an action of unlawful detainer, brought for the possession of 1,530 acres of farm land in Grant county. When the action was begun, a writ of restitution was issued, and the plaintiff was put in possession of the property. Upon the trial of the case the court found in favor of the plaintiff and entered a judgment accordingly. The defendant has appealed.

It appears that on the 6th day of December, 1917, respondent desired to let the farm in question for a period of one year. The appellant desired to lease the lands for a period of six years. After some consultation it was agreed that a lease for six years might be entered into. The respondent himself prepared a lease, providing that the appellant C. Wacker should have the property for a period of six years beginning February 5, 1918. The lease provided, among other things, that the lessor should be entitled to one-third of the crop and the land should be farmed in a workmanlike manner to the satisfaction of the lessor. The lease was signed by the respondent Frank Hinkhouse and by the appellant C. Wacker. It was not signed by Mrs. Hinkhouse, and was not acknowledged by any of the parties. After the lease was executed the appellant paid \$2,000 to the respondent for the purpose, he says, of binding the bargain. At the time the lease was entered into, it was agreed that the respondent Hinkhouse should sell to Mr. Wacker certain horses, feed, and seed which was then on the premises. This \$2,000 was applied upon the purchase of the horses, seed, and feed. The respondent that same year purchased farm machinery, etc., to the extent of about \$14,000. During the first year of the lease the parties

had some difficulty. After the lease had been signed by Mr. Hinkhouse, Mrs. Hinkhouse refused to sign it. She thereafter repeatedly refused to sign it. In the fall of 1918, namely, on September 5, a notice as follows was served upon Mr. Wacker:

"Ruff, Washington, September 4, 1918.

"To Conrad Wacker:

"Take notice that you are hereby requested to quit and deliver up to me the possession of the premises now held and occupied by you under the contract entered into by myself and you on the 8th day of December, 1918. [Then follows a description of the premises.] This notice is intended as notice to quit at end of year. However, it is not intended to waive any rights that I may have for redress on account of your not complying with contract, and I hereby ask you to give me my share of crop due me. [Signed] Frank Hinkhouse."

Thereafter, in October, the following notice was served upon the appellant Wacker:

"Ruff, Washington, October —, 1918.

"To Conrad Wacker and His Wife:

"You are here required to pay the balance of my share of rent of the premises described hereinafter, and which you now hold, and give me an accounting of said crop, within three days after service of this notice, as required by law, or deliver up to me the possession of said premises. [Then follows a description of the premises.]

"[Signed] Frank Hinkhouse, Landlord."

After this last notice was served, an action was brought by respondent against the appellant to recover rent alleged to be due and damages for breach of contract. While that action was pending another notice was served in the month of February, 1919, upon Mrs. Wacker, as follows:

"To Conrad Wacker and Mrs. Conrad Wacker, His Wife:

"You, and each of you, are hereby notified and required to vacate and surrender to the undersigned, Frank Hinkhouse and Mrs. Frank Hinkhouse, his wife, the following described lands and premises in Grant county, state of Washington: [Then follows a description of the land.]

"[Signed] Frank Hinkhouse,

"[Signed] Mrs. Frank Hinkhouse,

"By O. P. Barrows, Their Agent and Attorney."

This notice was served upon Mrs. Wacker on the 25th day of February, 1919. It was not served upon Mr. Wacker, because he was away from home. A copy was left with Mrs. Wacker, to be delivered to her husband. Thereafter this action was begun for restitution of the premises, and resulted as we have above stated.

[1] The appellant apparently makes no claim that the lease is valid for the full term, but insists that he is entitled to the possession of the premises for the year 1919, because in September of 1918 he sowed 320 acres of wheat upon the premises. This

wheat was sown after appellant had notice that he would be required to vacate at the termination of the first year. This court in a number of cases has held that an unacknowledged lease of community property is good only for one year. In *Spreitzer v. Miller*, 98 Wash. 601, 168 Pac. 179, a number of cases so holding are cited, and we there said:

"Hence it has consistently been held that a contract to lease community land, made by a married man without his wife joining him in the manner provided by the last-quoted section, the lessee knowing of its community character, is clearly in contravention thereof."

It follows, from what we said in that case, that the lease in this case was valid only for the year 1918.

[2-4] The appellant seriously contends that the giving of the last notice on February 25, 1919, is a waiver of the other notices. We are of the opinion that this would be correct, if the last notice was sufficient. We are of the opinion that the notice last given was of no effect, because it was not served in the manner provided by law. Section 814, Rem. Code, provides that such notice shall be served either—

"(1) By delivering a copy personally to the person entitled thereto; or (2) if he be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence."

In the case of *Smith v. Seattle Camp*, No. 69, 57 Wash. 556, 107 Pac. 872, we held that under this provision, where personal service could not be had upon the lessor, the two acts, viz. leaving the notice with a suitable person and mailing, must concur to make a valid service. It is plain, therefore, that the last notice given was ineffective by reason of the fact that the statute was not complied with in respect to mailing the notice. The second notice that was given was a notice to pay the rent or to deliver up possession of the premises. That notice was served for the purpose of bringing an action for the recovery of rent and for possession of the premises on account of violation of the terms of the lease. The action based thereon was not brought as an unlawful detainer action. That action was dismissed by the respondent before the present action was tried.

[5] It is also argued by appellant that the first notice was insufficient. In the case of *Smeltzer v. Webb*, 101 Wash. 568, 172 Pac. 750, a case of this kind, we held that an oral notice, given before the end of the year, demanding surrender of possession of a farm, was sufficient. In that case Judge Parker, speaking for the court, said:

"This is not a case of giving a statutory notice to quit, looking to the termination of a tenancy, but it is a case of preventing the commencement of a new tenancy, or rather of pre-

venting the renewal by consent of a tenancy which, by express terms of the contract creating it, expired on a specified date. We conclude that the trial court did not err in admitting testimony of the making of the oral demand for possession by respondents."

If an oral demand for possession is sufficient before the expiration of a yearly lease, clearly the notice given in this case was sufficient for the same purpose. We are of the opinion, therefore, that the first notice was sufficient upon which to base the action for unlawful detainer. We are also of the opinion that the giving of the subsequent notices did not amount to a waiver of the first notice.

[6] The appellant also contends that the respondents are estopped to question the validity of the lease for the second year because of the purchase of horses, feed, and grain by the appellant from the respondent at the time and after the execution of the contract of lease. We find nothing in the evidence to indicate that the purchase of the horses and the grain and feed was a part consideration for the lease, but it appears that the purchase of the horses and the feed and the seed was an accommodation to the lessor in farming the land for the year 1918. In the case of *Armstrong v. Burkett*, 104 Wash. 476, 177 Pac. 333, 180 Pac. 873, this court said upon the question of estoppel:

"To make an oral lease good for one year under the theory of estoppel, there must be some element of benefit to the landlord aside from the rent reserved, or some injustice to the tenant that a court of equity will not tolerate, as, for instance, where the landlord has made the lease conditioned upon some alteration or improvement that would enhance the value of the property, or where the value of the property lies in the taking of an annual crop. In other words, the mere possession, the payment of rent, and the conduct of a business in the usual way and for the sole benefit of the tenant, unaccompanied by circumstances which will create a consideration going to the term, will not make an oral lease from month to month a term lease, resting in estoppel."

The case of *Andersonian Investment Co. v. Wade*, 184 Pac. 327, relied upon by appellant, was a case where the lessor had been authorized to make improvements to a building by written consent of the agent, and where the lessor had made the improvements at his own cost. That was a case where the improvement enhanced the value of the building, and within the exception to the rule as stated in the *Armstrong Case*, supra.

[7] Appellant further argues that the intervener in this case is entitled to consideration. The facts in that respect are that, after respondent had notified appellant his lease would terminate on the 5th of February, 1919, the intervener loaned money or sold seed to the appellant, and took a chattel mort-

gage on the crop which was to be grown during the year 1919. It appears from the evidence that the intervener knew of the relation existing between the appellant and respondent, and we are satisfied for that reason he could not claim to be an innocent mortgagee, and have a greater claim upon the crops than the appellant himself. We are satisfied, upon the whole case, that the trial court arrived at the correct conclusion.

The judgment is therefore affirmed.

HOLCOMB, C. J., and BRIDGES and TOLMAN, JJ., concur.

(97 Or. 518)

STATE ex rel. KELLY et al. v. PLUMMER,  
Inspector of Buildings.\*

(Supreme Court of Oregon. July 31, 1920.)

Mandamus  $\Rightarrow$  87—Application to compel city officials to permit the erection of an apartment building dismissed.

On application for mandamus to compel city authorities to permit the erection of an apartment building, where it was admitted by applicant's reply to defendant's answer to the alternative writ that there were errors in the plans and specifications which applicants promised to correct, *held*, that applicant's motion, based on the pleadings, to direct the issuance of a peremptory writ, would be denied and the proceeding dismissed.

Johns, J., dissenting.

In Banc.

Proceeding in mandamus by the State of Oregon, on the relation of George H. Kelly and C. V. Everett, trading as the Berkshire Company, against H. E. Plummer, as Inspector of Buildings of the city of Portland. Dismissed.

See, also, 189 Pac. 405.

The relators, desiring to build an apartment house on real property in the city of Portland, of which the relator Kelly is the owner and which the relator Everett had contracted to purchase, applied to the defendant, as inspector of buildings of the municipality, for a permit to erect the building. Permission having been refused by the defendant, the relators by an original proceeding in this court, after their appeals hereinafter mentioned had been denied, sued out an alternative writ of mandamus requiring the defendant to issue the permit or show cause why he had not done so. After allegations of the ownership of the property, that the defendant is the inspector of buildings, intrusted by the bureau of buildings of the city of Portland with the supervision and direction of the issuance of building permits, and a further statement that on December 12, 1919, on the application of the relator

Everett the defendant had issued a permit of the bureau of buildings for excavation upon the premises for the future erection of the apartment house, it is said:

"That on January 22, 1920, relator Everett, through his architects, made application to the said defendant and to the said bureau of buildings for a permit to erect a six-story, fireproof apartment house on said premises at an estimated cost of \$225,000; that said application was accompanied by plans and specifications in manner and form as provided by the Building Code of the city of Portland; that the term 'Building Code' is the designation of Ordinance No. 33911 of the city of Portland, Or., entitled, 'An ordinance providing building regulations to be known as the Building Code, repealing certain existing building regulations and providing a penalty, and declaring an emergency,' which said ordinance had theretofore been duly enacted and approved and has been and is in full force and effect in the said city; that said ordinance requires application to be made to the said bureau of buildings for a permit to erect structures, directs the accompanying of the application for permit with two sets of plans and specifications and an estimate of probable cost of the work, and requires the issuance by said bureau of such permit if the applications, plans, and specifications conform to the requirements of the said Code; that the said ordinance further provides that a permit shall either be issued or refused within three working days from the date of filing the application, and a board of appeal is created to which appeal may be made from such refusal on the part of the said building inspector or bureau of buildings."

The writ states also, in substance, that at the time the excavation permit was issued the Building Code of the city provided that certain kinds of buildings erected or altered for use in whole or in part for certain kinds of occupancy therein named should be restricted as to location; that no permit for the erection or alteration of such building should be issued unless such application were approved by the council; that it should be accompanied by a plan giving the location of the building in question, together with all buildings within a radius of 200 feet from the proposed structure, and the names and addresses of the owners of such buildings; that the ordinance required fixing a time for the consideration of the case by the council, notification to the owners of neighboring buildings, and that the "granting of the application for a permit shall not be approved by the council wherever it appears that the granting of the same is or may be detrimental to the public health or safety or detrimental to the welfare and growth of the city." In the list of restricted buildings, as the ordinance stood at the time the excavation permit was issued, apartment houses were not included. The writ narrates that on January 14, 1920, the restrictive ordinance mentioned was amended so as to in-

clude, among other structures, apartment houses, and that section 2 of the amending ordinance limited the period of its application to apartment houses as follows:

"Sec. 2. That the provisions of section 706 of said Ordinance No. 33911 so far as the same applies to apartment houses, shall cease to be in force and effect from and after July 1, 1920."

This amended ordinance carried with it an emergency clause.

The writ goes on to allege that when the application was made for the erection of the desired apartment house the defendant did not object to the application, plans, or specifications because of any imperfections therein or because of failure to conform to the Building Code or any ordinance of the city, but based his refusal on the ground that because the building ordinance was amended so as to include apartment houses he was powerless to issue a permit without direction of the city council. It further appears that the relator Everett appealed from the action of the defendant to the board of appeals constituted by the Building Code, where his appeal was denied, and the matter was carried to the city council on his further appeal, accompanied by a plan as prescribed in the Building Code before the amendment mentioned, with the result that a majority of the owners of neighboring buildings within 200 feet of the site of the proposed structure objected to the granting of the permit, whereupon the council also rejected the application and declined to issue the permit. This rejection is characterized by the alternative writ as an arbitrary exercise of power assumed by the council to deny the right to erect apartment houses on the location chosen merely because of aesthetic considerations or because certain neighboring owners preferred to be exclusive. The effect of the action of the defendant and of the bureau of buildings, board of appeals, and city council is declared by the relators to be to deprive them of their property rights and to be in violation of article 14, § 1, of the Amendments to the Constitution of the United States, and article 1, § 10, of the state Constitution; and it is averred that if the property is used merely for the construction of a residence it is worth only \$20,000, whereas if used for the construction of an apartment house it will be worth \$40,000.

The defendant showed cause by answering. On information and belief he denies the ownership of the property, and admits that he is the inspector of buildings and is authorized to issue permits, but not for the erection of apartment houses. He denies that the application mentioned in the allegation of the writ already quoted was accompanied by plans or specifications in manner or form



as provided by the Building Code of the city of Portland, and denies that the Code requires the issuance by the bureau of such a permit if the application, plans, and specifications conform to the requirements of said Code, or that a permit shall either be issued or refused within three days or within any other time from the date of the filing of the application. It is admitted that the ordinance became *functus officio* on July 1, 1920, as to apartment houses. The answer denies that the defendant restricted his objections to the plans and specifications submitted with the application to mere want of authority to grant the permission without consent of the council. The appeal to the board of appeals and finally to the council is admitted, with the result as stated in the alternative writ. Other admissions and denials were made, not necessary to be noticed here.

Affirmatively, the answer to the writ sets out the amendment to the ordinance, including apartment houses on the restricted list, saying that as to such edifices the ordinance had been amended on December 21, 1919. The answer further points out that the plans and specifications mentioned in the alternative writ as having been presented to the defendant failed in 17 specified particulars to comply with the Building Code, the Housing Code, and other ordinances of the city of Portland, which are pleaded. There are other allegations of the answer giving reasons, based upon the ideas of the defendant respecting health requirements, fire protection, and aesthetic considerations, why the site mentioned ought not to be devoted to the use of an apartment house.

The reply admits many of the defects charged against the submitted plans and specifications by the answer, but avers a willingness on the part of the relators to make proper corrections in the future. At this stage of the litigation the relators moved for a judgment on the pleadings awarding a peremptory writ of mandamus against the defendant, commanding him forthwith to issue the desired permit.

Roscoe O. Nelson, of Portland (Dey, Hampson & Nelson and C. J. Young, all of Portland, on the brief), for plaintiffs.

Wallace McCamant and H. M. Tomlinson, both of Portland (W. P. La Roche, of Portland, on the brief), for defendant.

BURNETT, J. (after stating the facts as above). It is well-nigh axiomatic that the court is powerless to render judgment on the pleadings when there is at issue any question of fact material to the relief sought. It is charged in the writ, as appears more at large in the quoted allegation above set forth, that the application made to the defendant for permission to erect the apartment house was accompanied by plans and specifications in

manner and form as provided by the Building Code of the city of Portland, and this is denied. At this point the relators are confronted with a dilemma. On the one hand there is an issue on this part of the writ, in which there appears an affirmation on one side and a traverse on the other. On the other hand, this cannot be avoided with the statement, as made in the argument, that this allegation was a mere conclusion of law. In brief, there is either an issue of fact joined, or the pleading of the writ is insufficient in point of law, in that it states a mere conclusion of law and not a fact. To allow the motion for a judgment awarding a peremptory writ would be either to disregard the issue of fact, if there be one, or to permit the relators to stultify themselves by admitting that their pleading was insufficient to justify the issuance of a writ.

It is hornbook law that the writ will not issue unless it is made clear that all of the preliminaries preceding the execution of the function sought to be compelled have been completed, so that nothing is left for the defendant to do except the ministerial duty involved. Having availed himself of this extraordinary remedy of mandamus, the petitioner for the writ must show such a situation that all objections to the performance of the duty have been removed and that the defendant is confronted with the absolute obligation to perform the act sought to be compelled. In this case the validity and authority of the Building Code of the city of Portland are granted, except so far as it attempts by the amendment to make proposed apartment houses subject to the will of the council. In many of the respects in which the plans and specifications are challenged, the objections thereto are conceded; for instance, the requirement of the dimensions of flues, the width of stairways, and the like, which are sufficient for illustration. In the very nature of things, under the building ordinance, the defendant could not and ought not to be allowed to issue permits for the erection of buildings which do not conform to the Building Code.

It is urged, however, in argument, and substantially alleged, that at the time the defendant rejected the application he did not make any of the objections now set out in his answer respecting nonconformity with the Building Code. It must be remembered, however, that the defendant is a public officer, whose duties are prescribed by the ordinances of the city, of which the relators must take notice. It is not within his authority to ignore or waive any of the requirements of the city laws. The relators must take notice of the limitations upon his authority. Upon them, not upon him, rests the burden of showing all things necessary to creating a situation in which his duty to issue the permit is imperative. They cannot re-

ly upon waiver, as if the obligation were between private individuals, where only their respective rights are affected. In such an instance, where only private rights and duties are involved, either party may waive requirements which he otherwise would be authorized to enforce. It is not so, however, in matters where public rights are involved and the duties of an officer are enjoined upon him by law with restrictions governing his conduct. It is not necessary to cite authorities for the views herein expressed. They are of common learning. These are sufficient reasons for denying the motion asking the issuance of a writ on the pleadings as they now stand. Neither would it be competent to issue a peremptory writ conditioned upon the relators' future correction of the errors in their plans and specifications. A conditional peremptory writ would be a contradiction of terms. Peremptory means absolute, and admits of no qualification.

For the reason that by the admitted terms of the ordinance it ceased to be effective on the 1st day of July, 1920, as to apartment houses, the right of the council to pass such an ordinance has become a moot question, which the invariable practice of this court has excluded from our consideration. *Moore v. Moore*, 36 Or. 261, 59 Pac. 327; *State ex rel. v. Grand Jury*, 37 Or. 542, 62 Pac. 208; *State ex rel. v. Fields*, 53 Or. 453, 101 Pac. 218; *State ex rel. v. Webster*, 58 Or. 376, 114 Pac. 932.

Only in its discretion does this court take original jurisdiction in cases of this sort. Article 7, § 2, State Constitution.

For the reasons already stated, therefore, the motion, based on the pleadings, to direct the issuance of a peremptory writ, will be denied, and as an exercise of our constitutional discretion the proceeding will be dismissed, without prejudice to the rights of the relators to apply to the circuit court for a writ of mandamus as they may be advised.

MCBRIDE, C. J., and HARRIS, J., concur in the result.

JOHNS, J. Under the facts shown to exist, neither one of the reasons assigned for dismissing the writ is legally sound, and for such reason I dissent.

BEAN, J., took no part in the consideration of this case.

(100 Or. 830)

**MARSHALL et al. v. MIDDLETON et al.**

(Supreme Court of Oregon. July 31, 1920.)

**1. Wills § 840—Executors cannot be compelled to redeem devised land.**

Where purchaser assumed mortgage, but defaulted in payment, devisees to whom he had

devised the land could not, upon his death subsequent to foreclosure during period of redemption, compel executors to redeem out of funds belonging to the estate, though will directed that his just debts be first paid, since the property itself is as 'between decedent and legatees the primary fund out of which a lien must be satisfied.

**2. Mortgages § 390—Foreclosure suit held to preclude action on notes secured.**

The bringing of a suit by the mortgagees, against mortgagors and their grantee who had assumed mortgage, to foreclose the mortgage, constituted an election of remedies on the part of the mortgagees, and thereafter precluded them from bringing an action upon the promissory notes given in connection with the mortgage.

Department 1.

Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Proceeding by Redmond P. Marshall and another, against J. H. Middleton and another, executor and executrix of the last will and testament of Wm. H. Marshall, deceased, to compel payment of claim. Order of county court for complainants was reversed, and the proceeding was dismissed by the circuit court, and the claimants appeal. Affirmed.

This is a proceeding, originally brought in the county court of Multnomah county, to compel the defendants, as executors of the estate of William H. Marshall, deceased, to pay off and discharge a lien upon certain real estate bequeathed to the claimants by said decedent. The facts shown in the record are as follows:

In April, 1910, W. H. and May S. Hembree purchased a small farm from Mary E. and John N. Rogers, and, being indebted for the purchase price, gave their notes therefor; one of said notes being for the sum of \$4,225, bearing interest at 6 per cent., and the other for \$775, bearing interest at 7 per cent. per annum, and to secure said notes executed a purchase-money mortgage in favor of their grantors for said sums. Decedent purchased the tract from Hembree and wife, subject to the mortgage, which he assumed to pay. Having defaulted in the payment, suit to foreclose the mortgage was brought against Hembree and wife and decedent; and complete service was had during decedent's lifetime. He having died before final decree his executors and heirs at law, including claimants, were made parties, and a decree was rendered foreclosing the mortgage. Upon foreclosure the property was bid in by the mortgagees for the full amount due, and at the time this proceeding was instituted was subject to redemption by those beneficially interested.

When W. H. Marshall died, he left a will

providing, in the usual form, for the payment of all his just debts; then bequeathing to claimants some small articles of personal property and the farm in question, and leaving all the residue of his estate to his wife, Beessie M. Marshall.

The appellants, claiming that, under the terms of the will, the tract in question should pass to them unincumbered, brought this proceeding, praying that the executors be required to redeem said property out of the funds belonging to the estate, which claim being allowed by the county court, the executors appealed to the circuit court, where the order of the county court was reversed and the proceeding dismissed. From that order the claimants have appealed to this court.

E. K. Oppenheimer and W. E. Farrell, both of Portland (Frank J. Lonergan and Davis & Farrell, all of Portland, on the brief), for appellants.

M. H. Clark, of Portland (Clark, Middleton & Clark, of Portland, on the brief), for respondents.

McBRIDE, C. J. (after stating the facts as above). [1] Waiving certain questions as to the mode of procedure adopted by the claimants, we are of the opinion that the executors were not legally bound to redeem from the foreclosure sale, and that the will only passed to the claimants the legal title to the tract in question, subject to the mortgage.

As between decedent and the legatees, the land constituted the primary fund out of which the mortgagees could secure the satisfaction of the debt. The question as to whether the agreement by the assignee, to assume and pay off the mortgage rendered him personally liable to the mortgagees, in case they might elect to waive their mortgage and sue upon decedent's covenant with the mortgagors to pay the mortgage, is not controlling; the law being that in cases of this character the rule that the personality is the primary fund, out of which the liens upon devised property must be satisfied, is reversed as between the executors and devisees, where devised property is incumbered by a lien not created by the testator, the property itself becomes the primary fund out of which the lien must be satisfied. This is stated clearly by Chancellor Kent in *Duke of Cumberland v. Codrington*, 3 Johns. Ch. 229, 257, 8 Am. Dec. 492, from which we hereinafter quote.

[2] It is needless to say that the assumption of the mortgage by decedent imposed no greater liability upon him, in respect to the mortgage itself, than that imposed upon his grantors. The bringing of a suit by the mortgagees against decedent and his grantors to foreclose the mortgage, during the lifetime of decedent, constituted an election of remedies on the part of the complainants in

that suit, and they were thereafter precluded from any action against anybody upon the promissory notes given in connection with the mortgage. *Wright v. Wimberly*, 94 Or. 1, 184 Pac. 740.

While the authorities are not entirely uniform, we are of the opinion that the clause in the will of deceased, providing that his just debts should first be paid, cannot be held to apply to the lien created by his grantors upon the land in question. The leading case on this subject is *Cumberland v. Codrington*, supra, decided by Chancellor Kent, his opinion being a veritable mine of logic and precedent on this subject.

The distinction between those cases, where a man gives a note and mortgage to secure a debt which he has himself contracted, and those where he purchases land already mortgaged and merely assumes the mortgage, is clearly drawn. We quote from the chancellor's opinion:

"The question in these latter cases seems to be, not merely whether the purchaser has rendered himself liable at law to a suit by the creditor, but which estate is to be deemed the primary fund, and which only the auxiliary. When a man gives a bond and mortgage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But when a man purchases, or has devised to him, land with an incumbrance on it, he becomes a debtor only in respect to the land; and if he promises to pay it, it is a promise rather on account of the land, which continues, notwithstanding, in many cases to be the primary fund. The same equity which in other cases makes the personal estate contribute to ease the land, as between the real and personal representatives, will here make the land relieve the personal estates. There is good sense and justice in the principle; and I feel the force of the doctrine, that it requires very strong and decided proof of intention, before the court can undertake to shift the natural course and order of obligation between the two estates. We have already witnessed the tenacity with which the court adheres to the natural order of the funds, when a stranger comes in and takes the incumbered land; and the books are full of cases, on the other hand, which subject the personal estates primarily, and as the 'natural fund,' to the payment of debts originally contracted by the party, and even though the debt should be created by mortgage, without either bond or covenant. \* \* \*

"The mere covenant with the vendor to pay the mortgage debt does not shift the charge from the fund primarily liable. Most of the cases do not give that effect even to a covenant with the mortgagee. \* \* \*

"This series of cases, which I have thus examined, shows very conclusively, that by the English equity system, as it has been declared and received for the last 30 or 40 years, the purchase of the equity of redemption, in this case, by Sir W. P., with a covenant of indemnity to Williamson, the mortgagor, against the mortgage debt, did not make the debt his own, so

as to render his personal assets the primary fund to pay it. The cases all agree that no covenant with the mortgagor is sufficient for that purpose. There must be a direct communication and contract with the mortgagee; and even that is not enough unless the dealing with the mortgagee be of such a nature as to afford decided evidence of an intention to shift the primary obligation from the real to personal fund."

Other cases to the same effect are *McLennahan v. McLennahan*, 18 N. J. Eq. 101; *Hetzel v. Hetzel*, 74 N. J. Eq. 770, 71 Atl. 755; *Gould v. Winthrop*, 5 R. I. 819; *Hunt, Petitioner*, 19 R. I. 139, 32 Atl. 204, 61 Am. St. Rep. 743; *Creesy v. Willis*, 159 Mass. 249, 34 N. E. 265; *McLearn v. Wallace*, 10 Pet. 625, 643, 9 L. Ed. 559.

Nor does a general direction in the will that "all just debts shall be first paid" in itself take the case out of this rule in regard to mortgages not created by the deceased. *Hetzel v. Hetzel*, supra; *Meyer v. Cahen*, 111 N. Y. 270, 18 N. E. 852. Such a provision in a will creates no new obligation on the executor; such payments being required by law in any event. Concerning this provision in a will, Justice Peckham, in *Meyer v. Cahen*, supra, remarks:

"The fact that the testator in the first clause of his will directed the payment of his debts as soon after his decease as conveniently could be done we do not regard as material. Such a clause is usually a purely formal one, and works no change in the disposition of the testator's property. The statutes provide that all debts and funeral expenses shall be paid first, and a direction in the will to do what the law requires to be done can throw no material light upon the meaning of the will."

And Cooper, C., in *Re Porter's Estate*, 138 Cal. 618, 72 Pac. 173, observes:

"Some stress is laid upon the direction in the first clause of the will to 'pay all my just debts,' but in this case we attach little importance to the words used in the formal manner in which they are used. They are much like the formal, meaningless terms of endearment and pious phrases printed in the formal part of blanks for making wills."

There is then nothing to indicate in express terms, or by necessary implication, that the testator expected that anything but the usual or, as Chancellor Kent terms it, the "natural" course would be pursued with reference to this incumbrance assumed by him, in case of his death before it should be discharged, which course, as shown by the same learned authority, would be to treat the incumbered land as the primary fund out of which the incumbrance should be extinguished.

We have here no data as to the value or extent of the testator's estate. For aught disclosed by the record a redemption by the

executors might exhaust the personality and leave the widow penniless. It may be that the estate was so valuable that the sum necessary to redeem would be only a small part of the total worth of the estate; we do not know, and cannot ascertain from the record. We can only surmise from the fact that the testator in his lifetime was unable or unwilling to discharge the mortgage, and that his other property was inadequate for that purpose, without material impairment of his finances. It seems quite as probable that decedent intended that his sons should be burdened with any incumbrance that might remain upon the land as that it was his intent the widow should discharge it from the residue of the estate, to her possible impoverishment.

As the plaintiffs have not appeared by guardian in this proceeding, we are justified in assuming that they are not mere children, but grown-up men, and possibly as capable of bearing the burden of redeeming this property as the widow, and this might well have been in the contemplation of the testator when he made his will.

Plausible arguments may be deduced in favor of plaintiffs' position from the authorities cited by counsel, but most of them may be easily distinguished by the fact that the incumbrances were such as the deceased in his lifetime had created, or had so obligated himself that some privity existed between him and the mortgagee, of a higher nature than any disclosed in the case at bar.

Thus in *Turner v. Laird*, 68 Conn. 198, 35 Atl. 1124, excerpts from which are quoted in appellants' brief, the mortgage in question had been placed upon the land by the testator to secure his own debt.

The same condition obtained in *Hayward v. Hayward*, 199 Mass. 340, 85 N. E. 158. The court in its opinion does not allude to or criticize the opinion in *Creesy v. Willis*, supra, so it may be said that as to mortgages assumed but not created by the testator, the rule in that case is still adhered to in Massachusetts.

In *Wilts v. Wilts*, 151 Iowa, 149, 130 N. W. 906, the incumbrance was one created by the testator. The same condition existed in the case of *Brown v. Baron*, 162 Mass. 56, 37 N. E. 772, 44 Am. St. Rep. 331, and in *Hennegar v. Deadrick* (Tenn. Ch. App.) 54 S. W. 138. So it will be seen that none of these cases are in point in the present contention.

The case of *The Home v. Selling*, 91 Or. 428, 440, 179 Pac. 261, is not in point here. In that case Jacobs and wife executed a note for \$40,000 in favor of the plaintiff, and gave a mortgage to secure the note and the installments of interest thereon, when they should become due, the mortgage containing a covenant to pay the sums so secured. Thereafter Jacobs and wife sold the mortgaged land to Emanuel May, who, as part of

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the purchase price, assumed to pay the mortgage, his covenant being as follows:

"The grantee herein, in part consideration for this conveyance, assumes payment of the \$40,000, unpaid balance of the first of said mortgages, and the interest accrued and to accrue thereon."

Afterwards May conveyed to the Emanuel May Investment Company by deed with a covenant against incumbrances, except, among others, the mortgage of \$40,000, which "as part of the purchase price" was assumed by the grantee.

The Home Company, the original mortgagee, brought an action at law against May and his grantee to recover an installment of unpaid interest, setting up the facts as above, and claiming \$300 as attorney's fees upon a stipulation in the note providing for the recovery of attorney's fees in case action or suit should be brought to recover thereon.

Following *Miles v. Miles*, 6 Or. 266, 25 Am. Rep. 522, and a number of other cases in this jurisdiction, this court held that the covenant of May and his grantees to assume and pay the mortgage created such a privity between them and the original mortgagor that he was entitled to bring a personal action thereon, and upheld the action for the \$3,000 accrued interest, but disallowed the attorney's fees, Justice Burnett observing:

"No allusion is made to the note or any of its incidentals. The agreement is to pay the mortgage, and the action at law against the present defendant is really upon that stipulation."

So here, the covenant of decedent was a personal one to pay the mortgage, and the mortgagee could possibly have brought action upon that covenant, even though it was a purchase-money mortgage. But this fact has no bearing upon the relation between the decedent and his devisees in respect to the provisions of his will, and does not militate against the rule announced by Chancellor Kent that, as between the executor and the devisee, the mortgaged land, in the absence of an express declaration to the contrary, constitutes the primary fund for the payment of such assumed lien.

On principle, it is difficult to differentiate this case from one where the purchaser of mortgaged property has entered into an agreement with the mortgagor to save him harmless and protect him from the payment of the mortgage debt. On authority as enunciated from time to time in this state, there arose a double incidental liability. The principal liability was that to protect the de-

cedent's grantors from the consequences of their dealings with their mortgagees, if these should ever see fit to waive their security and bring action on the debt secured. From decedent's transaction with the mortgagors there arose (according to *Miles v. Miles*, supra) a contingent personal liability to the mortgagors to pay off the mortgage in case the mortgagees should see fit to demand it of them personally instead of relying on the land.

In *Miles v. Miles*, supra, the writer, as an attorney in the case, contended for what he considered the logical common-law rule, that the assumption of the mortgage by a subsequent purchaser did not of itself create any such privity between the mortgagee and the subsequent purchaser, as would give a personal right of action against such purchaser; but the contrary doctrine has been so firmly established in this jurisdiction that it is now beyond discussion, and such merely contingent and remote liabilities can hardly be construed into "just debts" within the meaning of a general clause of a will directing the payment of such.

Take this case, where the obligation of deceased was to assume and pay a purchase-money mortgage, which is not shown to contain any covenants for the payment of the debt, it would seem that such agreement would not rise higher than a mere undertaking or assurance that the debt should be extinguished by the sale of the land, and that, so far as the mortgagee and the decedent were concerned, the latter was only collaterally liable, the land being thereby the primary fund. Whether this be true or not, the case there presented is one radically different from the case at bar, where there was no attempt by the mortgagees to hold decedent personally, and where the foreclosure and sale of the land had completely satisfied the terms of the covenant to assume and pay the lien.

It is but fair to say that the case of *Thompson v. Thompson*, 4 Ohio St. 333, appears to sustain appellants' contention; but it stands alone, and is opposed to the weight of authority, and, so far as our investigation extends, it is contrary to every authority, both English and American, and ought not to be followed, and particularly here where, in the testator's lifetime, the mortgagees had taken such a course of action as discharged the testator from any legal liability to indemnify his grantors in any event.

The decree of the circuit court is affirmed.

BURNETT, BENSON, and HARRIS, JJ., concur.

(183 Cal. 447)

**ROTH v. RECLAMATION DIST. NO. 1001.**  
(Sac. 2824.)

(Supreme Court of California. Aug. 3, 1920.)

**1. Judgment §715(3) — On amendment of plans judgment annulling assessment was not conclusive on question of sufficiency of plans.**

Where an assessment of benefits by a reclamation district had been annulled because the plans were incomplete and uncertain, an amendment of the plans to meet those objections before a reassessment of the benefits prevents the judgment of annulment of the first assessment from being conclusive on question of the sufficiency of the plans and specifications to sustain the reassessment.

**2. Judgment §720—Annulling reclamation assessment for want of benefits conclusive after amendment of plans.**

Where an assessment of benefits by reclamation district was annulled on the ground that the lands assessed received no benefits from the district the judgment was conclusive as to benefits in suit to contest reassessment of the same lands for the same improvements, even though the plans for the work had been made more detailed and specific before the reassessment.

**3. Judgment §714(1)—Finding of want of benefits from reclamation district held not conclusive against reassessment.**

A judgment, annulling assessment of benefits by a reclamation district was based on findings that the five tracts of land not benefited contained 116 acres, is not conclusive in suit to contest reassessment of benefits against the tracts which contained 181 acres, since the acreage not included in the first finding may have received benefits sufficient to sustain the reassessment.

**4. Appeal and error §1011(1)—Findings on conflicting evidence not reviewed.**

Findings based on conflicting evidence cannot be reviewed by the Supreme Court.

**5. Drains §83—Evidence held to sustain findings of benefit in suit to annul reassessment.**

In a suit to annul reassessment of benefits by reclamation district, testimony by two owners of land in the vicinity as to the benefits the land in controversy derived from the improvements held sufficient to sustain a finding of benefits.

In Bank.

Appeal from Superior Court, Sutter County; G. W. Nicol, Judge.

Action by C. F. Roth against the Reclamation District No. 1001. Judgment for defendant, and plaintiff appeals. Affirmed.

A. H. Hewitt, of Yuba City, for appellant.

A. C. McLaughlin, of Yuba City, W. H. Carlin, of Marysville, and C. F. Metteer, of Sacramento, for respondent.

WILBUR, J. Plaintiff brought this action under section 3462, Political Code, to have an assessment made by the board of supervisors of Sutter county for and on behalf of reclamation district No. 1001 annulled on the grounds, among others, that the plans for the improvement contemplated by the reclamation district were insufficient, and that the lands of the plaintiff were not benefited thereby at all, or in proportion to the assessments made thereon. The assessment complained of is a reassessment, made by authority of section 3466½, Political Code, which authorizes such reassessment, in place of an invalid assessment, "for the purpose of charging said land with its proper proportion of the cost of reclamation." Plaintiff claims that, even if the reassessment was thus authorized, the questions involved in his attack upon such reassessment have been already adjudicated in his favor in the previous suit in which the assessment was annulled; that therefore the decision of the trial court holding this reassessment to be valid is against such conclusive evidence. Judgment having been rendered sustaining the reassessment, plaintiff appeals. The respondent, reclamation district No. 1001, was organized by an act of the Legislature in 1911 (Stats. 1911, p. 881). The plans for the reclamation were formulated and filed with the board of supervisors, and subsequently from time to time amendments to that plan were filed. Finally it was determined by the board that the expense of the reclamation would be \$851,730, and an assessment therefor was levied and paid and the money expended. It was found that an additional assessment for \$500,000 was necessary to complete the work of reclamation and provide for a deficit of \$466,866.47, and more detailed plans for reclamation were adopted, and an assessment therefor levied upon the lands of the district. All said assessments were paid with the exception of that of the plaintiff and two others, who filed objections to the assessment with the board of supervisors, and upon such objections being overruled began an action in the superior court under section 3462, supra, to have said assessment annulled. Judgment was therein rendered, annulling the assessment of the plaintiffs therein. No appeal was taken and the district proceeded to secure a reassessment, under section 3466½, Political Code, which reassessment plaintiff now seeks to have annulled.

[1] Plaintiff relies upon the proposition that in his first contest of the assessment it was conclusively adjudged that the plans for the work were so incomplete and uncertain as to invalidate the assessment, and also that certain tracts of his land were found not to be benefited by the assessment. Respondent relies upon the point that subse-

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quent to the annulment of the assessment, supplemental explanatory and more detailed plans and specifications were filed with the board of supervisors by which the matters, uncertain in the first plans and specifications, were made definite and certain, and that therefore the first decision is not res adjudicata; and that the decision of the trial court in this case in favor of the sufficiency of the new plans, being supported by the evidence, should be sustained, and, further, that the evidence in this case supports the finding of the court that the lands of the plaintiff were benefited to the amount of the assessment. The assessment, declared invalid in the first action, was identical in amount with the assessment now under consideration, upon each and every parcel of land owned by the plaintiff. The estimated expenditures proposed by the amended plans relied upon by the respondent are exactly the same to a cent upon every one of the numerous items contained in the original estimate upon which the \$500,000 assessment was levied. There was no change whatever in the plan of improvement. The amendments, or supplements to the plans, filed with the supervisors, merely amplified the description of the work contemplated by the original plan and assessment for the purpose of making the same more definite. The nature of these changes can be illustrated by one or two instances. The original estimate contained the following items:

"Over cross canal: 561 ft. 20-foot trestle at \$9 per ft., \$5,049.00."

The supplemental report contained the following explanation thereof:

"Over cross canal: 561 feet 20-foot trestle, \$5,049.00. The above item of trestle covers one-half of trestle over cross canal in the northwest corner of section 9, township 11 north, range 4 east, known as May bridge, also one-half of trestle known as Bennett bridge, all as shown on map filed April 8, 1914. The cost of the other half of these bridges to be borne by Reclamation District No. 1000."

The original estimate contained the following item:

"10 or more bridges over canal at \$75.00 each (call it), \$1,001."

The revised estimate contained the additional statement:

"The above bridges are structures 18 feet long, one to be placed over each tract of land cut in two by said interior drainage canal at a point to be selected by the owner."

—and refers to a map for more definite location. The amended specifications contained 12 different items in which similar indefinite statements in the original specifications upon which the original assessment was based were amplified and explained. A further difference may be illustrated by the

description of the right of way of an interior drainage canal. In the original specifications the description is as follows:

"Right of Way—Interior Drainage Canals:—Right of way to be purchased after Sept. 1, 1914, north of Burns property and paralleling the Feather river practically 5 miles of right of way, 50 feet wide; 30.3 acres at \$75. \$2,270.00."

In the supplemental specifications this right of way is described as follows:

"Strip of land 50 feet wide beginning at the quarter corner between sections 10 and 11, township 11 north, range 3 east, Mount Diablo base and meridian, and extending thence northerly 5 miles, paralleling Feather river and as indicating on map showing amended plan of reclamation district No. 1001, filed with board of supervisors of Sutter county, April 8, 1914, containing 30.3 acres, at \$75.00—\$2,270.00."

The character of these items sufficiently illustrates the fact that on the trial of this action the court was dealing with a very different situation with relation to the certainty of the plans and specifications and the location of the work than was before the court upon the first contest, and that the decision upon the first trial that the plans were insufficient and indefinite in the description and location of the work proposed to be done is therefore not controlling in the present action. The decision of the trial court in the first case may have been based upon the very uncertainties thus corrected by the amended plan. We conclude, therefore, that the question as to the sufficiency of the plans and specifications was open for the adjudication of the trial court in this action.

[2] It is contended that the first adjudication is conclusive upon the question of benefits, and that therefore the reassessment must be held invalid. The judgment in the first case annulling the assessment is based entirely upon the insufficiency of the plans. It is there adjudged:

"That the plans of reclamation upon which the assessment referred to herein were based are illegal and invalid, and the said assessment in so far as it affects any of the land of plaintiff described in said complaint is hereby decreed invalid, and the said assessment is hereby annulled."

It was, however, found by the court:

"That a portion of plaintiff's land included in tracts Nos. 698, 703, 704, 705, and 706, as described on the last assessment list of the district, and containing about 116 acres, was not benefited in any manner or at all by the work done or provided to be done under said plans of reclamation; that since the construction of said cross canal by defendant, said tracts of land above described have been affected with underground seepage therefrom, which never before affected said lands, to such an extent as to render it impossible to raise any crop thereon."

The amount assessed upon these tracts in the original assessment and in the reassessment are as follows: Tract No. 698, \$1,183; 703, \$730.92; 704, \$1,183; 705, \$895.70; 706, \$1,851.98. In the case at bar, however, the court found that—

"The amount charged and levied upon each and every tract of land in said district assessed was proportionate in every instance to the whole expense and to the benefit which would result from said work of reclamation; and the amount of the charge so levied upon said tracts of land belonging to the plaintiff was in every instance in proportion to the whole expense and to the benefits which would result from said works of reclamation. That the assessment levied upon the lands of plaintiff was proportionate to the whole expense and to the benefit which would result from said works of reclamation."

It was also found by the trial court that—

The "reassessment was based upon the report and plan under and upon which the assessment now under consideration, namely, said subsequent assessment, was based, and contains no items or item of work or expense that was not included in the former assessments of the lands of said district; and the plan and report under and upon which the assessment herein referred to, namely, said subsequent reassessment, was based, is not a different, but the same, plan and report upon and under which the other lands of said district were assessed," etc. "That, however, before making said subsequent reassessment, and after the 5th day of October, 1914, the plans used in making such general assessment of the lands of said district had been and were elaborated, and in many cases made more specific and certain in matters of detail. \* \* \* That the plans \* \* \* under which the said subsequent reassessment was made \* \* \* were not different plans either as to the extent and location of certain works of reclamation or otherwise, in substance or in any way, except in said matter of more specific certainty and elaboration. \* \* \* No tract of land owned by plaintiff \* \* \* has been assessed for any sum greater than the benefits which will be derived from the works of reclamation and the amount or sum apportioned to each and every of said tracts is not in any instance in excess of the benefits which will accrue thereto."

The court also included in its findings an interpretation of the effect of the previous decree annulling plaintiff's assessments as follows:

"And said court by its decision found that the lands of the plaintiff herein, who was the plaintiff in said action, had been assessed on said assessment list dated the 11th day of February, 1915, in excess of the benefits derived to said land by the said works of reclamation, and that the said assessment had not been made upon any valid or sufficient plan of reclamation \* \* \* and said assessment was by the judgment of said court \* \* \* declared invalid. \* \* \*

While, as we have held above, it is obvious that the judgment based on findings that the plans of reclamation are invalid for uncertainty is not conclusive as to the effect of amended plans in which items are specified with greater certainty, it is equally obvious that a mere increase of certainty in plans which the court is able to say are, notwithstanding such charges, still the same plans, would not increase or alter the benefits to be received by the lands of the plaintiff. In other words, as the court found in the first instance that 116 acres of plaintiff's land was not only not benefited but was actually damaged by the improvement made and contemplated, a more perfect description of the contemplated work which damaged plaintiff's land would not be a basis for a conclusion that the land was benefited, particularly as the work had actually been completed before the first case was tried, and its effect on plaintiff's land already clearly ascertained and shown. The difference between the situation at the first trial and upon the trial of this action is not in a change of plan or of result, but merely in a description of the means by which the result was or is to be achieved.

[3-5] The difficulty in applying the doctrine of res adjudicata grows out of the form of the finding as to the matter of benefits. The five tracts of land, described in the findings as containing 116 acres which were not benefited at all, contained 181.59 acres. So far, then, as the finding is concerned, each one of these tracts may have contained an acreage which was benefited to the amount of the assessment, in which case it is well settled that the assessment would not be invalid. *Reclamation Dist. v. Hershey*, 160 Cal. 692, 694, 117 Pac. 904; *Reclamation Dist. v. Birks*, 159 Cal. 233, 240, 113 Pac. 170. The finding, therefore, cannot be considered as an express finding that any one of the five tracts of land described therein was not benefited at all. If we should divide the 116 acres equally among the five tracts of land, it would leave 15.12 acres in each tract benefited by the improvement. Nor would it follow that because certain portions of the land were affected by seepage that such land was not benefited by the improvement, for, as contended by the engineers in this case to be the fact, it might be possible to reclaim such flooded portions of the land by a small additional expenditure. For the foregoing reason the question of benefits was open for adjudication in the last case. The findings against the appellant, being based upon conflicting evidence, cannot be reviewed by us. There is ample testimony to sustain the conclusion of the trial court that such lands were assessed in proportion to benefits. Some of this testimony is pointed out by the District Court of Appeal, First District, and we quote from its opinion as follows:



" \* \* \* It is quite plain, we think, that the direct testimony of witnesses called by respondent is abundantly sufficient to sustain the finding of the lower court. Mr. John Burns, who owns the adjoining place and has lived there for 60 years, testified strongly as to the enhancement of the value of the land due to its reclamation. It is true that he was a little indefinite as to the amount of increase to be apportioned to each particular tract of appellant's land, but as we understand his testimony, it is to the effect that 264 acres of the 379 acres were increased in value to the extent of \$25,000, in round numbers, whereas the amount of both assessments on the whole tract was \$27,356.44. In his estimates he excluded the timber lands, consisting of 114 acres or thereabouts. This portion of the land, however, was covered by the testimony of one J. R. Caldett, who owns a large farm in the neighborhood, and who has resided there for nearly 40 years. He testified that the timber land was worth about \$20 an acre before reclamation and \$150 an acre afterward. \* \* \* Another witness, Mr. George B. Green, seems to have covered the whole tract of land. He testified that a portion of it was worth \$5 to \$10 per acre before reclamation and \$100 afterward, another portion \$35 to \$40 before reclamation and \$200 thereafter, and the balance of the land was increased from \$100 or \$150 to \$250 or \$300 per acre."

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; OLNEY, J.; LAWLOR, J.

(183 Cal. 524)

In re ABBEY'S ESTATE. (L. A. 6418.)

(Supreme Court of California. Aug. 12, 1920.)

WILLS § 118.—Request to sign as "subscribing witness" is acknowledgment of signature.

Where testatrix had signed her will before the witnesses entered the room, her request to them to sign as subscribing witnesses, which they did immediately beneath her visible signature, was an acknowledgment of the signature on the will as her own, since they could not become subscribing witnesses unless she signed in their presence or acknowledged her signature.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subscribing Witness.]

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

In the matter of the estate of Harriet S. Abbey, deceased. From an order revoking probate of will the proponents of the will appeal. Reversed.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellants.

Bicksler, Smith & Parke, of Los Angeles, for respondents.

WILBUR, J. This is an appeal from an order revoking the probate of the will of Harriet S. Abbey, upon the finding that the testatrix did not sign the will in the presence of either of the subscribing witnesses and did not acknowledge her signature to them. The facts concerning the execution of the will are undisputed, and the sole question raised by the appeal is whether this finding is sustained by the evidence. The will was prepared by an attorney some months before it was signed. It is conceded for the purposes of the appeal that the will was not signed by the testatrix in the presence of either subscribing witness, although both subscribing witnesses signal the usual attestation clause, stating that the will was signed by the testatrix in their presence, and made affidavit to the same effect at the time of the probate of the will. The sole witness on the revocation of the will was the attorney who prepared it, assisted in its execution, and as executor thereof presented it for probate. He testified that on March 7, 1918, the testatrix sent for him to attend to having the will executed; that she produced the document and affixed her signature while only the two were present. The witnesses were then asked by the attorney to come into the room. "They came into the room, and I, as I remember it, held the will then, she having signed it, in my hand and said, 'Mrs. Abbey, this is your will, is it?' She said, 'Sure,' and I said, 'Do you wish these gentlemen to sign as subscribing witnesses?' She said, 'Sure, I do.' They turned right near the bedside there, and then they affixed their names in her presence and in the presence of each other." The signature of the testatrix is on the same page as that of the subscribing witnesses, and no doubt the signature was visible to the subscribing witnesses at the time each signed the will. The request that these persons sign the will as "subscribing witnesses" was in effect an acknowledgment of her signature to them for only by signing the will in their presence, or by acknowledging the same in their presence, could they become subscribing witnesses. The word "subscribing" in the request is therefore very significant, for the word assumes that the signature appended to the will is her signature, and hence amounts to an acknowledgment of such signature as her own. Under similar circumstances, as to one witness, the other having seen the testator sign the will, it was held by the Court of Appeals of New York that the declaration by the testator that the in-

strument was his will was a sufficient acknowledgment of his signature to the same, as well as a publication of the will. *Baskin v. Baskin*, 36 N. Y. 416. See, also, *Matter of Will of Phillips*, 98 N. Y. 267, and *Matter of Hunt*, 110 N. Y. 278, 18 N. E. 106; *Matter of Akers*, 173 N. Y. 620, 66 N. E. 1103; affirming 74 App. Div. 461, 77 N. Y. Supp. 643.

Decree reversed.

We concur: OLNEY, J.; LENNON, J.; SHAW, J.; LAWLOR, J.

(183 Cal. 454)

**BRIMBERRY v. DUDFIELD LUMBER CO.**  
et al. (S. F. 8968.)

(Supreme Court of California. Aug. 3, 1920.  
Rehearing Denied Sept. 2, 1920.)

**1. Municipal corporations §706(7)—Contributory negligence of motorcyclist held for jury.**

In an action for injuries to a motorcycle in collision with an automobile, contributory negligence in driving at an excessive rate of speed and in driving on the wrong side of the street held for the jury.

**2. Appeal and error §1011(i)—Findings on conflicting evidence not disturbed.**

Findings on conflicting evidence will not be disturbed.

**3. Master and servant §302(1)—Negligence of automobile driver held imputable to employer.**

Where an employé, after having driven an automobile furnished him by employer to a customer for purpose of having check payable to employer countersigned as directed when he left employer's office for the day, drove back toward the office to procure his overcoat, instead of driving directly home, the employer was liable for his negligence while returning to the office, though his trip to obtain the signature was not in the line of his usual duties.

Shaw, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; John L. Hudner, Judge.

Action by John H. Brimberry against the Dudfield Lumber Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

John G. Jury and Louis Oneal, both of San Jose, for appellants.

Norman E. Malcolm, of Palo Alto, for respondent.

**LAWLOR, J.** This is an appeal from a judgment for \$1,200 against the defendants, Dudfield Lumber Company, a corporation, and Joseph A. Jury, and in favor of the plaintiff, John H. Brimberry, in an action to recover

damages for injuries alleged to have been suffered by him as the result of negligence on the part of defendant Jury in the course of Jury's employment by the defendant corporation. The record before us is presented under the alternative method.

The following facts are undisputed: Jury was the secretary of the Dudfield Lumber Company, whose offices were in the city of Palo Alto. He testified that prior to December 11, 1917, the company had purchased an automobile, which was registered in his name and turned over to him for his use. On the last-mentioned day, about 4:30 p. m., Jury left the office of the company in the automobile, and drove to Camp Fremont to have a check countersigned at the office of the Lindgren Construction Company at the camp. He returned from the camp to Palo Alto via the state highway. On arriving at the intersection of the state highway with University avenue, at the entrance to Stanford University, he collided with a motorcycle, on which the plaintiff and one Leslie C. Kees, both sergeants in the United States army, were returning from Mayfield to Camp Fremont. By the force of the collision the plaintiff was thrown from the motorcycle and suffered the injuries for which he now seeks damages.

The cause was tried before the court without a jury. The court made findings of fact and conclusions of law, and rendered judgment in favor of the plaintiff and against both defendants in the sum of \$1,200.

1. We shall first consider appellants' contention:

"That the decision is against law," in that "the evidence conclusively shows negligence on the part of the respondent, and that his said negligence was a proximate and contributing cause of the injuries sustained by him, and that therefore the court erred in giving judgment for the respondent herein."

In this connection we shall also consider the following four propositions advanced in appellants' opening brief:

(1) "The evidence is insufficient to justify the decision that the motorcycle driven by plaintiff and Leslie C. Kees was driven on the right side of the state highway, \* \* \* or that 'the plaintiff or \* \* \* Kees proceeded carefully or with due care to drive said motorcycle across said intersection.'"

(2) "The evidence is insufficient to justify the decision 'that the plaintiff and \* \* \* Kees were not operating and driving said motorcycle \* \* \* in a careless, negligent, and imprudent manner,' or 'that they were not going at a rate of speed greatly in excess of that which was reasonable and proper, having regard to the traffic and use of said highway.'"

(3) "The evidence is insufficient to justify the decision 'that said collision and all injuries and damage suffered by plaintiff as a result thereof were not wholly or in any way due to

want of ordinary care on the part of the plaintiff, or to plaintiff's own negligence, or to the negligence of his associate and companion, \* \* \* Kees'."

(4) "The evidence was insufficient to justify the decision that there was no want of care and no contributory or any negligence of the plaintiff whereby the injuries and damage suffered by the plaintiff were brought upon himself."

It is well to call attention to the fact that at the point where the collision occurred the state highway, about 60 feet wide, runs northwest and southeast; that at the intersection University avenue, about the same width, runs northeast and southwest; that, owing to the wide entrance to the University grounds and the curve of University avenue, the crossing or intersection presents an open road space about 200 feet in diameter; that about 30 feet west of the concrete curb along the eastern side of this open area, and running parallel to said curb, are the tracks of the Peninsular Railroad, which runs between Palo Alto and Mayfield, and at this point turns from University avenue into the state highway; that about 2 feet northeast of the property line on the northeast side of the highway, and 34 feet northwest of the property line on the northwest side of University avenue, is a "trolley pole"; and that between this pole and the intersection of the two roads is a rough, unpaved area, across which, it appears, it was customary for vehicles to pass when making the turn from University avenue to go north on the highway.

Kees, the driver of the motorcycle, testified that, as he was returning from Mayfield to Camp Fremont on the right-hand (east) side of the highway, he approached the intersection at a speed of about 25 miles an hour; that he noticed a Ford car coming toward the intersection along University avenue, and that he thereupon slowed down to a speed of not more than 12 miles an hour in order to allow the Ford car to pass in front of him, at the same time swerving "a little bit to the right"; that the Ford car passed across the highway in front of him and went "out into the University grounds"; that, after the Ford car had passed in front of him, he saw Jury's car coming down the highway, but that, inasmuch as Jury was looking "out University avenue as though he was going to turn in that direction and follow the Ford," he took no further notice of Jury and proceeded north on the east side of the highway; that, just as the witness "neared the corner of the property line of University avenue with the state highway," Jury made a sharp turn toward him, "cutting several feet from the center of the intersection," so that the witness, "not having time enough to turn to my left and give him the wrong side of the road," set his brakes, and "was compelled to swerve more to the right to avoid

a head-on collision"; that immediately thereafter the car which Jury was driving struck the rear wheel of the witness' motorcycle on the left-hand side, throwing Sergeant Brimberry off, so that he rolled about 20 feet, to "within a few feet of the trolley pole"; and that he could not state how fast Jury was traveling at the time of the collision.

Miss Cornelia Kempff testified that at the time of the collision she was driving her automobile west on University avenue, intending to turn north into the highway, in order to return to her home in Atherton; that she was driving near the center line of University avenue, for the reason that "it was a little bit rough" near the trolley pole; that before she reached the intersection a Ford car, going in the same direction, passed her on her right and "started to crowd in ahead, so I swerved out a little bit to make my turn"; that she saw the plaintiff and Kees, just as another car passed in front of them; that they were traveling on the right-hand side of the highway—"in fact, they were a little too much to the right, if anything"; that at the time of the collision the front wheels of Jury's car were in the rough space near the trolley pole, and she thought the rear wheels were there also; that plaintiff was thrown from the motorcycle and "rolled two or three times before he stopped" near the trolley pole; and that she had told Jury he "was on the wrong side of the road."

Plaintiff corroborated the foregoing testimony. He declared that at the time of the collision Jury "was not going very fast or very slow, and we were not going very fast either," and that he did not see Jury's car until after the Ford car had passed in front of the motorcycle. On this point Jury testified that as he approached the scene of the collision traveling south on the west side of the highway, he noticed a Ford car coming out of University avenue across the highway, and that the driver of the Ford car "seemed to hesitate as to what way she was going"; that because of this seeming hesitation he "naturally slowed up and kept on to the extreme right until she passed out of my way"; that just as the Ford car passed across the highway the motorcycle on which plaintiff and Kees were riding at a speed of "about 35 miles an hour, I imagine, \* \* \* shot around the back of the Ford"; that the plaintiff and Kees were traveling on the west side of the highway; and that he first saw the motorcycle when "it swept around in back of the Ford." On cross-examination he said that the reason he thought the plaintiff's speed was 35 miles an hour was because "they came around back of that machine at an angle of 35 degrees."

Mrs. Anabel Titchworth, a witness for the defense, testified that at the time of the collision she, with two other women, was driving a Ford car west on University avenue

at a speed of about 12 miles an hour; that as she reached the highway she saw the motorcycle "zigzagging all over the highway, and that frightened me"; that she thought the motorcycle was going "two or three times faster than I," and that it did not slow up on reaching the intersection; that she was "too frightened" to notice any other details of the collision; that the reason why she thought the motorcycle was traveling fast was that "it looked to me as if they were going to run into me"; and that she could not state what direction the motorcycle took after it passed behind her car. Mrs. Isabella Telmont and her daughter Irma, witnesses for the defense, who were in Mrs. Titchworth's car at the time of the collision, corroborated the latter's testimony.

Bruce Hight, a witness for the defendants, testified that just prior to the collision he was driving a delivery car west on University avenue at a speed of about 25 miles an hour; that he passed Miss Kempff's automobile on University avenue before he arrived at the intersection; that he was about 120 feet east of the intersection when he first saw plaintiff and Kees on the highway about 75 yards south of the center of the intersection traveling "not under 30 miles an hour, either on the center [of the highway] or over it—on the left"; that the motorcycle passed in front of him and just behind Mrs. Titchworth's car; that he never saw, but heard the crash of, the collision; that he immediately turned around and drove back to the intersection; and that he saw the motorcycle about eight feet south of the trolley pole lying in a pool of gasoline. On cross-examination he admitted that he was not certain whether, at the time when plaintiff and Kees crossed the intersection, they were on the west side of the highway; that when he reached the intersection of the northwest property line of University avenue with the highway the plaintiff and Kees were "about the center of the paved part of the highway; \* \* \* they had already started to swing out on account of the Ford—to their right"; and that he did not know at what rate of speed they were traveling when they crossed the intersection after they had passed in front of him.

[1, 2] From this summary of the testimony it is clear that, with respect to the points urged by appellants, including the speed at which the motorcycle was traveling at the time of the collision, the care or lack of care with which Kees was driving the motorcycle, and the side of the highway upon which plaintiff and Kees were traveling, the evidence is involved in substantial conflict. First, with regard to appellants' claim of contributory negligence: As to the speed and the manner in which he was driving the motorcycle, Kees stated that he was "going 10 or 12 miles an hour"; he having slowed

down from 25 miles an hour. The plaintiff testified somewhat indefinitely that the motorcycle was "not going very fast, either." On the other hand, Jury stated that it was moving "about 35 miles an hour"; admitting, however, that he had not seen the motorcycle until it swept around in rear of Mrs. Titchworth's car. Mrs. Titchworth stated that the plaintiff and Kees were "zigzagging all over the road," and were going "two or three times faster than I was"; but she also testified that she was "too frightened," and thought that the motorcycle was going to run into her machine. Hight said he thought the speed of the motorcycle was about 30 miles an hour. As to the course of the motorcycle with reference to the center line of the highway, Kees said that he approached the intersection on the right-hand side, and later swerved "a little bit more to the right." He was corroborated on this point by Miss Kempff and the plaintiff. And Jury stated that at the time of the collision the motorcycle was on the west side of the road. Mrs. Titchworth said she could not state what direction was taken by the motorcycle after it passed in back of her car. Hight declared that the point at which he saw some gasoline spilled and at which he thought the collision took place was about "8 feet south of the telegraph pole," which would be on the east, or right-hand, side of the highway. Thus, on each of the questions involved in the issue of contributory negligence, there was a substantial conflict in the evidence. The findings, therefore, negating contributory negligence, will not be disturbed.

## 2. Appellants' second contention is that—

"The evidence is insufficient to justify the decision 'that the wrongful and negligent acts of the defendants brought about said injuries and damage to the plaintiff,' or that \* \* \* 'Jury operated \* \* \* said automobile carelessly or negligently at said intersection,' \* \* \* or that he 'did negligently drive said automobile far to the left of the center of said intersection, cutting the corner thereof short,' \* \* \* or that by reason of any careless or negligent acts of said defendant said collision occurred."

It is not necessary again to review the evidence, in order to point out that each of these questions of fact is involved in conflict. We think this is abundantly clear, and that the findings are amply supported by the evidence.

3. Since we have reached the conclusion that the findings negating contributory negligence and holding that the defendants were guilty of negligence which caused the injuries to plaintiff are supported by the evidence, it only remains to consider appellants' final contention:

"That, under the evidence, the judgment here-in against the Dudfield Lumber Company, under the rule of respondent superior, was, as a matter of law, clearly and wholly erroneous."

The court found:

"That at all times mentioned in the complaint the said Joseph A. Jury was engaged in the business of the Dudfield Lumber Company as an employé of said company, and said Jury, at the time of the infliction of the injuries on plaintiff herein mentioned, was riding in and driving the automobile and that said automobile was \* \* \* owned by defendant Dudfield Lumber Company, \* \* \* and was at the time of the infliction of these injuries in use by said Jury in and on the business of said company."

The defendant Jury was made a witness for the plaintiff. Regarding the events of December 11, he testified on direct examination:

"Q. What time did you leave the Dudfield Lumber Company's office that afternoon? A. That afternoon I left about 4:30. Q. Where did you go? A. I was on my way home. Q. Where do you live now? A. Mayfield. \* \* \* In receiving a check from the Lindgren Company, Mr. Gowing neglected to countersign it, and the bookkeeper handed the check to me, and said: 'You might run around by Camp Fremont and have Mr. Gowing countersign this check and bring it to me in the morning.' Q. Did you do that? A. I did. Q. What was that check for? A. For material furnished. Q. Purchased from the Dudfield Lumber Company? A. Yes. Q. And then you had gone up to Camp Fremont to get this check countersigned? A. Yes, sir. Q. And were returning from Camp Fremont at the time of the collision? A. I was on my way home then. Q. You use this machine in going from your office to your home, do you not? A. Yes, sir. Q. Every day? A. Yes, sir. Q. And in the scope of your employment; that is a part of the way you get to and from your business, is it not, by the use of this machine? A. Yes."

Upon cross-examination the witness gave the following testimony:

"Q. When this check was signed were you through with your work for the day? A. I was; yes. Q. You were through with your work for the day at the time you left the Dudfield Lumber Company about 4:30, were you not? A. I was. Q. Except the getting of this signature on the check? A. Yes, sir. Q. Were you on the business of the Dudfield Lumber Company at the time of this collision? A. No, sir. Q. The Dudfield Lumber Company had nothing to do with it? A. Not a thing."

Jury was next called as a witness for the defense, and testified as follows on cross-examination by the plaintiff's attorney:

"Q. Where were you going? A. I was going into Palo Alto. \* \* \* Q. Then you were not going on into Mayfield? A. I was on my way home. In going into Palo Alto I had forgotten my overcoat, was going in after my overcoat. Q. You intended to turn into University avenue to go to Palo Alto? A. Yes."

And on redirect examination he testified:

"Q. When you were going back to get your overcoat, Joe, you were not in the business of

the Dudfield Lumber Company, were you? A. No, sir."

Kees, when asked, if, at the time of the accident, Jury was going to the office of the Lumber Company, answered, "He apparently was."

Shearman & Redfield on Negligence, vol. 1, § 147, lays down the rule that—

"Where a servant is allowed by his master to combine his own business with that of the master, or even to attend to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured by his negligence; but the master will be held responsible unless it clearly appears that the servant could not have been, directly or indirectly, serving his master in the act, the negligent performance of which caused the injury."

See, also, Patten v. Rea, 2 O. B. (N. S.) 606, 140 Eng. Rep. 554.

In Rahn v. Singer Mfg. Co. (O. C.) 26 Fed. 913, it was said:

"In order to fix the responsibility of the defendant, it is not necessary for the plaintiff to prove that the servant, for whose tort he seeks damages, was, at the time of the commission of the tort, engaged in executing specific commands of the defendant. It is enough for him to prove that the servant was acting within the general scope of his employment, but this much is necessary. If the usage of the parties, under the servant's contract of hiring, was of such a character that it allowed the servant to attend to his duties on such terms as suited his convenience, and at the time of the commission of the tort he was engaged in his own private business, but at the same time was pursuing the defendant's business in the service for which he was employed, the defendant would still be liable."

[3] In our opinion, the principle announced in these authorities is applicable to the facts of this case, and clearly the testimony of Jury himself that the automobile was purchased by the company, and was used by him both in the service of the company and on his own business, that his trip to Camp Fremont was for the purpose of having a check countersigned for the company, and that he intended to proceed to Palo Alto to get his overcoat, is sufficient to sustain the finding that at the time of the collision he was acting in the course of his employment.

Appellants contend further:

"That the having of the particular paper countersigned was not within his general employment. It was an isolated—a single—act, \* \* \* a mere matter of convenience, a mere accommodation."

In Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 Pac. 25, the plaintiff had been injured through the negligence of one Rosso. It appeared that Rosso was the driver of an automobile truck for the defendant and was regularly engaged in distribut-

ing supplies, but that at the time of the injury he was, pursuant to the orders of defendant's storekeeper, towing an automobile belonging to a fellow employé. The court said:

"It makes no difference that Rosso's usual employment was the distribution of supplies. His business was to operate his motor truck under the orders of his superior, and that was exactly what he was doing at the moment when his carelessness caused the injury to plaintiff."

Here, too, the employé had undertaken the trip to Camp Fremont on business of his employer, although such business was not in the line of his usual duties.

This conclusion renders it unnecessary to discuss appellants' point that the evidence is insufficient to justify the finding that the automobile used by respondent was the property of the defendant corporation.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.

WILBUR, J. I concur in the judgment against the Dudfield Lumber Company, for the reason that at the time plaintiff was injured Jury was returning to the office of the Dudfield Lumber Company from an errand for the defendant company on which he was sent by the bookkeeper. The court, having decided against the credibility of his testimony as to the manner in which the accident occurred, was therefore also justified in disregarding his statement that he merely turned aside to the office for his overcoat while returning to his own home, and in concluding that he was merely completing a journey to and from the office on the business of the company. As to the other points in the case, I concur with Justice LAWLOR'S conclusions.

SHAW, J. I dissent. In my opinion Jury was not in the service of the company and was not its agent for any purpose at the time of the accident. The fact that he had been in its service during the preceding part of that day does not compel the conclusion that he was in its service at that time. The fact that he was then driving an automobile belonging to the company did not, under the circumstances appearing, make him its servant or agent. He was not driving it for or on behalf of the company, nor in its work or service. He lived at Mayfield, and worked for the company as its secretary at its office in Palo Alto. He used the car after office hours in the evening and before office hours in the morning in going to and returning from his home in Mayfield. This was with the consent of the company, but not by its direction, nor in the transaction of its business. In contemplation of law he merely borrowed the car for his own use in so doing. He was not hired either to go to his home

from the office in the afternoon, at the close of his work for the day, or to go from his home to the office in the morning to begin his work for the day, or to use the car in going or coming. That formed no part of his service; while so going and returning he was not in the service or under the employment of the company, and for his negligent acts in so doing the company was in nowise liable.

Ordinarily he ceased to be in the service of the company the moment he left its office for his home. On the day of the accident, as he was about to leave for home, he was directed to go to Camp Fremont, which was in the opposite direction from his home, and there get a check countersigned, which he was to keep and bring to the office the next morning. While on his way to Camp Fremont, and while engaged in getting the check countersigned, he was doubtless in the company's service. But when that task was completed his service for the company ceased for the day, so far as his goings and comings were concerned, and the company then ceased to be liable for his negligence in driving the car. It was no concern of the company how or by what route or means he got from Camp Fremont to his home, or whether he got there at all. It so happened that Camp Fremont was on the state highway a mile north of Palo Alto, while Mayfield was on said highway a mile or more south of Palo Alto. Consequently in going home from Camp Fremont on the highway he had to pass through Palo Alto. If he had been turning into Palo Alto for groceries to take home, it would be conceded that the company would not be liable. If he had been directed to take a check to Los Altos, and after doing so had gone to his home, without passing Palo Alto, the same result would follow.

Apparently, according to the majority opinion, the company's liability depended on the direction he had to go to get the signature. There is no evidence that he was intending to call at the office of the company on its business on his return from Camp Fremont. He had not been directed to do so, and as it was 5 o'clock in the afternoon, and he had already left the office for the day, no reasonable inference to that effect is deducible. It is said he was going there for his overcoat. The evidence shows merely that he was turning down University avenue toward "Palo Alto" in order to get his overcoat, which he had forgotten. It does not show that the overcoat was at the office. But it is immaterial where it was. The company did not engage him to look after his own clothes, and it was not liable for his negligent acts while he was doing it. The decision appears to be contrary to all authority. See 2 Mechem on Agency, §§ 1896 to 1909, where the exact question is extensively treated; also *Mauchle v. Panama P. I. E. Co.*, 37 Cal. App. 715, 174 Pac. 400; *Slater v.*

(191 P.)

Advance T. Co., 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; 2 Cor. Jur. 853; 20 Am. & E. Ency. of Law, 178; 28 Cyc. 1536; 6 Labatt on M. & S. §§ 2274, 2283.

(183 Cal. 472)

# ELLIOTT v. LOS ANGELES COUNTY. (L. A. 4979.)

(Supreme Court of California. Aug. 3, 1920.)

1. Eminent domain §293(1)—Count alleging diversion of storm waters by county in connection with protection district held sufficient.

A count, alleging that county wrongfully and unlawfully, by certain concrete conduits and ditches constructed by the county in connection with a protection district, diverted storm waters from their previous course across plaintiff's land without plaintiff's consent, damaging the land, without alleging that the county was authorized to form such protection district under Act March 27, 1895 (St. 1895, p. 247), held to state a cause of action against the county; an allegation as to the right to form a district being unnecessary, since it is a matter of law that a county has such power.

2. Eminent domain §293(1)—Count alleging overflow from negligent construction of conduit in protection district held to state cause of action.

Count alleging that county in connection with a protection district changed the course of storm drain so that the water came within 75 feet of plaintiff's land and so negligently constructed concrete conduit that it broke, causing overflow of and damage to plaintiff's land, held to state cause of action against county, without allegation that the county under Act March 27, 1895 (St. 1895, p. 247), was authorized to form such protection district, since the county has such power as a matter of law.

3. Counties §146 — Municipal corporations §745½—Not responsible for negligent acts of officers acting ministerially.

A county or municipal corporation is not responsible for the negligent acts of its officers, acting ministerially in pursuance of statutes imposing duties directly upon them, whereby injury is caused to persons or property; the right of action in such cases being solely against the officer whose negligence caused the damage.

4. Appeal and error §1170(3) — Defect in complaint cured by findings.

In an action against county for diversion of water on breaking of negligently constructed conduit, failure of complaint to show clearly that the conduit was made for public purposes held cured by the findings and by Const. art. 6, § 4½.

5. Eminent domain §285 — County is liable for damage from public works, where compensation has not been paid.

Where property has been damaged by works constructed by county for public pur-

poses, and no compensation has been provided or paid in advance, as required by Const. art. 1, § 14, the county is liable for the damage, and under Pol. Code, § 4003, subd. 1, may be sued therefor.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Della B. Elliott against the County of Los Angeles. Judgment for plaintiff, and defendant appeals. Affirmed.

A. J. Hill, Co. Counsel, and Roy V. Reppy, Asst. Co. Counsel, both of Los Angeles, for appellant.

Charles H. Mattingly, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment. The record on appeal consists of the judgment roll alone.

The first count of the complaint alleged that certain storm waters, prior to the injury complained of, had always flowed in a westerly direction, in a course a mile north of plaintiff's land, and not over, through, or across said land; that in February, 1914, the defendant wrongfully and unlawfully and without plaintiff's consent, by certain concrete conduits and ditches constructed by it in 1913, in connection with a protection district known as the San Fernando Protection District, diverted said storm waters from their previous course over, through, and across the plaintiff's land, whereby said land was damaged by reason of the ditches and gullies washed therein by said storm water, in the sum of \$2,000. It also alleges the filing of a claim with the board of supervisors and the rejection thereof. The second count, in addition to the allegations aforesaid included in the first count, alleges that the alteration in the course of the storm drain, made in connection with the protection district, changed the course so that the storm water came within 75 feet of the plaintiff's land, and that, in constructing said artificial water course, defendant negligently failed to make it sufficient and adequate to carry the waters diverted into the same, and used inferior, defective, and inadequate materials, and that by reason of all these acts of the defendant the said concrete conduit broke at a point 75 feet from plaintiff's land, in consequence whereof the waters were diverted over, across, and through plaintiff's land to its damage as previously stated. The answer consisted solely of a denial of the material allegations of the complaint.

The findings state that prior to the alterations made by the defendant the course of the storm waters in question was not nearer than one mile from plaintiff's land; that in 1912, under and in pursuance of the act of March 27, 1895 (Stats. 1895, p. 247),

the defendant formed a protection district, called the San Fernando Protection District; that in carrying out the objects of the said protection district defendant, by means of a dam, headworks, tunnel, and concrete conduit constructed for that purpose, diverted said storm waters over, through, and across plaintiff's land, by reason whereof the same was damaged in the sum of \$300; and that the said dam, headworks, concrete conduit and tunnel were erected under plans and specifications furnished by the defendant.

[1-4] Each count of the complaint states a cause of action against the defendant. It is true, as pointed out in *Sievers v. San Francisco*, 115 Cal. 648, 47 Pac. 687, 56 Am. St. Rep. 153, that a county or municipal corporation is not responsible for the negligent acts of its officers acting ministerially in pursuance of statutes imposing duties directly upon them, whereby injury is caused to persons or property, the right of action in such cases being solely against the officer whose negligence caused the damage. But the complaint alleges that the acts which caused the injury in the present case were the acts of the county itself. It alleges that it was done in connection with a certain protection district. The act of 1895 provides that the county may form protection districts and through that agency may construct works for the control of surface water and storm water to protect lands liable to injury therefrom. An allegation to that effect is not necessary, since it is a matter of law that the county has such power. The findings show more clearly than the pleading that the new conduit for the water was made for public purposes. If the complaint is defective in that respect the defect is cured by the findings and by section 4½, article 6, of the Constitution. *Cutting P. Co. v. Cnty.*, 141 Cal. 695, 75 Pac. 564; *Vallejo, etc., Co. v. Reed*, 169 Cal. 545, 147 Pac. 238.

[5] The case, therefore, is one wherein property has been damaged by works constructed for public purposes, and no compensation has been provided or paid in advance, as required by the Constitution. Article I, § 14. In such cases the rule is well established that if the property is not condemned by legal proceedings and the damage paid in advance before the construction of the works, the county is liable for the damage resulting therefrom, and an action will lie against it for the recovery thereof. *Tyler v. Tehama*, 109 Cal. 621, 42 Pac. 240; *Rear-don v. San Francisco*, 66 Cal. 492, 6 Pac. 817, 56 Am. Rep. 109; *Perkins v. Blauth*, 163 Cal. 789, 127 Pac. 50; *Sala v. Pasadena*, 162 Cal. 717, 124 Pac. 539; *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158. An action may be maintained against a county for any damages arising

from an injury for which such county is legally liable under this section of the Constitution. Pol. Code, § 4003, subd. 1.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.

(133 Cal. 386)

**HEINE PIANO CO. v. BLOOMER et al.**  
(S. F. 8703.)

(Supreme Court of California. July 28, 1920.  
Rehearing Denied Aug. 26, 1920.)

1. Appeal and error ⇐2—Order refusing new trial not appealable, where notice filed after passage of act abolishing such appeals.

Where an appeal was prosecuted under the alternative method, notice being filed after the amendment of 1915 to Code Civ. Proc. § 963, the appeal from the order refusing new trial must be dismissed.

2. Justices of the peace ⇐133—Where justice refused to vacate satisfaction of judgment for want of jurisdiction, subsequent order vacating on merits invalid.

Where a justice of the peace declined to vacate the satisfaction of a judgment on the ground of want of jurisdiction, a subsequent order, denying the motion on the merits, is invalid, for the law does not authorize the correction of judicial errors under the guise of correcting clerical errors, and where a court determines it is without jurisdiction any further order is a nullity.

3. Justices of the peace ⇐133—Order denying motion to vacate satisfaction not a conclusive adjudication.

As Code Civ. Proc. § 1911, declares that only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged or which was actually and necessarily included, a judgment of a justice, denying plaintiff's motion to vacate satisfaction of an earlier judgment on ground of want of jurisdiction, is not a conclusive adjudication against the right to vacate.

4. Judgment ⇐883(14)—Judgment denying right of set-off not a conclusive adjudication.

An order of justice court denying plaintiff's motion to offset a judgment in its favor, which had been indorsed as satisfied against a second judgment, held not a conclusive adjudication preventing subsequent action; it appearing that the order was based on the justice's want of jurisdiction to vacate the satisfaction of the earlier judgment.

5. Equity ⇐46—Equitable remedy lies where no adequate relief at law.

Where the law does not furnish adequate relief, equitable remedy may be invoked.

6. Justices of the peace ⇐133—Court of equity may vacate satisfaction of a judgment of justice.

Where a justice of the peace refused to vacate satisfaction of a judgment on the ground



of want of jurisdiction, a court of equity may grant relief, as the legal remedy is inadequate, the case being one where the court in which action was pending was unable, by reason of its jurisdiction, to grant the relief.

**7. Justices of the peace ⇨133—Satisfaction of judgment vacated where property not subject to execution.**

In view of Code Civ. Proc. § 708, declaring that, if a purchaser at a sheriff's sale fails to recover possession because the property was not subject to execution, the court having jurisdiction must revive the original judgment, satisfaction of a judgment of a justice should be canceled where execution was levied on land belonging to defendant, but which had recently been homesteaded; it not appearing that plaintiff was aware of that fact, and this is so regardless of any constructive notice.

**8. Judgment ⇨883 (11) — Defendant held plaintiff in another action, so first judgment might be offset against second.**

Where plaintiff sought to offset a judgment of justice court in its favor against an adverse judgment, evidence held to show that the defendant in the first action was the real party plaintiff in the second, although the litigation was carried on in the name of another.

**9. Judgment ⇨883(8)—Failure of plaintiff to counterclaim not laches preventing setting off one judgment against another.**

Where plaintiff recovered in justice court a default judgment for over \$300, and execution was levied against the homestead property of the debtors, held that, though Code Civ. Proc. § 855, authorizes counterclaim in justice court, the failure of plaintiff to plead his judgment against an action for the benefit of the defendants in the first was not laches which would prevent the offsetting of one judgment against the other, for satisfaction of the judgment would first have to be vacated, etc., and, for that matter, the amount exceeded the amount which a defendant may plead as counterclaim, etc., in justice court.

**10. Justices of the peace ⇨133—Plaintiff not guilty of laches in sale of land on execution so as to preclude vacation of satisfaction.**

As laches is a matter to be determined from all of the facts and circumstances of the case, plaintiff, who recovered a judgment in justice court and had execution levied on land belonging to the defendants, but as to which one of the defendants only shortly before filed a homestead declaration, will not be denied relief by way of vacating the satisfaction of the judgment on the theory that plaintiff's failure to discover the homestead declaration of which it had constructive knowledge was laches.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Suit by the Heine Piano Company against J. M. Bloomer and others. From a judgment for plaintiff, defendants Bloomer and certain others appeal. Affirmed.

G. C. Ringole, of San Francisco, and H. A. I. Wolch, of Turlock, for appellants.

Charles F. Hanlon, of San Francisco, for respondent.

LAWLOR, J. This is an appeal from a judgment entered in favor of the plaintiff, the Heine Piano Company, a corporation, and against the said defendants, G. C. Ringolsky, Frank T. Deasy, James G. Conlan, Robert W. Dennis, and Kohler & Chase, a corporation, in an action brought: (1) To vacate the satisfaction of a judgment rendered in favor of the present plaintiff and against defendants Charles and Laura Olson in an action—hereinafter referred to as action 76831—in the justices' court of the city and county of San Francisco, and to revive said judgment; (2) to have said judgment "offsetted \* \* \* against the judgment in action 85133 [in said justices' court] to the extent that one judgment equals the other"; and (3) to restrain defendants from issuing execution in action 85133. Judgment was entered on November 8, 1917, granting the relief prayed and continuing the action for further proceedings as against defendants J. M. Bloomer, Charles and Laura Olson, John Doe, Richard Roe, Cornelius Coe, and Henry Hoe. Defendants Bloomer, Ringolsky, Deasy, Conlan, Dennis, and Kohler & Chase prosecute this appeal, the record of which is presented under the alternative method.

[1] These last-named defendants also appeal from the order denying their motion for a new trial, but, inasmuch as the notice of appeal was filed after the amendment of 1915 to section 963 of the Code of Civil Procedure, the appeal from the order refusing a new trial must be, and is hereby, dismissed. *Roberts v. Colyear*, 179 Cal. 669, 180 Pac. 937; *Rockey v. Vieux*, 179 Cal. 681, 178 Pac. 712; *Marsh v. Lapp*, 180 Pac. 533.

On May 25, 1915, plaintiff commenced action 76831 against the Olsons for the sum of \$250, alleged to be owing at the time by them to the Heine Piano Company. On June 28, the Olsons having failed to appear, judgment by default was entered against them for \$303.65, which sum included costs. On June 30, "without the consent or knowledge of or any notice other than constructive notice to the plaintiff," Laura Olson executed and recorded a declaration of homestead and a homestead lien on the land upon which they were residing on Rhode Island street in San Francisco. On November 29 a writ of execution was issued in action 76831 to the sheriff of the city and county of San Francisco, and, by virtue of that writ, on December 27, the sheriff sold said Rhode Island street property to one A. G. Mitchell, who is admitted

to have been plaintiff's agent in the transaction. On January 12, 1916, the writ of execution was returned, satisfied.

On March 17, 1916, action 85133 was commenced against the plaintiff in the justices' court of the city and county of San Francisco in the name of Miss J. M. Bloomer, who, it appears, was a stenographer in the office of G. C. Ringolsky. The plaintiff in that action, as assignee of the Olsons, alleged that the Heine Piano Company was indebted to Laura Olson in the sum of \$250, "for goods, wares, and merchandise sold and delivered." The action went to trial, and on September 27 judgment was rendered in favor of Miss Bloomer and against the Heine Piano Company for \$259.95. An appeal from that judgment was taken by plaintiff herein, but, an exception to the sureties having been filed and the said sureties having failed to justify within the time allowed by law, on December 22 the appeal was dismissed. A petition to the District Court of Appeal for a writ of review was denied.

On March 19, 1917, Mitchell having in the meantime transferred to G. O. Heine, plaintiff's president, all the right, title, and interest which he had acquired in or to the Rhode Island street property at the execution sale, said Heine, in behalf of the plaintiff, executed a deed conveying back to the Olsons all the right, title, and interest which either he or the corporation had in said real property.

On March 22 plaintiff moved in the justice's court, where the judgment in action 76831 had been rendered for an order vacating, canceling, and setting aside the satisfaction of said judgment, on the ground that the entry of satisfaction was a mistake, the execution having been levied upon real property which was exempt as a homestead, and on the further ground of ignorance on the part of the plaintiff of the existence of such a homestead at the time of the execution sale.

On March 27 Heine Piano Company moved in action 85133 for an order offsetting the judgment in that action against the judgment in action 76831 on the grounds that Miss Bloomer, in whose name the judgment in action 85133 stood, was not the real party in interest but was the Olsons' assignee for collection only, that the Olsons were the true owners of the Bloomer judgment, and therefore that their judgment, being less than that in action 76831, should be offset and canceled.

On April 3 defendant Deasy made an order denying plaintiff's motion to vacate the satisfaction of judgment in action 76831, the order reading in part:

"Thereupon defendants object to further hearing herein on the ground that the issues raised by said motion involve a decision on the title to real estate of which this court has no jurisdiction. \* \* \* The court does now sustain

said objection, and on the ground of lack of jurisdiction denies the plaintiff any further hearing on its said motion." (Italics ours.)

On April 4 defendant Conlan made a second order in action 76831, denying plaintiff's motion to vacate on the merits. This last order was entered on April 5. On April 4 defendant Conlan denied the motion made by plaintiff in action 85133 to offset that judgment against the one in action 76831. On the same day plaintiff commenced this action.

At the conclusion of the plaintiff's case defendants moved for a nonsuit, but the motion was denied. The contentions made by appellants in their opening brief are the same as the grounds urged for a nonsuit:

"(1) The matters in issue at bar were previously determined by courts of competent jurisdiction, and hence are to be treated as res judicata. (2) The complaint does not show any equity. (3) The plaintiff \* \* \* was guilty of laches in asking for the relief prayed."

[2] 1. In support of their first contention appellants assert:

"That all of the matters and showing made in the justice's court and upon which the justice of the peace based his decision were the same as the facts alleged in this action."

First, as to the order denying the motion to vacate the satisfaction of judgment in action 76831. Even if the correctness of the statement just quoted be assumed for the purposes of this discussion, it is not decisive of this question, for appellant's position ignores the fact that the order denying the motion was not the order entered on April 5, which purported to deny the motion without stating the grounds, but was the order made and entered on April 3, in which the court refused to grant the motion because of lack of jurisdiction. In other words by the making of the order of April 3 the power of the court to rule on the motion to vacate became functus officio. As is said in Freeman on Judgments, section 70:

"The law does not authorize the correction of judicial errors under the pretense of correcting clerical errors. \* \* \* It is certain that proceedings for the amendment of judgments ought never to be permitted to become revisory or appellate in their nature; ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce, even though the proposed amendment embraces matters which ought clearly to have been so pronounced."

See, also, Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775; First National Bank v. Dusy, 110 Cal. 69, 42 Pac. 476; People v. Davis, 143 Cal. 673, 77 Pac. 651; Dunsquair v. Coffey, 148 Cal. 137, 82 Pac. 682; Takekawa v. Hole, 170 Cal. 323, 149 Pac. 593; Suttman v. Superior Court, 174 Cal. 243, 162 Pac. 1032

(191 P.)

In *Weimmer v. Sutherland*, 74 Cal. 341, 15 Pac. 849; *Sutherland* had recovered judgment against *Weimmer* and his wife after a trial in the justice's court. Three weeks after such judgment was rendered the court, upon motion of the defendants *Weimmer*, entered an order "that said judgment is hereby set aside and vacated." It did not appear that plaintiff had notice of this motion or was present when it was heard. On a writ of review sued out by *Sutherland* in the superior court, the justice's order vacating the judgment was held void. On appeal it was said:

"Justices' courts have no power to review their own judgments, unless by some method expressly provided by law. \* \* \* Section 925 of the Code of Civil Procedure is as follows: 'Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this Code which are in their nature applicable to the organization, powers, and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein.' It is therefore argued \* \* \* that by virtue of said section 925 all the broad powers granted to courts of record by section 473 of the Code of Civil Procedure may be exercised by justices' courts. \* \* \* It will be observed, however, that the section expressly preserves the notion of the 'peculiar and limited jurisdiction' of these courts, and, moreover, that its general character is negative rather than positive. The grant is somewhat in the shape of a parenthesis in a clause of limitation. If, therefore, that part of the Code which expressly deals with proceedings in justices' courts prescribes the powers of those courts in relation to a general subject about which the powers of courts of record are expressly prescribed in another part, then we think that the powers of the justices' courts with respect to that subject are to be looked for in the former and not in the latter provision. Now, the power in question here—i. e., the power to relieve from a judgment taken through surprise, excusable neglect, etc.—is expressly given to courts of record by section 473, and is expressly given to justices' courts by section 859. \* \* \* But \* \* \* section 859 confines the power in justices' courts to cases of a 'judgment by default.' \* \* \* We think, therefore, that the latter section is determinative of the question here involved, and not section 473."

See, also, *Heinlen v. Phillips*, 88 Cal. 557, 26 Pac. 366; *Simon v. Justices' Court*, 127 Cal. 45, 59 Pac. 296. In our opinion the only effective action taken by the justices' court on plaintiff's motion to vacate the satisfaction of judgment in action 76831 was the order of April 3, and the order subsequently entered on April 5 was a nullity.

[3] As to the effect of this order as res judicata on the plaintiff's rights, section 1911 of the Code of Civil Procedure declares:

"That only is deemed to have been adjudged in a former judgment which appears upon its face

to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 50 Pac. 277, it was held that where a suit was dismissed for want of jurisdiction or was disposed of on any ground not going to the merits of the action, the judgment rendered was not a bar to another suit. This rule finds support in 7 Encyc. Evid. 811:

"If it appears that a suit has been dismissed for want of jurisdiction, the judgment of dismissal will be no bar to another action brought in a court having jurisdiction of the subject-matter."

See, also, *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; 23 Cyc. 1150; *Laguna Drainage District v. Charles Martin Co.*, 5 Cal. App. 166, 172, 89 Pac. 993; *Shively v. Eureka Tellurium, etc., Co.*, 5 Cal. App. 236, 243, 89 Pac. 1073. As already shown, the order of April 3 stated that the plaintiff's motion to vacate the satisfaction of judgment was denied by reason of want of jurisdiction. Inasmuch as this order—and not the order of April 5—represented the court's ruling on the motion to vacate, we think it clear that the question whether the plaintiff is entitled to have the satisfaction of judgment in action 76831 vacated is not res judicata.

[4] We now turn to a discussion of the effect of the order denying the motion to offset the judgment in action 85133 against that rendered in action 76831. That order reads in part:

"\* \* \* It appearing to the court that the judgment in action 76831 \* \* \* has been heretofore satisfied and discharged, and it further appearing to the court that the said J. M. Bloomer has no legal or equitable interest in or to said judgment, \* \* \* the court hereby orders that the motion be, and the same is hereby, denied."

It is at once apparent that the basis of the court's ruling in this instance, as well as in the case of the motion to vacate, was lack of jurisdiction, for at the time the motion to offset was made the judgment in action 76831 had been marked "satisfied," and had not been revived, so that there was no existing judgment in action 76831 which could be offset against the judgment in action 85133. It must be held, therefore, under the rule already referred to, that neither the question whether the plaintiff is entitled to have the satisfaction of its judgment vacated, nor the question whether plaintiff is entitled to have that judgment offset against the one in action 85133, is res judicata.

[5, 6] 2. We shall next consider appellants' second contention that "the complaint does

not show any equity." The claim is made in their brief that—

"The court lacked jurisdiction to hear and determine the issues in this case. \* \* \* A court of equity cannot assume the powers of appellate jurisdiction to review the errors of the lower court."

In stating the rule on this point we cannot do better than quote from Uhlfelder v. Levy, 9 Cal. 607, 614:

"The power of one district court to restrain proceedings in another, in cases where an adequate relief can be as well had in the court in which the proceedings are pending, is denied by the former decisions of this court. \* \* \* The only case in which it will be allowed is where the court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought."

See, also, *Anthony v. Dunlap*, 8 Cal. 26; *Rowley v. Howard*, 23 Cal. 401; *Crowley v. Davis*, 37 Cal. 269; *Kelley v. Kriess*, 68 Cal. 211, 9 Pac. 129; *Gregory v. Diggs*, 113 Cal. 196, 199, 45 Pac. 261. And in *Hager v. Shindler*, 29 Cal. 48, the court said:

"Before the case can be considered as beyond the reach of a court of equity, it must be made to appear that the legal remedy would be adequate and complete."

And in *Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 30 L. R. A. 786, 45 Am. St. Rep. 50:

"The rule under which a court of equity declines to interfere until after the application for relief has been made to the court in which the judgment was rendered has no application when relief has been sought and denied in that court. The denial of that court to grant that relief gives to the court of equity the same authority to interfere as if the other court were powerless to render aid."

In the case at bar the plaintiff moved in action 76831 to vacate the satisfaction of judgment, but that motion was denied, as we have seen, because of lack of jurisdiction. Plaintiff also moved in action 85133 to offset the two judgments, but this motion was also denied. Under the authorities we have cited, the plaintiff having exhausted his remedy at law, the superior court, as a court of equity, had jurisdiction to hear and determine the issues raised in the complaint.

[7] We shall next consider the question whether the plaintiff was entitled to the relief granted, and in this connection we shall first inquire whether he was entitled to a decree vacating the satisfaction of judgment in action 76831. The rule is thus stated in the note to *Sturdivant v. Ward* (Ark.) 134 Am. St. Rep. 86:

"We cannot suggest a better solution [of this question] than the general adoption of some such declaration of the law as has been enacted in California. Code Civ. Proc. sec. 708. \* \* \* 'If the purchaser of property at sher-

iff's sale \* \* \* fail to recover possession \* \* \* because the property sold was not subject to execution and sale, the court having jurisdiction thereof must \* \* \* revive the original judgment.' \* \* \* The section has been construed and applied in the well-known case of *Cross v. Zane*, 47 Cal. 602, and followed in *Hitchcock v. Carruthers*, 100 Cal. 100, 34 Pac. 627, and *Merguire v. O'Donnell*, 139 Cal. 6, 96 Am. St. Rep. 91, 72 Pac. 337. In those cases it was held that, as the section was remedial in its character, it was to be liberally construed, and that, if the property sold was not the property of the defendant in the execution, it amounted to a sale of property not subject to execution and sale within the intent of the statute, and the purchaser was entitled to the remedies afforded by the act."

And in *Scherr v. Himmelmann*, 53 Cal. 312, it was held:

"Where a party causes an execution to be issued on a judgment, and it is levied on property which turns out not to have belonged to the judgment debtor, such party is entitled to bring an action in equity for the purpose of reviving the original judgment."

The facts in the instant case clearly fall within this principle. It is conceded that the sale of the Rhode Island street property, as a result of which the judgment in action 76831 was marked "satisfied," was void because it had already been homesteaded. *Waggle v. Worthy*, 74 Cal. 266, 15 Pac. 831, 5 Am. St. Rep. 440; *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852, 21 Am. St. Rep. 26; *City Store v. Cofer*, 111 Cal. 482, 44 Pac. 168; *Powell v. Patison*, 100 Cal. 236, 34 Pac. 677; *Gleason v. Spray*, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47. But it is contended by appellants that at the time of the sale the plaintiff had either actual or constructive notice that the Olsons had declared a homestead upon the property, and, therefore, that it is not entitled to have the satisfaction vacated. This same contention was made in *Cross v. Zane*, 47 Cal. 602, referred to in *Sturdivant v. Ward*, *supra*, where the judgment creditor had caused execution to be levied upon an interest which he believed the judgment debtor had in certain real property. He subsequently ascertained that said debtor had no interest in the property, and petitioned to have his judgment revived in accordance with section 708. The defendant argued:

"That the plaintiff, being fully informed of what he was buying, made a mistake of law, against which he was not entitled to relief in a court of equity after so long a delay."

The court, nevertheless, held, as we have seen, that the statute was to receive a liberal construction, and the plaintiff was entitled to the relief sought. In view of these authorities, we are not disposed to hold, even if the plaintiff here is to be charged with notice of the recordation of the homestead

declaration at the time of the execution sale, that it is not entitled to the remedies afforded by the statute. Under the ruling in *Scherr v. Himmelmann*, supra, the plaintiff is plainly entitled to the aid of equity in order that the judgment may be revived.

[8] Now, as to whether plaintiff was entitled to have that judgment offset against the one in action 85133. Appellants claim "that Kohler & Chase, the assignor of Bloomer, has been and still is the real and beneficial owner of the Bloomer judgment," and that the court's finding that the Olsons were the owners thereof is without support in the evidence. Upon this point Mrs. Olson testified that she had purchased a piano from Kohler & Chase on the installment plan, and that she had assigned her cause of action against the plaintiff to Kohler & Chase upon the understanding that if anything was recovered upon said cause of action "that money would go off the piano." She did not claim that she was to be given unconditional credit for the sum alleged to be due, and owing from the Heine Piano Company, but only for such amount as Kohler & Chase might recover. In our opinion the court was justified in finding that the Olsons, and not Kohler & Chase, were "the real and beneficial owners" of the claim, the latter merely having the legal title for the purposes of suit.

3. Appellants insist that plaintiff was guilty of laches:

[9] (1) "In its defense in action 85133. \* \* \* In the answer nothing was alleged by way of defense or counterclaim setting forth the judgment in action 76831." There are two answers to this contention. Section 855 of the Code of Civil Procedure provides that the answer to a complaint in a justice's court may contain a denial, "and also a statement \* \* \* of any other facts constituting a defense or counterclaim, upon which an action might be brought by the defendant against the plaintiff, or his assignor, in a justice's court." (Italics ours.) At the time of the commencement of action 85133 plaintiff's claim against the Olsons was a "satisfied" judgment, and, until that "satisfaction" was vacated, plaintiff had no counterclaim "upon which action might be brought." And, too, as heretofore noted, the amount of the judgment in action 76831 was \$303.65, a sum in excess of the jurisdiction of the justice's court. *Malson v. Vaughn*, 23 Cal. 61. It is clear that the plaintiff was not guilty of laches in action 85133 in not pleading his claim against the Olsons.

[10] (2) Appellants claim that plaintiff was negligent in not consulting the records of the county recorder "to learn whether or not the real property of the Olsons was homesteaded before they proceeded to sell the same." Laches is a matter to be determined from all the circumstances of the case. As

already pointed out; appellants have admitted that "plaintiff had no knowledge of the fact that any such declaration was recorded." We cannot hold that plaintiff was guilty of laches in not earlier seeking to vacate the satisfaction of the judgment.

Since the matters here in issue are not res judicata, and equity will relieve the plaintiff from the "satisfaction," it follows that the judgment should be affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.

(183 Cal. 497)

WOODS LUMBER CO. v. MOORE.  
(L. A. 6055.)

(Supreme Court of California. Aug. 10, 1920.)

1. Corporations  $\S$  447—Have implied power to make contracts reasonably tending to advance authorized business.

Under Civ. Code, § 854, subd. 3, empowering corporations to make contracts essential to the successful prosecution of their business, a corporation has implied power to make all contracts reasonably expected to advance its business or which can directly promote its business.

2. Corporations  $\S$  484(3)—Whether contract of guaranty will advance corporate business is generally for officers, not courts.

The question whether a contract of guaranty is one which will advance the business of a corporation is primarily for the officers of the corporation and the courts will hold such contracts executed by the officers ultra vires only when they clearly appear to be so as a matter of law.

3. Corporations  $\S$  484(3)—Authority to guaranty contract of another to whom corporation was selling goods is implied.

A corporation engaged in the business of supplying costumes for theatrical productions has implied power to guarantee a contract by a motion picture producing company for lumber necessary to produce a film, for which the first corporation had contracted to furnish the costumes.

4. Corporations  $\S$  484(3) — Furnishing material in reliance on guaranty is sufficient consideration.

The furnishing of material to another corporation in reliance on the guaranty of defendant that the material would be paid for is sufficient consideration for the guaranty, if any is necessary to make it binding.

5. Corporations  $\S$  416—Liable for contract of guaranty authorized by managing officer.

A corporation is liable on a contract of guaranty executed by its secretary under instructions from its president, who was the general manager of its business, and held out by it as authorized to transact its business though it had passed no resolution authorizing the contract.

Department 1.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Woods Lumber Company against the Goldstein Company, in which W. H. Moore, Jr., as trustee in bankruptcy of the Goldstein Company, was substituted as defendant. Judgment for the plaintiff, and defendant appeals. Affirmed.

Adams, Adams & Binford, G. Harold Jane-way, Hunsaker & Britt, Le Roy M. Edwards, and Samuel Poorman, Jr., all of Los Angeles, for appellant.

R. W. Clapp, of Los Angeles, for respondent.

SHAW, J. The defendant appeals from the judgment. The plaintiff sued to recover of Goldstein Company, as guarantor, the sum of \$2,845.55 owing to plaintiff from Continental Producing Company for building materials and merchandise bought of plaintiff by said Continental Company. The guaranty contract alleged to have been executed by Goldstein Company is as follows:

"Jan. 6, 1917.

"Woods Lumber Company, Beverly Hills, Calif.—Gentlemen: This is to confirm conversation Mr. Woods had with R. Goldstein on the afternoon of the 4th inst., guaranteeing the payment of all bills which you have or will have against the Continental Producing Co., 650 S. Broadway St., city.

"Yours very truly,

"Goldstein Company, Los Angeles, Inc.,  
"By L. C. Armbrust, Secretary."

Goldstein Company was the original defendant, but during the pendency of the action it was adjudged a bankrupt and the defendant, Moore, was appointed trustee in bankruptcy and substituted as defendant.

The answer alleged that the guaranty contract above set forth was given without consideration and for accommodation only; that the officer of defendant corporation that executed the same had no authority to do so, and that the guaranty of said Continental Producing Company's debts was not within the scope of the Goldstein Company's business. The court below made findings to the effect that the guaranty contract was given for a valuable consideration; that the officer who executed it was duly authorized to do so, and that the making of said guaranty contract was within the scope of the said Goldstein Company's corporate powers.

The appellant claims that the evidence shows: (1) That the contract of guaranty was not within the scope of the powers of the corporation as set forth in its articles, nor in direct furtherance of its business, and consequently that it is ultra vires; (2) that the said Goldstein Company received no benefit from the making of said guaranty, and is therefore not estopped to assert that it was ultra vires; (3) that the officers who

executed the contract had no authority to bind the corporation thereby.

The articles of incorporation of Goldstein Company stated that—

It was incorporated "to manufacture, \* \* \* buy, sell, lease, or otherwise acquire, and generally deal in all kinds of goods, wares, merchandise, and property of every class and description; to construct, purchase, lease or otherwise acquire, \* \* \* operate, maintain and conduct theaters, concert halls, and amusement places of all kinds and descriptions; to manage theatrical, concert hall and vaudeville companies of all kinds; \* \* \* and to purchase, own, produce and present theatrical plays, operas and exhibitions of all kinds."

The principal business in which the Goldstein Company was engaged at and before the making of this guaranty was the selling and renting of costumes to persons engaged in the operation of theaters or shows and to persons engaged in the manufacture of films for moving picture shows. The Continental Producing Company was engaged in manufacturing films for the production by moving pictures of a play entitled "the Spirit of '76." On May 31, 1916, the Goldstein Company and the Continental Producing Company entered into a contract whereby the Goldstein Company agreed to sell and furnish to the Continental Company the costumes and other similar articles necessary for the production of this film. The contract price the Goldstein Company was to receive therefor amounted to \$8,300. In producing the film it was necessary for the Continental Company to buy a large amount of lumber and building materials for the erection of structures to be shown in the pictures. The Woods Lumber Company had arranged to furnish such materials to the Continental Company, as required. Robert Goldstein was president of the Goldstein Company and the principal stockholder therein. L. C. Armbrust was the secretary. Goldstein was also a stockholder in the Continental Company. Although the evidence is conflicting on the subject, it is sufficient to show that Goldstein was at that time acting as the manager of both companies, and was actively superintending the work of the Continental Company in producing the films, and was also controlling the operations of Goldstein Company. Woods Lumber Company began furnishing building materials to the Continental Company in September, 1916. Payments were made from time to time, but in the latter part of December the Continental Company was delinquent in payments. Thereupon W. E. Woods, manager of the Woods Lumber Company, informed Goldstein that the Woods Lumber Company would give the Continental Company no further credit, and would furnish it no more materials, unless Goldstein Company would guarantee the payment of the bills of the Continental Company for materials to be furnished to it by Woods Lumber

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Company. Goldstein Company was at that time financially interested in the success of the proposed moving picture then being made by the Continental Company, by reason of the fact that if the Continental Company was unable to go on with that enterprise, it would not order any more costumes from the Goldstein Company under the contract aforesaid. This, at least, was a fair inference from the evidence. Goldstein, in reply to the statement by Woods, said his company would execute such guaranty. In pursuance of this promise and by order of Goldstein to Armbrust, the secretary, the guaranty contract above quoted was executed by the secretary and delivered to Mr. Woods for the Woods Lumber Company. The evidence is in conflict on these points, but there is substantial evidence to the effect stated. Thereafter the Woods Lumber Company, on the faith of this guaranty, furnished materials to the Continental Company to the amount herein sued for, and the indebtedness thereby created was not paid.

1. The articles of incorporation of Goldstein Company gave it power to make films for moving picture plays, and to exhibit them to the public and also to build structures for the purpose of making such films. This fact, however, did not empower it to guarantee the obligations of other persons or corporations engaged in such business. It was not authorized to make contracts of guaranty as an independent business. It had no express power to make such contracts. The guaranty in question can be upheld as binding upon it only upon the theory that under the circumstances existing at the time it was within its implied powers.

[1] A corporation engaged in carrying on a business which it is authorized to do by its articles and the law under which it is organized has implied power to make all contracts which are "essential to the successful prosecution of the business" (Civ. Code, § 354, subd. 8; *Bates v. Coronado B. Co.*, 109 Cal. 163, 41 Pac. 855; *Mercantile Trust Co. v. Kiser*, 91 Ga. 636, 18 S. E. 358) or the making of which is an appropriate means by which it may be "reasonably expected that the business in which the corporation is engaged will be advanced" (*Depot R. Synd. v. Enterprise Brewing Co.*, 87 Or. 560, 170 Pac. 294; 171 Pac. 223, L. R. A. 1918C, 1001) or which are "necessary and helpful to the conduct of its authorized business" (*Timm v. Grand Rapids Br. Co.*, 160 Mich. 371, 125 N. W. 357, 27 L. R. A. [N. S.] 186), or which tends directly to promote the business authorized by its articles, and which it is doing (*Kraft v. Brewery Co.*, 219 Ill. 205, 76 N. E. 372; *Central L. Co. v. Kelter*, 201 Ill. 503, 66 N. E. 543; *Blue Island Br. Co. v. Fraatz*, 123 Ill. App. 26; *Horst v. Lewis*, 71 Neb. 365, 98 N. W. 1046; 103 N. W. 460).

[2] The question whether or not a contract of guaranty comes within the reasons above

mentioned is one which is to be primarily "determined by the corporation, or those to whom the management of its affairs is intrusted." *Bates v. Coronado B. Co.*, supra. The court cannot determine that it is beyond the powers of the corporation, unless it clearly appears to be so as a matter of law. With respect to the means which the corporation may adopt to further its objects and promote its business its managers "are not limited in law to the use of such means as are usual or necessary to the objects contemplated by their organization, but, where not restricted by law, may choose such means as are convenient and adapted to the end, though they be neither the usual means, nor absolutely necessary" for the purpose intended. *Winterfield v. Cream City Brewing Co.*, 96 Wis. 239, 71 N. W. 101.

For illustration: A sawmill corporation may guarantee bonds of an auxiliary railway corporation formed to build a railroad penetrating the country from which the sawmill company expected to obtain its timber. *Mercantile Trust Co. v. Kiser*, supra. A brewing company can lawfully guarantee the payment of rent of a saloon keeper who has agreed to sell the beer of the brewing company exclusively, or the rent of a hotel which was one of the brewing company's customers, or the bond required by the state law of a liquor dealer who was one of its customers, or notes of a saloon keeper to obtain money from a third person for the erection of a saloon building in which he had agreed to sell exclusively the beer of the guarantor, or when by such contract the brewing company creates for itself a new customer and an additional outlet for its product. *Depot R. Synd. v. Enterprise Brewing Co.*, supra; *Winterfield v. Cream City Br. Co.*, supra; *Timm v. Grand Rapids Br. Co.*, supra; *Kraft v. Brewery Co.*, supra; *Blue Island Br. Co. v. Fraatz*, supra; *Holm v. Lipsius Br. Co.*, 21 App. Div. 204, 47 N. Y. Supp. 518; *Koehler v. Reinheimer*, 26 App. Div. 1, 41 N. Y. Supp. 755; *Horst v. Lewis*, supra; *Miller v. Northern Br. Co.* (D. C.) 242 Fed. 164; *McQualde v. Enterprise Br. Co.*, 14 Cal. App. 315, 111 Pac. 927. A lumber company may become surety on the bond of a building contractor to induce him to purchase of the lumber company the lumber used in such building. *Central L. Co. v. Kelter*, 201 Ill. 503, 66 N. E. 543.

There is a seeming conflict of authority on this subject, but, except for a few cases, it is more apparent than real. In the following cases the guaranty was not shown to be directly connected with or beneficial to the authorized business carried on by the company, and the question of implied power was not discussed. *Elevator Co. v. Memphis R. R. Co.*, 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798; *Lucas v. White Line Tr. Co.*, 70 Iowa, 541, 30 N. W. 771, 59 Am. Rep. 449; *Norton v. Bank*, 61 N. H. 589, 60 Am. Rep. 334;

*Wheeler v. Home Sav. Bank*, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161; *Bank v. Winchester*, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 904; *Morgan v. Missouri, etc., Co.*, 50 Tex. Civ. App. 420, 110 S. W. 978. There are other "border line cases," where it was held that benefit from the guaranty was too remote or too indirect to justify the conclusion that it was within the implied powers. The following are of this class: The fact that the operation of a railroad and a street car line would each tend to increase the population of the city and the business over each road did not authorize either company to guarantee the bonds of the other. *Northside R. Co. v. Worthington*, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778. A railroad company cannot make a guaranty to enable a hotel company to build a summer hotel on its line merely because the guests of the hotel would probably travel on the railroad and increase its business and profits. *Western, etc., Co. v. Blue Ridge Co.*, 102 Md. 321, 62 Atl. 351, 2 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362. A brewing company could not erect a building for a boarding house and saloon for rent, in order that the saloon keeper might buy its beer. *U. S. Br. Co. v. Dolese*, 259 Ill. 274, 102 N. E. 753, 47 L. R. A. (N. S.) 898. A few cases are directly contrary to the weight of authority. *Twiss v. Guaranty L. Ass'n*, 87 Iowa, 730, 55 N. W. 8, 43 Am. St. Rep. 418; *Anheuser-Busch v. Helstand*, 177 Fed. 197, 101 O. C. A. 367; *Davis v. Old Colony Co.*, 131 Mass. 258, 41 Am. Rep. 221. In each of the other cases the doctrine of implied powers was recognized. In *Best Br. Co. v. Klassen*, 185 Ill. 37, 57 N. E. 20, 50 L. R. A. 765, 76 Am. St. Rep. 26, where the benefit to the corporate business was held to be too remote, the court said that the question as to such contract being within the implied powers was one to "be determined according to the facts of each case," and that such guaranty must be a means tending directly to promote the corporate business, "and not amounting to a separate unauthorized business." The doctrine we are following was thus recognized.

[3] The case presented by the record comes clearly within the principle of the first-mentioned cases. The Goldstein Company was in the business of selling theatrical costumes, and had a pending contract with the Continental Company for the sale of a large amount of such costumes, presumably for a good profit. It was directly interested in the continuance of the business by the Continental Company, and in the success of the enterprise of producing the proposed play. The circumstances are such as to create the inference, which the court might reasonably have drawn, that the payment of the expenses of the Continental Company in producing the film for the play, including the price of the costumes aforesaid, was very largely dependent upon its completion and its

successful production. The expressed purpose of the lumber company to refuse further credit to the Continental Company threatened to stop the entire enterprise, both that of the Continental Company in manufacturing the film and that of the Goldstein Company in selling the costumes therefor. The manager of the company reasonably concluded that this could only be prevented by making the guaranty in question. In a business view the guaranty appeared to be essential to enable the Goldstein Company to obtain payments upon its contract with the Continental Company. It was to be reasonably expected that the making of the guaranty would advance the business of the Goldstein Company, and would secure to it the payment of the debt that would be due to it from its customer, the Continental Company. It was a thing helpful to the conduct of its business, and tended directly to promote the same. All of these things are held in the foregoing cases to be sufficient to bring the contract of guaranty within the scope of the implied powers of a corporation. We are of the opinion that the guaranty was a valid contract of the Goldstein Company.

[4] 2. It is apparent from what we have said that the Goldstein Company had what it deemed to be good reason to expect a substantial benefit from the making of the guaranty. As we have held that it had implied power to do so, under the circumstances, it is not necessary to consider the question whether or not the benefit was sufficient to create an estoppel to prevent it from asserting that it was ultra vires. If any consideration was necessary to make the guaranty binding, the selling of more lumber by the plaintiff to the Continental Company, in reliance thereon was sufficient for that purpose. Civ. Code, secs. 1606, 1606, 2792.

[5] 3. Under the circumstances shown by the evidence, it was not necessary for the plaintiff to prove that the guaranty contract was directly authorized by the board of directors of Goldstein Company, or that it was ratified by them. It was signed by the secretary by the direction of R. Goldstein, the president and business manager of the corporation; the man who, apparently, had the power to direct and control, and who did direct and control, its affairs and business. Woods knew this, and relied upon it in accepting the guaranty and furnishing the lumber in reliance upon it. The authority of an officer or agent of a corporation to make contracts in its behalf may be shown by proof of conduct, and without resort to the minutes of its board of directors, or even where the minutes do not speak on the subject. "It may be shown by evidence that the person does business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors. \* \* \* The company, in such a case, is bound by his acts \* \* \* within the scope



of the business intrusted to him." *Venice v. Short Line, etc., Co. (App.)* 181 Pac. 658. "If a corporation allows its officers to conduct its business and third persons act upon the apparent authority thus shown, it cannot defeat the rights of such persons arising from transactions done and completed under such ostensible authority by failing to enter upon its minutes any order giving its officers authority to act." *Fowler Gas Co. v. Weber*, 181 Pac. 663, citing *Fresno, etc., Co. v. S. P. Co.*, 135 Cal. 202, 87 Pac. 773; *Blood v. La Serena L. Co.*, 134 Cal. 370, 66 Pac. 317; *Crowley v. Genesee M. Co.*, 55 Cal. 276. We find no error in the record.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

(183 Cal. 566)

# IN RE MINTABERRY'S ESTATE.

## BICKMORE v. GRIFFIN.

(Sac. 3030.)

(Supreme Court of California. Aug. 18, 1920.)

### 1. Executors and administrators § 32(2)— Relative can name nominee only when such relative is personally competent to qualify.

Code Civ. Proc. § 1383, providing that, when letters of administration have been granted to any other person than the surviving husband or wife, child, mother, brother, or sister of intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters and be entitled to the administration, only authorizes any of the relatives named to act through a nominee when such relative is personally competent to qualify as administrator.

### 2. Executors and administrators § 32(2)— That person appointing nominee is surviving wife is immaterial, if she is not personally competent.

The mere fact that an administration of a decedent's estate involves the right of a surviving wife, claiming a superior right of nomination by virtue of Code Civ. Proc. § 1365, subd. 1, does not entitle her nominee to apply for revocation of letters granted to one not in the preferred class, when such wife is not personally competent to act as administratrix.

In Bank.

Appeal from Superior Court, Merced County; E. M. Rector, Judge.

Petition by Edward Bickmore for the revocation of letters of administration issued to W. M. Griffin, public administrator in the matter of the estate of Juan Mintaberry, deceased. From a denial of the petition, petitioner appeals. Affirmed.

William T. Hawkins, of Sacramento, for appellant.

J. J. Griffin and Hugh K. Landram, both of Merced, for respondent.

SLOANE, J. This is an appeal from an order denying the petition of Edward Bickmore for revocation of letters of administration issued to W. M. Griffin, public administrator of Merced county, in the matter of the estate of Juan Mintaberry, deceased, and praying for issuance of letters to himself.

The petitioner is the nominee of the widow of the decedent, who is a resident of the state of Nevada and therefore personally disqualified. The application for such change of administrators was made under section 1383 of the Code of Civil Procedure, which provides as follows:

"When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him."

[1] The trial court in denying the prayer of the petitioner held that this Code provision only authorizes any of the relatives named to act through a nominee, when such relative is personally competent to qualify as administrator. Such must be held to be the proper construction of the statute in view of the decision of this court in *Estate of Martin*, 163 Cal. 440, 125 Pac. 1055. In the *Martin* Case revocation was sought by the nominee of a nonresident brother. The court there says:

"The right to obtain such revocation is solely for the benefit of the relative. It is limited by express terms in the first instance to such of the designated relatives as are themselves competent, and the words 'at the written request of any one of them' may well be construed as referring solely to those described in the last preceding clause, viz.: 'Any one of them who is competent,' thus giving the competent relative the right to act either directly or through a nominee."

So construing the section, this court denied the right of the nominee of the nonresident brother to petition for revocation of letters and to succeed to the administration, under the terms of this section of the Code.

[2] Appellant seeks to avoid the application of the construction adopted in *Estate of Martin*, supra, for the reason that the present case involves the right of a surviving wife, claiming a superior right of nomination by virtue of the preference given by subdivision 1 of section 1365, Code of Civil Procedure. This cannot be done without doing violence

to the plain language of section 1383. Standing by itself, section 1383 clearly places the surviving husband or wife upon the same footing as the child, father, mother, brother, or sister in the matter of petitioning for revocation, and there is no such relation between the two Code sections cited as to justify reading into the latter an exception in favor of a husband or wife which cannot apply to the other relatives therein named. Obviously, either all or none are required by section 1383 to be qualified in person to act as administrator before naming a substitute.

As suggested by counsel for appellant it may be an unreasonable rule which permits the nonresident husband or wife to nominate a representative on an original application for letters of administration, but denies such privilege in the matter of revocation, where a stranger to the estate or a public administrator may have taken advantage of the non-residence of the husband or wife to slip into the office unobserved; but the whole matter of representation of the estate is one of statutory regulation, and the Legislature has a wide discretion in determining the conditions to be imposed. It would perhaps be equally inconsistent to permit a nonresident brother or sister, father or mother, of decedent to compel a revocation of letters through a nominee when not permitted to act through such nominee on an original application for letters. We are compelled to accept one or the other horn of the dilemma.

On the authority of the Estate of Martin, supra, the judgment is therefore affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

(183 Cal. 486)

**SINCLAIR v. JORDAN, Secretary of State.**  
(S. F. 9554.)

(Supreme Court of California. Aug. 5, 1920.)

1. Elections  $\S$  126(1)—Statute requiring affidavit of candidate at primary election mandatory.

Direct Primary Law,  $\S$  5, subd. 4, and section 6, requiring candidate for Congress to file affidavit at office of the secretary of state specified period before day of primary election, is mandatory, and, on a candidate's failure to file affidavit within required time, secretary of state was without power to certify his name as a candidate, under section 10.

2. Mandamus  $\S$  74(3)—Court cannot by writ of mandate relieve primary election candidate from default as to affidavit.

Where candidate for nomination failed to file affidavit within required time, the court was not empowered to grant relief from his default, under Direct Primary Law,  $\S$  27, by writ of mandate requiring secretary of state to file af-

fidavit and certify petitioner's name to be printed on ballot; such section having reference only to errors or omissions of those charged under the law with duties relative to the matter of primary election, and not to the failure of the candidate or those proposing him as a candidate to comply with mandatory requirements of the statute.

In Bank.

Mandamus by Bentley W. Sinclair against Frank C. Jordan, as Secretary of State. Proceeding dismissed.

Wright & McKee, Eugene Daney and Heskett, Sample & Harden, all of San Diego, and Walter H. Linforth, of San Francisco, for petitioner.

U. S. Webb and Robert W. Harrison, both of San Francisco, for respondent.

PER CURIAM. Petitioner seeks a writ of mandate requiring the secretary of state to receive and file the affidavit made by him for the purpose of conforming to the requirements of subdivision 4 of section 5 of the Direct Primary Law (St. 1911, p. 773) as a candidate for the Republican nomination for representative in Congress from the Eleventh congressional district, and to certify his name to the county clerks of the counties of the congressional district to be printed on the ballot to be used at the primary election to be held on August 31, 1920, as a candidate for said nomination.

[1] It is conceded, as it must be upon the admitted facts, that the petitioner failed to conform to a mandatory requirement of such law with relation to such affidavit, in that he failed to present such affidavit at the office of the secretary of state for filing "on or before the thirty-fifth day prior to" the day of the primary election. Subdivision 4,  $\S$  5 and section 6 of the Direct Primary Law. In view of the provisions of the law, the secretary of state could not properly receive the affidavit, which was not tendered to him for filing until after the latest date for filing had passed, and unless such an affidavit be on file the secretary of state cannot certify the name of petitioner as a candidate. Section 10, Direct Primary Law.

[2] Conceding the failure of petitioner to conform to this mandatory requirement of the law, relief from his default is sought by him at the hands of this court. We are forced to the conclusion that the courts have no power to grant relief in such a matter. Section 27 of the Direct Primary Law, the only provision authorizing any review by a court, is, to our minds, reasonably susceptible of no other construction than that it is inapplicable to any failure of the candidate or those proposing him as a candidate for nomination to comply with mandatory requirements of the law essential to his candidacy. It has to do solely with errors or omissions

of others charged under the law with duties relative to the matter of the primary election, and the relief expressly provided for therein is an order requiring "the officer or person charged with such error, wrong or neglect to forthwith correct the error, desist from the wrongful act or perform the duty."

The order to show cause is discharged, and the proceeding dismissed.

ANGELOTTI, C. J., and SHAW, WILBUR, LAWLOR, LENNON, and OLNEY, JJ., concur.

(183 Cal. 506)

**DAVENPORT v. SUPERIOR COURT OF CALIFORNIA IN AND FOR IMPERIAL COUNTY. (L. A. 8361.)**

(Supreme Court of California. Aug. 11, 1920. Rehearing Denied Sept. 10, 1920.)

**1. Corporations §668(15)—Service on officer of foreign corporation which does not do business within the state is invalid.**

In order that service of a foreign corporation made on an officer within the state be valid under Code Civ. Proc. § 411, the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed for that purpose.

**2. Appearance §9(5)—Securing an order extending time to plead held not "general appearance."**

The securing by defendant's attorneys of an order extending the time for defendants to plead is not, under Code Civ. Proc. § 1014, a "general appearance" which submits defendants to the jurisdiction of the court notwithstanding failure to secure legal service upon them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

**3. Appearance §9(1)—Act manifesting intention to submit to jurisdiction of court is "general appearance."**

An act of defendant by which he intentionally submits himself to the jurisdiction of the court in action to obtain a ruling or order going to the merits of the case is a general appearance, which waives objection to the services of process, though such act is not a demurrer, answer, or written notice of appearance, which are specified means of appearance under Code Civ. Proc. § 1014.

In Bank.

Petition for mandamus by Don Davenport against the Superior Court of the State of California in and for the County of Imperial. Writ denied.

M. C. Atchison, of Calexico, and Hocker & Austin, of Los Angeles, for petitioner.

Conkling & Brown, of El Centro, for respondent.

SHAW, J. This is a proceeding in mandamus to compel the superior court of Imperial county to order the clerk of said court to enter the default of each of two corporations, namely, Franco-American Vineyard & Wine Company and El Progreso Inter-California Canning Company, defendants in an action in said court wherein Don Davenport is the plaintiff.

The claim of the plaintiff is that each of said defendants has been duly served with the summons issued in said action, and has also entered a general appearance therein; that the time for answering or demurring has expired; that no answer or demurrer has been filed; and that notwithstanding these facts the court refuses to direct the clerk to enter either default.

[1] 1. The complaint in the action was filed and the summons was issued on February 19, 1919. On February 20, 1919, an attempted service of said summons was made on one Peter Barnes, as president of said Franco-American Vineyard & Wine Company and as secretary of said El Progreso Inter-California Canning Company, at Calexico, in Imperial county, near the Mexican line, by delivering to him there the proper papers for that purpose. At that time the said Peter Barnes held said offices in said respective corporations. No other service was ever made or attempted upon either defendant. Both of said corporations were foreign corporations, the first named being an Arizona corporation, and the second a corporation organized under the laws of Mexico. Neither of them has ever at any time done business within this state, or anywhere else except Mexico, and neither of them was at that time doing any business in this state.

In order to justify a finding that a foreign corporation is so far engaged in business in this state that a valid service of summons upon it in an action in this state, under section 411 of the Code of Civil Procedure, may be made upon its agent within this state, "the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose." "Legal service of process upon a corporation, which will give a court jurisdiction over it, can be made only in the state where it resides by the law of its creation, or in a state in which it is actually doing business at the time of service, in the manner prescribed by the statutes of that state or of the United States." *Doe v. Springfield, etc., Co.*, 104 Fed. 687, 44 C. C. A. 128; *Jameson v. Simonds Saw Co.*, 2 Cal. App. 585, 84 Pac. 289. It follows, therefore, that the attempted service upon the two corporations by service upon Barnes as president and secretary, respectively, of said corporations, was ineffectual for any purpose.

2. The proposition that said defendant cor-

porations had entered a general appearance in said action so as to waive the service of summons upon them is not sustained by the record. On March 1, 1919, after the attempted service aforesaid, Messrs. Conkling and Brown obtained from the judge of the said court an order that the defendants have 20 days' additional time in which to plead to the plaintiff's complaint. Notice of this order was served on the plaintiff's attorneys on March 2, 1919. Thereafter, on March 11, 1919, the said attorneys for defendants served upon plaintiff's attorneys a notice that on March 14, 1919, the time being shortened to 2 days for that purpose, the defendants would move the court for an order to quash and set aside the pretended service of summons theretofore made in the action as aforesaid, and that said motion would be made upon the grounds above stated, that both defendants were foreign corporations, and that neither of them had ever done any business within this state. Thereafter, on March 22, 1919, the motion was regularly heard, and the court thereupon made an order setting aside and quashing the said service of summons upon said defendants.

Thereafter the plaintiff filed with the clerk an order from plaintiff to him to enter the default of said defendants upon the ground that their time for answering the complaint had expired, and in pursuance of said order the clerk, on March 31, 1919, made an entry of the default of said two corporation defendants. Thereafter, on April 25, 1919, the said attorneys for said defendants, upon notice duly given, moved the court to set aside the said default so entered by the clerk, upon the ground that the said defaults were entered by inadvertence and mistake of the clerk, that no summons had ever been served upon defendants, and that there was no authority or warrant for entering such defaults. The court sustained the motion and made an order setting aside said defaults. Afterwards, on October 17, 1919, pursuant to notice to the defendants' attorneys, plaintiff moved the court to enter the defaults of said defendants, based upon the claim that defendants had entered a general appearance in the action, which motion the court denied. Upon this order the present proceeding for a mandamus is based.

[2] The order given by the judge to the defendants' attorneys extending the time within which the defendants might plead to the complaint in the action therein did not, under the circumstances of this case, have the effect of a general appearance in the action and did not authorize the court to proceed to enter default against said defendants. "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." Code Civ. Proc. § 1014. Section 525 of the old Practice Act was identical with the above-quoted pas-

sage of section 1014. In *Steinbach v. Leese*, 27 Cal. 299, the court said on this point:

"We have no doubt that the written notice of appearance provided for in the section is a document to be drawn up especially for that purpose."

The point decided in that case was that the service of a notice of appeal by the attorney who represented some of the defendants, but did not represent Jones, the party concerned, although the notice purported also to be in his behalf, did not operate as a general appearance in the action. In *Powers v. Braly*, 75 Cal. 238, 17 Pac. 197, after two stipulations extending the time to answer had been made between the attorneys for the plaintiff and defendant, a motion by special appearance to strike out the complaint and dismiss the action was presented and an order extending time to plead was obtained. The court held, referring to section 1014, Code of Civil Procedure, that there was no general appearance. In *Vrooman v. Li Po Tai*, 113 Cal. 306, 45 Pac. 471, referring to this question, the court said:

"Section 1014 of the Code of Civil Procedure defines what shall constitute an appearance. A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of an appearance for him, and he can appear in no other way. This statute was intended to settle all disputes upon the subject. There can be no chance for argument about equivocal acts. \* \* \* The occasion for a rule was to dispose of questions upon which there might be dispute."

In *Anderson v. Nawa*, 25 Cal. App. 153, 143 Pac. 555, the giving of a notice to dismiss the action because of delay in serving the summons was declared not to constitute a general appearance. See, also, *Waters v. Central T. Co.*, 126 Fed. 469, 62 C. C. A. 45, *Benedict v. Arnoux* (Sup.), 38 N. Y. Supp. 882, *Bell v. Good* (City Ct.), 19 N. Y. Supp. 695, and *Paine L. Co. v. Galbraith*, 88 App. Div. 68, 55 N. Y. Supp. 971, each holding that the obtaining of an order extending the time to plead is not a general appearance under a similar provision of the New York Code.

The cases cited to the contrary are *Roth v. Superior Court*, 147 Cal. 604, 82 Pac. 246, *Cooper v. Gordon*, 125 Cal. 296, 57 Pac. 1006, and *California, etc., Co. v. Superior Court*, 13 Cal. App. 65, 108 Pac. 882. In the *Roth* Case a stipulation between the respective attorneys, made the day after the service of summons, extending defendant's time to plead, was held to be a "virtual appearance" and sufficient to prevent a dismissal of the action, under section 581, subd. 7, of the Code as amended in 1897 (St. 1897, p. 98), after the lapse of three years. In *Cooper v. Gordon* two stipulations, each granting plaintiff the right to have judgment entered in his favor at any time and providing for a stay of execution thereon

upon certain conditions, were held to estop the defendant from moving to dismiss the action, and to be, in effect, an answer admitting the truth of the complaint. In California, etc., Co. v. Superior Court, a letter of defendant's attorney to plaintiff's attorneys, asking a stipulation for further time to answer, in order to avoid the filing of a demurrer, and the making of a stipulation giving time to answer as requested, followed by an application to the court, based on an affidavit showing cause, for a further extension, which the court granted, were held to amount to a general appearance. In each of these cases the court was considering the effect of stipulations between the attorneys for the respective parties, and it was, in effect, determined that the stipulations under consideration, under the circumstances there appearing, showed an intent to appear generally and not specially. The construction of section 1014 in *Vrooman v. Li Po Tai*, supra, was directly recognized as correct in the *Roth Case*.

[3] The statement in the above-quoted passage from the *Vrooman Case*, that a defendant "can appear in no other way" than by demurrer, answer, or formal written notice, is doubtless too broad. An act of a defendant by which he intentionally submits himself to the jurisdiction of the court in that action for the purpose of obtaining any ruling or order of the court going to the merits of the case, as, for example, a motion to strike out part of the complaint, or the making of stipulations, as in the cases above mentioned, which may reasonably be construed to imply that the court has in that action acquired jurisdiction of the person of the defendant, will be equivalent to an appearance, although not strictly in accordance with the terms of section 1014. But the securing of the order extending time to plead was not an act of that character, and the rule of section 1014 should be applied to this case.

Under all these circumstances we are of the opinion that the defendants did not enter an appearance to the action, and that the application for an entry of the default based on the supposed appearance was properly denied by the court below.

The application for a writ of mandamus is denied.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; WILBUR, J.; LAW-LOR, J.

(183 Cal. 466)

ROLLAND v. PORTERFIELD. (L. A. 6064.)

(Supreme Court of California. Aug. 3, 1920.)

1. Appeal and error ⇨1011(1)—Findings on conflicting evidence conclusive.

Trial court's findings on conflicting evidence are conclusive.

2. Appeal and error ⇨931(1)—Reasonable inferences to be indulged in support of findings.

All reasonable inferences are to be indulged in support of findings.

3. Evidence ⇨570, 574—Expert and nonexpert testimony, of equal weight and conflict, must be determined by jury.

There is no distinction between expert testimony and evidence of other character as regards the weight to be given the testimony in a particular case, and, where there is a conflict between scientific testimony and testimony as to the facts, the jury or trial court must determine the relative weight thereof.

4. Witnesses ⇨317(1)—Trial court may disregard testimony of witnesses as incredible.

Under Code Civ. Proc. § 2061, subd. 3, it was within the province of the court to determine to what extent the falsity of certain testimony, which the evidence was sufficient to satisfy the court was false, affected the credibility of other statements of same witnesses concerning contemporaneous occurrences.

5. Bills and notes ⇨517—Evidence held to justify finding that note was forged.

In an action on note involving issue of whether note had been forged, evidence held to justify finding for defendant.

6. Executors and administrators ⇨221(6)—Evidence held insufficient to prove loan.

In an action against an executrix, evidence that plaintiff had made certain payment to testator held not sufficient to prove a loan; the presumption, under Code Civ. Proc. § 1963, subd. 7, being that the money was due testator.

Department 2.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Lordy Rolland against Pearl Morgan Porterfield, executrix of the estate of Alfred E. Blake, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

E. E. Rogers and Richard Kittrelle, both of Los Angeles, for appellant.

John G. Harrah and Rush M. Blodget, both of Los Angeles, for respondent.

LENNON, J. This action was brought by plaintiff against the executrix of the estate of Alfred E. Blake, deceased, to recover the sum of \$5,500. The complaint contains two counts. The first count is based upon a promissory note for \$5,000 alleged to have been "made, executed, and delivered" by decedent. The second count seeks to recover the sum of \$500, alleged to have been loaned to decedent by plaintiff. The trial court rendered judgment in favor of the defendant and against the plaintiff on both counts of the complaint, and plaintiff appeals upon the ground that the findings and judgment of the trial court

are not supported by the evidence. The position of appellant is predicated upon the proposition that there is no conflict whatever in the evidence, and that all of the evidence supports the allegations of the complaint.

The promissory note for \$5,000 is written on the back of an old photograph of the mother of decedent, and is in the following words:

*July 13, 1917.*

*"I, Alfred E. Blake, do hereby acknowledge a debt for loans and very kind services from Lordy Rolland to me, the debt I owe is \$5,000 thousand dollars gold American coin to be paid at my death. Alfred E. Blake."*

It is an admitted fact in the case that the words above italicized are in a different handwriting from that of the rest of the note. In support of the allegations of the execution and delivery of this note, two witnesses testified that the following events occurred in their presence: On the evening of July 13, 1917, the date of the note, the witnesses were, together with decedent, at the home of plaintiff. Decedent requested a piece of paper, pen, and ink, which were brought. Instead of using these, however, he took up the photograph of his mother which was standing on the table, removed it from its frame, and, after erasing, with a moistened handkerchief, some writing on the back of the photograph, handed it to plaintiff with directions to write on the back thereof at his dictation. When plaintiff had finished writing, decedent signed his name on the back of the photograph, returning it to plaintiff with instructions to keep it. It was also stated that decedent did not request plaintiff to do the writing until he had himself started to write and found there was insufficient ink in his fountain pen, thus accounting for the first few words of the note in decedent's handwriting. One of these witnesses, Clinton Marr, a boy employed to wheel decedent about in a wheel chair, testified that about a month later plaintiff gave him the same picture, which had in the meantime been replaced in its frame, and told him to take it to decedent. According to the further testimony of this witness, decedent, upon receiving the photograph, called plaintiff on the telephone, telling her that she should have kept the picture, because it was her only protection, and that she must come over and get it. The picture remained at the home of decedent until his death, October 31, 1917. Thereafter it was given by defendant to plaintiff upon the latter's request. Three other witnesses testified that decedent had told them, at different times, that he had borrowed quite a sum of money from plaintiff and that he had given her a note therefor. One of these witnesses stated that plaintiff was worried about some loans she had made to decedent, and, at her suggestion, he mentioned the matter to decedent. During the ensuing conversation, so the witness

stated, decedent said that he had borrowed \$5,000 from plaintiff, but that she was protected by a note. In response to an inquiry from the witness as to why decedent had borrowed money from the plaintiff when he had property of his own, the answer of decedent was, as quoted by the witness:

*"Well, you borrow it from the bank; something happens to me if this gangrene sets in on me again; they will take my property and everything away from me; that is the reason. Why should I go to the bank and borrow money when I have friends to help me out of my difficulty?"*

The above testimony in favor of plaintiff may be resolved into the three following fundamental factors, namely: (1) That two witnesses saw plaintiff write on the back of the photograph on July 13, 1917, in the presence of decedent and at his dictation; (2) that thereafter the same witnesses saw decedent sign his name on the back of the photograph and deliver the same to plaintiff; (3) that decedent made statements to certain persons that plaintiff had loaned him \$5,000, and that she was protected by a note from him.

[1, 2] As stated in *Hoppe v. Robb*, 1 Cal. 373, and repeated in nearly every subsequent volume of the California Reports, the findings of the trial court upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged to support the findings. It therefore remains to be determined whether there was any conflicting evidence on these salient points to support the finding of the trial court that:

*"It is not true that within the county of Los Angeles, state of California, on the 13th day of July, 1917, or at any other place, or at any other time, or at all, that the said decedent, Alfred E. Blake, made, executed, and delivered, or made, executed, or delivered, his promissory note in words and figures as set out in paragraph II of plaintiff's complaint in this action."*

[3] In behalf of defendant a handwriting expert testified, giving in full the reasons upon which his opinion was based, that the words above italicized could not have been written on July 13, 1917, and that they had, in his opinion, been written approximately ten years ago. In derogation of this testimony appellant cites the statement in *Grigsby v. Clear Lake Water Co.*, 40 Cal. 405, to the effect that expert witnesses "are generally but adroit advocates of the theory upon which the party calling them relies, rather than impartial experts, upon whose superior judgment and learning the jury can safely rely." Whatever the individual opinion as to the value of expert testimony, it has been clearly settled in this state that, as regards the preference or weight to be given the testimony in any particular case, the law makes no distinction between expert testimony and evidence of other character, and that, when

there is a conflict between scientific testimony and testimony as to the facts, the jury, or trial court, must determine the relative weight of the evidence. *Estate of Blake*, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135; *Watson v. Watson*, 58 Mich. 607, 25 N. W. 497. Moreover, the note itself, which was offered and received in evidence, affords, by reason of the relative position and condition of its parts, intrinsic evidence amply sufficient to warrant a person, even in the absence of any scientific testimony on the question, in concluding, from ordinary observation, that the name of decedent and the words "July 13" were written on the back of the photograph before the rest of the writing was placed there.

[4] Appellant contends that, in view of the fact that there is no dispute that the signature appearing on the back of the photograph is the signature of decedent, and in view of the direct testimony that decedent delivered the note to plaintiff in the presence of two witnesses after the plaintiff had written thereon, the note must be held binding upon the estate of decedent, and the time when the signature was placed on the back of the photograph is immaterial. This assumes that the testimony as to the delivery of the note under the above-mentioned conditions is uncontradicted and entirely trustworthy, which is not the case. If the evidence adduced by defendant as to the relative date of the signature of decedent was sufficient, in the mind of the trial judge, to disprove the direct and positive statements of the two witnesses in behalf of plaintiff that they saw decedent sign his name on the back of the photograph under the described circumstances, it was exclusively within the province of the same judge to determine to what extent the falsity of this part of the testimony of the two witnesses affected the credibility of the other statements of the same witnesses concerning contemporaneous occurrences, namely, the writing by plaintiff at decedent's direction and the delivery of the note to plaintiff by decedent. Code Civ. Proc. § 2061, subd. 3; *Robinson v. Robinson*, 159 Cal. 203, 113 Pac. 155. Furthermore, the testimony of plaintiff's witnesses on this phase of the case is not entirely uncontradicted by defendant's witnesses; for a witness for defendant testified that, four nights before decedent's death, she examined this particular photograph, among others on decedent's desk, and, although she had the picture out of its frame and looked at the back of it, she noticed no dark writing, such as that claimed to have been written by plaintiff, but only light writing, such as the name of decedent. She also testified that all of the other pictures of decedent which she saw at that time bore his name on the back, and that her attention would have been attracted by any heavy writing such as that now appearing on

this photograph. Counsel for appellant observe that this testimony is indefinite and unsatisfactory, in that this witness did not testify that there was, in fact, no writing on the back of the photograph other than the name of decedent. It may be pointed out in reply that the testimony in behalf of plaintiff in identification of the handwriting other than decedent's was equally indefinite and uncertain; for there was no testimony that the words claimed to have been written by plaintiff and now appearing on the back of the photograph were the ones which were written at decedent's dictation. On the other hand, both of plaintiff's witnesses who claim to have seen the delivery of the note testified that they did not hear what decedent dictated to plaintiff and that they never saw what was written by plaintiff. One of these witnesses stated that she did not know whether or not the writing which is now on the back of the photograph is the same writing that was there when she saw decedent sign his name. The testimony of the other witness is silent on this point. There must also be taken into consideration the testimony of defendant that her attention was not called to the writing on the back of the photograph at the time that plaintiff asked defendant for the picture, but that, subsequent to decedent's death and a few days after she had given the photograph to plaintiff, the latter for the first time showed her the writing on the back thereof, and, upon being told by defendant that it was not in decedent's handwriting, said:

"I know it is not, I have just written that.  
\* \* \* It is just a copy of what was on there."

In contradiction of the testimony of witnesses as to statements made by decedent that he had given a note to plaintiff for money borrowed by him, there stands the testimony of defendant that decedent had stated to her that he did not owe any one a cent and that there were no debts against his estate.

[5] From the foregoing analysis of the evidence adduced upon the whole case it is evident that the finding of the trial court, if not unavoidable, was at least justifiable.

[6] Upon the issue of the loan of \$500 there was simply the testimony of the boy, Clinton Marr, that, when plaintiff told him to take the photograph to decedent, she also gave him a handkerchief which, plaintiff stated to witness, contained \$500. When this was delivered to decedent, he remarked that he had not seen so much money for a long time. There is an entire absence of testimony as to the purpose for which this money was sent to decedent. It is a presumption "that money paid by one to another was due to the latter," and such a presumption is satisfactory if uncontradicted. Code Civ. Proc. § 1963, subd. 7; *Fox v. Monahan*, 8 Cal. App. 707, 97 Pac. 765. The testimony of witnesses as to

decendent's statements that he had borrowed money from plaintiff cannot be considered as relating to the \$500 loan; for they all include the statement that decendent had given plaintiff a note for the money borrowed, whereas the \$500 loan is claimed to have been unsecured by note. Obviously these statements were introduced in support of the action on the \$5,000 note. Even if this evidence could be considered as relating to the \$500 loan, it is contradicted by the testimony of defendant above referred to, namely, that decendent told her he owed nothing.

The evidence supports the findings, which, in turn support the judgment.

The judgment is affirmed.

We concur: WILBUR, J.; SLOANE, J.

(123 Cal. 576)

**CROUCH et al. v. WILSON et al.**  
(L. A. 5338.)

(Supreme Court of California. Aug. 19, 1920.)

**1. Fraud —45—Cross-complaint held not defective in failing to state knowledge of falsity.**

In an action on a note given for purchase price of a stallion, a cross-complaint for fraud, alleging that every one of the representations made by plaintiff was wholly false, and were personally known to the plaintiff to be untrue, held not open to the objection that there was no direct allegation that the representations were actually known by the plaintiffs to be untrue.

**2. Fraud —45—Cross-complaint held not defective, as not showing in what respect representations were false.**

In an action on notes given for the purchase price of a stallion, wherein defendants interposed fraud and claimed damages for false representations, cross-complaint held not defective as failing to allege in what respect the representations were false or fraudulent.

**3. Sales —52(7)—Evidence in action for price of stallion held to sustain findings of fraud.**

In an action on a note given for the purchase price of a stallion, wherein the defense of false representations as to the value and history of the stallion was interposed, evidence held sufficient to sustain finding of fraud in that the stallion delivered was not the stallion in fact purchased.

**4. Sales —120—Purchaser of stallion under guaranty held entitled to rescind without suing on guaranty.**

In an action on a note given for the purchase price of a stallion, wherein the defense of fraud was interposed, that the sales agreement provided for rescission by the purchaser by a return of the stallion did not make it necessary for defendants to bring action on the guaranty; the claim of fraud going to the very inception of the guaranty contract.

**5. Sales —124—Offer to rescind, failing to expressly offer to return property purchased, held insufficient.**

Where note was given for the purchase price of a stallion, an offer to rescind held insufficient, where it did not appear that the defendants offered to return the stallion to the plaintiff.

**Department 1.**

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by J. Crouch and another, copartners doing business under the firm name and style of J. Crouch & Sons, against John T. Wilson and others, with cross-complaint by defendants. From a judgment that neither plaintiff nor defendants take anything by the action, plaintiffs appeal. Reversed, with directions to enter judgment for plaintiffs.

Jones & Weller, and Simms & Fulwider, all of Los Angeles, for appellants.

Haas & Dunnigan, of Los Angeles, for respondents.

**LAWLOR, J.** This is an appeal by the plaintiffs and cross-defendants J. Crouch and G. R. Crouch, copartners, doing business under the firm name and style of J. Crouch & Son, from a judgment in favor of the defendants and cross-complainants, John T. Wilson, J. O. Jennifer, F. L. Troxel, B. F. Ermel, and P. L. Lopez, in an action to recover upon certain promissory notes executed and delivered by the said defendants, in which action they filed a cross-complaint, alleging that the notes had been given as the price of a stallion purchased from the plaintiffs, and that said sale had been procured by fraudulent representations, and praying the rescission of the contract, the cancellation of the notes and damages in the sum of \$1,950. The record on appeal is presented under the alternative method.

Plaintiffs were engaged in the business of importing Percheron horses from France and selling them in this country. Their principal place of business was in the state of Indiana, but they maintained branches in various states for the purpose of the delivery to their agents and sale of the animals. In 1911 the California branch was located at Sacramento, and was in charge of J. F. Campbell. Harry Kenah was the local agent of the plaintiffs at Santa Ana. After some negotiations between Kenah and the defendants, the latter formed a syndicate or association under the name of the San Fernando Horse Breeders' Association. On January 8, 1912, defendants agreed to purchase from plaintiffs a Percheron stallion named "Epinal" for the sum of \$4,000, and the defendants jointly executed three promissory notes aggregating that amount, which notes are those upon which



plaintiffs have brought this action: On the same day plaintiffs executed this guaranty:

"We have this day sold the imported Percheron stallion Epinal No. 65631 to the San Fernando Horse Breeders' Association, \* \* \* and we guarantee the said stallion to be a satisfactory, sure breeder, provided the said stallion keeps in as sound and healthy condition as he now is and has proper care and exercise. If the said stallion should fail to be a satisfactory, sure breeder with the above treatment, we agree to take the said stallion back, and the said horse company agrees to accept another imported draft stallion of equal value in his place, the said stallion \* \* \* to be returned to us at Sacramento, California, in as sound and healthy condition as he is now by April 1, 1913."

Defendants admitted the execution, delivery, and nonpayment of the notes, and filed a cross-complaint, alleging that the plaintiffs represented to them that the stallion was valuable for breeding purposes; that he was a thoroughbred Percheron stallion, registered and bred in France and known as "Epinal"; that to the personal knowledge of plaintiffs he had been stood and proven to be a sure "foal-getter" in France; that he had never been stood in the United States; and that he had just been imported and brought "practically direct" to California. The cross-complaint further alleged that such representations were made to induce defendants to purchase the stallion; that the defendants relied solely on these statements, and were induced thereby to purchase him; that each of the representations was false, and was known to the plaintiffs to be false; that defendants did not discover the stallion was not a sure breeder until July, 1912, and did not discover he had been stood in this country and proven worthless, or that he had been in this country for two years prior to the sale, until December, 1912, and that in July, 1912, and continuously thereafter until February, 1913, defendants repeatedly requested plaintiffs to rescind the contract and to accept the return of the stallion. The cause was tried by the court without a jury. The court found that each of the alleged misrepresentations had been made by Kenah as agent for the plaintiffs; that all of the representations were known by Kenah to be false, and were made for the purpose of inducing defendants to purchase the stallion; that in fact the stallion had been in the United States for more than two years; that he had been tried as a "foal-getter," and had been proven to be totally barren and worthless for such purposes; that defendants "had repeatedly requested the plaintiffs to rescind said contract and to accept the return of said stallion"; that "plaintiffs at all times refused to rescind said transaction or to accept the return of said stallion"; and that the horse was not worth the sum of \$4,000, or any sum in excess of \$200. The judgment was that neither

the plaintiffs nor the defendants take anything by the action. It is from this judgment that the plaintiffs appeal.

Appellants contend: (1) That the cross-complaint lacks certain necessary averments to state a cause of action for rescission; (2) that the cross-complaint is insufficient, in that the defendants, having elected to rescind the contract, "are bound by their election, \* \* \* and cannot now stand upon any claim for damages"; (3) that "the evidence was wholly insufficient to support the findings of the court as to fraud at the inception of the contract"; (4) that, inasmuch as the guaranty provided, in the event Epinal should not prove to "live up" to the terms of the guaranty, that plaintiffs should exchange the stallion for another, "the defendants \* \* \* must abide by its terms and be bound by the remedy which it provides for a breach"; and (5) that "there is in the correspondence [between the parties] \* \* \* no expression of intention \* \* \* to rescind the contract of sale, no offer to return the horse."

[1] 1. As to the alleged defects in the cross-complaint. The transcript on appeal was prepared in typewriting, as provided in sections 953a, 953b, and 953c of the Code of Civil Procedure. Appellants did not print in their opening brief any portion of the pleadings. Section 953c. Respondents called attention to this omission, and now claim that the sufficiency of the cross-complaint should not be considered. Their brief was filed subsequently to the amendment of section 953c (Stats. 1919, p. 261), of which no notice was taken, and the appellants have not replied. We have, however, examined the transcript. The position of appellants is: First, that "primarily there is no direct allegation that the representations were actually known by the plaintiffs to be untrue." Paragraph 6 of the amended answer and cross-complaint alleges "that each and every one of the representations so made \* \* \* by the said J. Crouch & Son \* \* \* was wholly and entirely false and untrue, and were \* \* \* personally known by the said plaintiffs \* \* \* to be untrue." The cross-complaint is not open to the objection urged.

[2] Appellants also claim:

"Nor is there any allegation in the cross-complaint showing in what respect such representations were false or fraudulent."

But paragraph 6, after asserting the falsity of the representations and the scienter of the plaintiffs, also alleges:

"That in truth and fact the said stallion had been in the United States for more than two years, and that the said fact was then and there well known to the said plaintiffs, and that in truth and fact the said stallion had prior thereto been stood and tried as a 'foal-getter' or breeding stallion in the United States, and had been proven and demonstrated by actual

experience that he was totally barren and utterly worthless for said purposes."

It plainly appears from these allegations wherein the representations made by Kenah on behalf of appellants were false.

2. Appellants' contention that defendants "cannot now stand upon any claim for damages" is disposed of on the ground that the judgment appealed from is that neither party take anything by the action. No judgment for damages was rendered.

3. We now turn to a discussion of appellants' claim that the findings of fraud are not supported by the evidence. At the trial respondents undertook to prove that appellants did not deliver to them the registered Percheron stallion Epinal, but that instead appellants delivered to them a grey Percheron stallion registered under the name of "Francinette," which had been formerly owned by McLaughlin Bros., a firm in Oakland and competitors of appellants, and which had, several years before, been stood in Los Angeles and found worthless for breeding purposes. On this point respondent Wilson testified:

"He [the stallion] has turned whiter; as he grows older he turns white. He is not quite as fleshy as he was a couple of months ago; he weighs a couple of hundred or one hundred and fifty pounds less. \* \* \* When we purchased him he was a dapple grey horse, and he has faded out considerably now, and has turned grey. \* \* \* Q. What is the difference between the appearance of that quarter crack [in the hoof of the stallion] as it now exists compared with when you first saw the horse? A. It is practically the same. \* \* \* Q. Was there any evidence of his having suffered a recent injury at the time you bought the horse? A. No, sir. \* \* \* I regarded it as an injury the colt had sustained when it was very young."

W. S. Magill, a veterinary surgeon, testified that he had known the stallion which was delivered to respondents for four years; that when he first saw him he was a

"dark, dapple grey. He is now grey, not a white, but a grey, changing to white. The process has been gradual. \* \* \* The deformity was a depression in the left front hoof caused by a crush received in some manner when he was very young, a colt or a foal, perhaps. \* \* \* It was not a wire cut or a quarter crack. \* \* \* A groove in the hoof. It came from an injury from a crush. \* \* \* And the other deformity in the hind leg, that would come from colthood too, from being foaled. \* \* \* Both of these were that way when he was foaled."

W. J. Crouch admitted that he had not noticed any quarter crack or depression in the hoof of the stallion, Epinal; that no such deformity existed in the horse appellants had purchased in France.

George W. McElroy testified that he was

engaged in farming in Illinois; that in 1908 he had purchased from appellants a grey Percheron stallion named Epinal; that he kept the horse three years; that during that time "Epinal was a satisfactory and sure colt-getter"; and that he had no quarter crack or groove in his hoof.

L. Goodin testified that he lived in Los Angeles and had been breeding stallions in California for more than 30 years; that he had examined the stallion delivered to respondents; that he had seen him in 1911 and had had charge of him at that time; that this stallion was then known as "Francinette"; that he was positive this was the same horse; that Francinette had been stood repeatedly, but had failed to beget any colts; and that in September or October, 1911, he had been returned to McLaughlin Bros. of Oakland.

L. A. Lanning, one of the owners of the stallion, Francinette, testified that the stallion in possession of the respondents was the same horse that he had bought under the name of Francinette on April 29, 1911, and had kept about five or six months; that "he was a horse when we bought him in the neighborhood of 2,140 pounds, but he is much whiter now than he was then, and he is much thinner than he was then. \* \* \* He has a quarter crack on his left front forefoot, had when we had him. \* \* \* He is a kind of a peculiar horse in his going, in his travel; when we shipped him to Oakland, I led him down behind the wagon to the depot, and he is a horse that you cannot walk him, he is a horse that will trot, and I led him yesterday from my place to Dr. Connolly's, and it is the same horse, exactly."

Guy Goodin and L. E. Wood corroborated the testimony of L. A. Lanning.

[3] Appellants introduced evidence tending to show that the Percheron stallion Epinal was purchased in France and shipped by them to Indiana; that he was subsequently sold and delivered in 1908 to McElroy, who stood him and bred him satisfactorily for three years; that, upon McElroy's trading him back to appellants, he was shipped to California in the latter part of 1911 and sold to respondents in 1912. It is unnecessary to refer to the remainder of the evidence introduced by appellants further than to say that it created a conflict. It clearly appears that the evidence is sufficient to sustain the findings.

4. We shall next consider appellants' contention that the respondents did not rescind in accordance with the terms of the contract. In this connection appellants take the position that—

"The representations being in regard to matters relating to his previous record and ability, they could not be held to change or modify the express contract which followed, and which contained a more positive assertion of his present capacity."

Union Investment Co. v. Rosenzweig, 79 Wash. 112, 139 Pac. 874, as a similar action. We quote from the opinion:

"On the delivery of each of the horses the vendors sent to the vendees a writing guaranteeing that the stallion described therein 'would get sixty per cent. of the producing mares with foal, with proper care and handling,' and, if he did not do so, that they would replace him with another stallion of the same breed and price. The writing also contained the further provision to the effect that the foregoing was the only contract, guaranty, or representation made by the vendees. \* \* \* The appellant contends that the remedy of the respondents was confined to the terms of this bill of sale or guaranty, and that they cannot be heard to urge any defense to the note itself. But the defense to the note was fraud in its inception, and, because of the fraud a want of consideration for the note, and clearly under this defense the respondents were entitled to show the worthless character of the horses for the purpose for which they were purchased, notwithstanding the terms of the guaranty may have included another remedy. In other words, the guaranty was accepted on the theory that the vendors of the horses were acting honestly and in good faith, and, when the respondents discovered otherwise they could lawfully repudiate the transaction."

[4] We think that the discussion in that case is plainly applicable to the facts herein. The guaranty was part of the contract which the respondents here seek to rescind. To say that they must comply with the terms of the guaranty in order to have their remedy for the alleged fraud, is, in effect, to take the position that the respondents are bound by the very contract which they seek to avoid. Such position cannot be upheld. Appellants cite on this point the case of First National Bank v. Hughes, 5 Cal. Unrep. 454, 46 Pac. 272. But in that case the ground of the attempted rescission was the breach of a warranty, and it was held, in accordance with section 1786 of the Civil Code, that the breach of a warranty did not entitle the buyer to rescind an executed sale. There was no allegation or proof of fraud in that case. Here, the ground of rescission is the fraudulent representations of the appellants. As we have seen, the court found that the whole transaction was fraudulent. The misrepresentations were made to induce the respondents to enter into the contract and to accept the guaranty. The guaranty must therefore be regarded as part of the scheme to defraud and deceive respondents. The object of reducing contracts to writing is to prevent, not to promote or protect, fraud.

5. We shall next consider appellants' fifth contention. The court found, as above shown, that the respondents offered to return the stallion, but that appellants had refused to accept it. This presents the question whether this finding is supported by the evidence. The correspondence to which appellants re-

fer consists of three letters. On June 28, 1912, respondent Ermel wrote to Campbell:

"We regret to advise you that we have learned that the grey stallion Epinal No. 63681 is not as he was represented to us. We have discovered that he is a barren horse and must ask that you come down here at your earliest convenience and straighten the matter out."

Campbell replied on July 9, stating that, as far as he knew, the horse was "just as he was represented to be," and asking Ermel "to take the matter up with J. Crouch & Son." Accordingly, Ermel wrote to appellants under date of July 13, inclosing a copy of Campbell's letter, "the horse is entirely unsatisfactory and not as represented, and we would like to have the matter adjusted at once." To this appellants replied on July 17 that they were prepared "to live up to the guaranty to the letter"; that they were "much surprised that he [the horse] has not proven satisfactory." On August 7 Joseph P. Keogh, respondents' attorney, wrote to Campbell that—

Respondents had been led to believe that the stallion delivered to them by appellants was not Epinal, but "a horse that was sold to some other people in this section of the country, and was returned by them \* \* \* to McLaughlin Bros., \* \* \* as a barren horse and utterly worthless for the purpose for which it was sold. \* \* \* Will you kindly advise me by return mail whether or not you will adjust this matter with my clients and return to them the notes they signed? If this matter is not adjusted satisfactorily by the 19th day of this month, I shall advise my clients to institute suit to rescind the contract, on the ground of fraud and to recover the damages which they have sustained to date."

[5] No other evidence was received to prove an offer to return the stallion. It is true that at the trial it was stipulated by appellants that Ermel, who could not be present in court, "would testify that he \* \* \* personally offered to return to the plaintiffs the said stallion; \* \* \* and that the said plaintiffs refused to accept said return." But it appears that the "offer" to which Ermel "would testify" was contained in his letters to Campbell and to the appellants, which we have just quoted. According to the findings the stallion was not worth "any sum in excess of \$200." This amounts to a finding that the horse had a value of \$200. It was incumbent upon the respondents, seeking rescission of their contract of purchase, to allege and prove that they had returned, or offered to return, to appellants everything of value which they had received under the contract. Section 1691, Civ. Code; Gifford v. Carvill, 29 Cal. 589, 593; Gamble v. Tripp, 99 Cal. 223, 226, 33 Pac. 851; Kelley v. Owens, 120 Cal. 502, 47 Pac. 369; 52 Pac. 797. This was not done. There is in the letters from Ermel to appellants and their agent

no offer to return the stallion, but only an expression of dissatisfaction with the precreative qualities of the horse, a statement that respondents believed fraud had been perpetrated upon them, and a request for an "adjustment" of the matter. In our opinion appellants' contention that the evidence does not support the finding that respondents offered to return the stallion must be sustained. It follows that respondents have failed to prove one of the essentials of rescission, and, on that theory of the case, the judgment that plaintiffs take nothing cannot be upheld. It is alleged, however, in paragraph 1 of the answer that the notes sued upon herein were given "wholly and entirely without consideration." The findings of fraud, already set forth, and the particular finding as to the value of the stallion, show that there was a failure of consideration for the notes, except to the extent of \$200.

The judgment is reversed, with directions to the court below to enter judgment on the findings in favor of the plaintiffs for \$200, without costs, and that defendants take nothing by the action. It is further ordered that respondents recover of appellants their costs of appeal.

We concur: SHAW, J.; OLNEY, J.

(183 Cal. 548)

**COUGHLIN v. GREAT WESTERN POWER CO. (S. F. 8723.)**

(Supreme Court of California. Aug. 13, 1920.  
Rehearing Denied Sept. 10, 1920.)

**1. Evidence ¶9—Judicial knowledge that electric current would jump 1 inch, to grounded metal, rather than 21 inches, to defendant's hand.**

It is a scientific fact, of which we take judicial notice, that if a 22,000-volt wire had been surcharged with a sufficient voltage to jump for the distance of 1 inch, such additional voltage would have been discharged into the ground wire at that distance, rather than to ground through the hand of plaintiff at 21 inches, and, moreover, where there were iron beams in a substation 12 inches from the wire, which were connected with the corrugated iron surface connected with the ground, this would receive the charge, before it would have jumped 21 inches to plaintiff.

**2. Master and servant ¶278(11)—Evidence held insufficient to establish gross negligence as to operator of electric substation.**

In an action based on gross personal negligence, within the Roseberry Act, brought by an electric substation operator, alleging injury by a current of electricity which jumped to his hand from a live 22,000-volt uninsulated wire, while he was cleaning a dead wire with a rag, evidence held insufficient to support a finding

of gross negligence of defendant in failure to furnish a safe place to work.

Lennon and Lawlor, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by William E. Coughlin against the Great Western Power Company. Judgment for plaintiff, and defendant appeals. Reversed.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for appellant.

O'Gara & De Martini, of San Francisco, for respondent.

**WILBUR, J.** Plaintiff recovered judgment in the lower court for damages sustained by him November 3, 1913, by the short-circuiting of a 22,000-volt current through his body while he was engaged in the work of cleaning certain bushings and wires in an electric substation operated by the defendant, his employer. Defendant appeals.

[1, 2] At the time of the injury the Roseberry Act (Stats. 1911, p. 796) was in force, and both plaintiff and defendant had elected to be bound by the provisions thereof. Plaintiff, however, ignored the compensatory provisions of that statute as therein authorized, in cases of gross personal negligence, and brought this action, in which the jury found as a fact by necessary implication that the defendant was guilty of such gross personal negligence. Unless such negligence has been proved, the plaintiff cannot recover. The claim of negligence is based upon the failure of the employer to furnish a safe place to work. Briefly stated, the admitted facts are as follows:

In the substation were three stationary transformers, by which electricity entering at 100,000 volts was transformed by induction into a current of 22,000 volts. To prevent the grounding of the high-voltage current, insulators, called bushings, extended 4 feet 6 inches above the upper surface of the transformers, which surface was 11 feet 5½ inches above the floor of the substation. In order to prevent the current from leaking over the surface of these bushings, it is necessary to clean the surface thereof of dust and other accumulations about once a month, and for this purpose the current was shut off from the 100,000-volt circuit. Plaintiff was engaged in cleaning this surface and the uninsulated copper wire leading therefrom at the time of his injury, and for that purpose the current had been shut off from the high-voltage circuit. The injury resulted from the short-circuiting through his body of the 22,000-volt current coming from a sta-

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tion bus distant from the wire being cleaned, at its closest point, between  $28\frac{1}{4}$  and 31 inches. It was unnecessary to clean the surface of the copper wire, as the purpose of the cleaning was to avoid the danger of short-circuiting the current over the surface of the bushing. The plaintiff had been working in the substation a month, and knew the voltages carried by the respective wires, and believed that the arcking distance from the 22,000-volt wire was only three-eighths of an inch. He had arranged the switches at the substation to shut off the current on the 100,000-volt wire and retain the current on the 22,000-volt wire, and at the time he was engaged in cleaning the former the 22,000-volt wires were "hot." The arcking distance of a 22,000-volt current to ground under the most favorable conditions is 1.2 inches.

Assuming that it was properly a part of the duty of the employé, not only to clean the bushing, but the copper wire arising therefrom, the question at issue resolves itself into this: Was it negligence to so arrange the substation that a man was required to clean the wire distant  $28\frac{1}{4}$  inches from an uninsulated wire carrying a current of 22,000 volts? It must be obvious that such a wire could be cleaned by wiping it with a rag, without bringing any part of the body sufficiently near the station bus to produce an arc. If this was a usual place in which a workman was required to perform duties which would distract his attention from the perils involved in working in proximity to an uninsulated high-voltage wire, and there was a possibility of contact by reason of unconscious or involuntary action, it might readily be concluded that a finding of gross negligence by the jury was sustained by the evidence. But this was not a place where workmen were usually required to work. At most but once a month were they called upon to perform this service, and then under conditions which necessitated their careful attention to the condition of the various wires in the substation. To have come in contact with the 100,000-volt wire, or within arcking distance thereof ( $10\frac{1}{4}$  inches), meant instant death. It is evident that a man, engaged in the occasional task which occupied the plaintiff, would naturally be alert to the peril of his position.

At this point it is well to give the plaintiff's statement as to the conditions attending his injury. He testified that the current jumped across a space of 21 inches to the back of his hand. If this were a contestable fact, we would have to assume the correctness of this testimony in determining the question of defendant's negligence. But it is a scientific impossibility for a current of that voltage to jump through the air for that distance, and it is shown that a lightning arrester with a perfect ground reached within one inch of the wire. It is a scientific

fact, of which we take judicial notice, that if a 22,000-volt wire had been surcharged with a sufficient voltage to jump for a distance of one inch, such additional voltage would have discharged into this ground wire at 1 inch, rather than to ground through the hand of the plaintiff at 21 inches. Moreover, the iron beams of the substation were within 12 inches of the 22,000-volt wire, and connected with the corrugated iron surface of the substation so as to form a perfect ground, and this would receive the discharge before plaintiff could have been injured as he states. Plaintiff testified that the rag in his hand was moist and dirty; that he had been flipping the rag about in an endeavor to clean the 100,000-volt wire at a point higher than he could reach, and for the purpose, also, of shaking the dust out of it.

It is defendant's contention that his injury resulted from the rag coming in contact with the 22,000-volt wire, and thus forming an arc which, once formed, may extend a distance of 2 or 8 feet. If the injury thus resulted, it is evident that it was occasioned by the carelessness of the plaintiff rather than the gross negligence of the defendant. In determining the credibility of the plaintiff's testimony, we may freely concede that he testified with the utmost good faith. It is doubtful if any one who has survived a stroke of lightning or a short-circuit from a high-voltage wire could either observe, or, if he did, could remember, the circumstances. But if we assume that his testimony is absolutely true, and that the current did leap over this intervening space of 21 inches, without short-circuiting into the lightning arrester or any of the nearer metal conductors in the building, it would at once follow that this extraordinary violation of all known rules of the conduct of electricity of that voltage was such as no human being could anticipate, and the failure to anticipate it could not be considered negligence. The defendant, in arranging its substation, was only bound to make provision for those laws of nature of which one of ordinary prudence engaged in a like enterprise would be required to take notice. Whether, therefore, we regard the circumstances detailed by the plaintiff as an inherent impossibility, or as an extraordinary and unprecedented electrical phenomena, the defendant cannot be held guilty of gross negligence in the arrangement of its electrical devices in the substation.

A good deal is said in the evidence and in the briefs concerning the distance which should be maintained between wires carrying a 22,000-volt current and those carrying 100,000-volt current. This testimony has no significance in this action, for the reason that such testimony is directed to a condition where both wires are charged with the current they are designed to carry, and has

no relevancy to a situation where the 100,000-volt wire is "dead." We have therefore directed our attention to that situation. It is proper to say that the testimony of an expert witness to the effect that it was customary and desirable that a partition should be placed between wires carrying these voltages, and that such partitions would have made the place a safe one in which to work, has no significance, other than to point out the fact that, if there had been a partition between the plaintiff and the 22,000-volt wire, he would not have been injured. This, of course, is a self-evident fact. Mr. Van Norden, an electrical engineer, was asked his opinion as to what precautions could be made which would make the situation perfectly safe to a man working where plaintiff worked. He replied:

"The only safe method of construction in a point of that kind, and I think it is general practice, would be to have a barrier or cell wall outside of the 100,000-volt line to protect the 100,000-volt line from any possible circuit that might be near it. In other words, there should have been a barrier between the 100,000-volt line and the 22,000-volt line."

He further testified that the ordinary form of barrier is a thin reinforced concrete wall, and that the practice was to place each 100,000-volt transformer in a separate cell, or the three in a single cell; that is, a room closed at both ends, at the back and top, and open in front. It developed, however, that the reason this witness considered the place where plaintiff was working dangerous was because:

"It is always dangerous to work within reaching distance of a 22,000-volt line, because a man might unconsciously put his hand out, or his coat might fly out, or in this case the rag that was in the man's hand, the point of the rag might fly out, as he moved around unconsciously, and either come very close to the wire, or actually strike it, in which case there is no question but he would get a short-circuit falling down into his hand, and hence over his body—as it probably was in this case, because, if it had gone through his body, it probably would have killed him—down through his shoes, and into the transformer, and to the ground."

"Q. Then, as I understand it, it is because the man might come close to the 22,000-volt wire? A. He might; if he was constantly keeping his presence of mind, he might work up there every day for years, and not actually come close enough to get a shock off of that wire. Then, again, in an unconscious moment, he might do it. It does not seem to me that there is any particular question of negligence; it might be unconscious."

In response to a question of a juror, this witness also testified that the accident would have been impossible if such a barrier had been erected between the two wires. The arcking distance of a 22,000-volt current having been established by expert testimony, the

question as to whether or not plaintiff was working in a safe place was not a question for an expert witness, and although the evidence came in, in the first instance, without objection, motion was made to strike it out. It is sufficient, however, to say that the witness do no more than to call the attention of the court and jury to the obvious fact that a man working within 31 inches of a live wire might carelessly or thoughtlessly come in contact with it. Whether or not this constituted either negligence or gross negligence was a question of law and fact. Where, as here, all the facts are either shown without dispute, or by scientific principles of which the court takes judicial notice, the question of whether or not the evidence was sufficient to support a finding of gross negligence is a matter of law for the court.

In the view we take of the case it becomes unnecessary to determine whether the plaintiff was guilty of negligence, or that the defendant was guilty of lack of ordinary care; for we hold, as a matter of law, that the plaintiff failed to establish that gross negligence upon which his cause of action was predicated. For the same reason it is unnecessary to determine whether such negligence is personal, within the meaning of the Roseberry Act, supra, and it is unnecessary to pass upon the question of whether the defenses of contributory negligence or assumption of risk are available under the Roseberry Act, in cases based upon the gross personal negligence of the employer.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.

LENNON, J. I dissent. In this action for damages for personal injuries sustained by the plaintiff while in the employment of the defendant, a corporation engaged in the business of generating, transmitting, and distributing electricity for lighting, heating, and power purposes, the prevailing opinion reversed the judgment in favor of the plaintiff upon the theory that the evidence adduced upon the whole case did not support the finding of the jury, implied from their verdict, that the defendant was guilty of gross negligence in the maintenance and operation of that part of its power plant where the plaintiff was injured during the course of his employment. The prevailing opinion holds that defendant corporation was not guilty of gross negligence. I cannot concur in this conclusion. The facts of the case, as I find them from a perusal of the record, are these:

Along defendant's main transmission line, which carries electricity at 100,000 volts from its generating plant or power house in Butte county to San Francisco Bay, are sev-

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eral substations. These substations are installed for the purpose of reducing the voltage carried by the main transmission line for distribution from the substations for commercial use in the surrounding districts. At the time plaintiff was injured he was employed as an operator at one of the substations of defendant located at Isleton, Cal. It is the duty of an operator in such a substation to watch the apparatus and keep it in proper working condition. In this substation, where plaintiff was employed, were three transformers, standing in a row, north and south. They were 11 feet in height, 6 or 7 feet in diameter, and consisted of coils of copper wire in a metal casing, into which the electricity was carried at 100,000 volts by means of wires connected with the main transmission line. After being reduced in voltage, the electricity was carried from the transformers at 22,000 volts by wires issuing from the covers of the transformers. The covers of the transformers, which were of boiler iron, were rounded, sloping from the center toward the edges, the only flat portion of the surface being a man-hole cover about 18 inches wide and 2 feet long. Upon the top of each transformer, projecting at an angle therefrom, and close to the edge of the transformer shell, were two bushings,  $4\frac{1}{2}$  feet in height and about 10 inches in diameter at the bottom, tapering toward the top. The purpose of these bushings, which were made of fiber rings alternating with fiber discs, was to insulate the 100,000-volt wires so as to prevent the electricity running to ground over the metal shell of the transformer. There were also two smaller bushings, for the purpose of insulating the 22,000-volt wires issuing from the tops of the transformers; but they are of no importance for the purposes of this case. In addition to the connection with the main transmission line, the several substations were also electrically connected between themselves, so that, in case of a shut-down at any one substation, electricity could be fed to the district thus affected from other substations.

It was the custom to shut down the substations once a month in order to clean the apparatus of the substations, and this was ordinarily done after midnight, when the demands for electricity were at a minimum. There were three operators at defendant's substation at Isleton—Dorman, the chief operator, Post, and the plaintiff. It was arranged to have a general cleaning of this substation after midnight, November 3, 1913, and plaintiff, in compliance with a direction from Dorman, opened the switches for the purpose of shutting off the current from the wires leading into and out of the substation. All of the wires and apparatus in the substation were thus entirely freed from electricity, with the exception of the sta-

tion bus, which consisted of three parallel wires near the roof and about 20 feet from the ground, running east and west (at right angles to the row of transformers) across the south end of the building, and feeders dropping therefrom into oil switches set on the shelf against the south end of the building. This station bus was fed from other substations and carried electricity at 22,000 volts. No cleaning was to be done on the station bus, and it was left charged in order to furnish electricity to the neighboring towns and light for the substation while the high-tension bank was shut down during the cleaning process. After the substation was thus shut down, the three operators went upon the roof of the building to clean some of the apparatus. They then began to work inside the building, and Dorman told plaintiff to "take No. 3," meaning thereby to clean the bushings and wires on the top of the transformer furthest toward the south, known as "No. 3." Plaintiff, standing on the top of the transformer, cleaned its north bushing, and then proceeded to work on the south bushing. After cleaning the south bushing, he began to dust the wire above the bushing. He had a cotton rag, about 2 feet square, and with this rag reached up as high as he could to clean the upper part of the wire, and then, holding the greater part of the rag in his hand, wiped down the wire. Just as he was dropping his hand to his side, the back of the hand was struck by a flash from a live 22,000-volt wire of the station bus, which was just to the south of the transformer upon which plaintiff was standing. The electricity severely burned the back of his right hand and right forearm, and passed through his body, burning the sole of each foot. The shock threw him off the transformer to the floor beneath.

On the night in question there was "a very heavy fog, everything was just wringing wet," and this condition prevailed inside as well as outside the substation, owing to the doors of the substation being left open for ventilating purposes. At the time he was injured plaintiff was 21 years of age, and had been working at Isleton about a month. Although he had worked in electricity to some extent before coming to Isleton, he had no experience with high voltage, other than one month's work as an operator at defendant's substation at Cowell. The jury rendered a general verdict in favor of plaintiff for damages in the sum of \$6,735.83. On defendant's motion for a new trial, the court made an order granting the new trial unless plaintiff stipulated to deduct from the damages awarded the sum of \$1,735.83. This was consented to by plaintiff, and the motion for a new trial was thereupon denied, whereupon the defendant appealed from the judgment.

It is contended by appellant, and the prevailing opinion holds, that gross negligence

has not been proven. The distance between the dead 100,000-volt wires, which plaintiff was cleaning, and the nearest point of the live 22,000-volt wires of the station bus, was 28¼ inches, according to appellant's measurements; 31 inches, according to the estimates of witnesses for respondent. Plaintiff's hand, owing to the thickness of the rag he held and the movement in dropping his hand to his side, was about 21 inches from the nearest live wire at the time it was struck. It is pointed out by appellant that it was testified to at the trial by the expert witnesses, including those who testified for plaintiff, as well as those called by the defendant, that the arcking distance of 22,000 volts of electricity is, under no conditions, more than 1.2 inches; that is to say, the air space across which a current of electricity will jump in its effort to reach the ground is ordinarily less than 1 inch, and, under any circumstances, never greater than 1.2 inches. Opposed to this expert testimony is the testimony of the plaintiff that the current "jumped right over through the air, and it caught me on the back of the hand." It is further pointed out that, since electricity seeks the path of least resistance, and there were other conductors nearer the wire than plaintiff's hand, had the electricity jumped from the wire, it would have done so, not a distance of 21 inches to plaintiff's hand, but to the conductor, the shortest space from the wire, such as the lightning arrester outside the substation.

The theory is advanced by appellant, in support of the contention that the evidence fails to show any negligence on the part of the company, that, since plaintiff's hand was admittedly 21 inches away from the live wire at the time it was struck, plaintiff must have carelessly brought his rag, by shaking or otherwise, or some other conductor, within an inch of the live wire, and thus drawn an arc. It is further argued that, if the 22,000 volts did arc 21 inches directly to the back of plaintiff's hand, the occurrence was so unheard of and opposed to every known principle of electricity that it was purely an accident, and not a danger which appellant was required to guard against in providing for the safety of its employees. However that may be, and assuming that 22,000 volts could not jump 21 inches, there is no reason thus presented for disturbing the verdict in this case. There were no special findings, simply a general verdict in favor of plaintiff. "It is, of course, the duty of this court to treat all of the facts brought out by the evidence which are necessary to support the verdict as having been found to be true by the jury" (*Clark v. Tulare Dredging Co.*, 14 Cal. App. 414, 429, 112 Pac. 564, 570), and, conversely, the verdict of the jury cannot be assumed to be based on inherently im-

probable testimony, if there is other testimony sufficient to support the verdict.

Plaintiff's action was based upon the alleged personal gross negligence of defendant in maintaining a live 22,000-volt wire in too close proximity to the place where plaintiff was required to work, because of which plaintiff was injured by a current of electricity which "jumped and passed" from the said live wire "and came against and in contact with plaintiff's right hand and arm." Consistently with these allegations of the complaint, plaintiff might have drawn an arc by a close approach to the live wire with his rag, and the arc having once been formed, it could, according to the testimony of the expert witnesses, be extended for 2 or 3 feet. The jury was entitled to infer, from the evidence adduced upon the whole case, that this was the manner in which the current "jumped and passed" to plaintiff's hand, despite plaintiff's general statement that the spark jumped directly to the back of his hand. *Follmer v. Rohrer*, 158 Cal. 755, 112 Pac. 544; *Bancroft-Whitney Co. v. McHugh*, 166 Cal. 140, 134 Pac. 1157; *Lynch v. Lynch*, 22 Cal. App. 653, 135 Pac. 1101; *Turner v. Bush (App.)* 185 Pac. 190. It is not, therefore, essential to the general verdict in favor of plaintiff to assume that the jury found that the electricity jumped directly through the air and, without the aid of any intervening substance, the entire 21 inches to the back of plaintiff's hand.

Moreover, there was, in my opinion, evidence tending to show the existence of gross negligence, irrespective of the question of the arcking distance of the 22,000 volts of electricity. While the employer is not an insurer of the safety of his employees, he must furnish a place to work in which is "reasonably safe, having regard to the character of the work itself." *Spivok v. Independent Sash & Door Co.*, 173 Cal. 438, 440, 160 Pac. 565, 566. The jury, when arriving at a general verdict, were warranted in taking into account the dangerous nature of electricity, the high voltage which the wires carried, the youth of plaintiff, his inexperience in high-voltage work, and the fact that he had never before performed the particular duties upon which he was engaged at the time of his injuries. It further appears that at least one expert witness, a consulting engineer, testified that, although 22,000 volts could not arc over 1.2 inches, the place in which plaintiff was working was not a safe working distance from the live wires, and that, under the circumstances, 28¼ inches, or even 31 inches, was in dangerous proximity to the 22,000-volt wire, because of the likelihood that a person working in that position would come sufficiently close to the live wire to produce a short circuit. It was stated by this witness, and others, that the only safe method of construction in a sit-



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uation of that kind was the erection of a concrete barrier in the form of a concrete wall about the transformers; that this was the general practice; that the wires were thus properly protected in other substations belonging to the defendant; and that this "barrier should be there for a twofold purpose—one for operating purposes, and the other for the safety of anybody working in the cell." There was testimony, and it is conceded, that if the barrier had been erected in this case the occurrence now under consideration could not have happened. The evidence also shows that the standard distance between 100,000 and 22,000 volt wires is between 36 and 42 inches; but in one or two cases, where there were building difficulties, as at Isleton, this distance was cut down. There is also evidence that, by installing a switch at a cost of less than \$100, it would have been possible to render the substation entirely free from current by shutting off the current from the station bus and obtaining light for the substation from a small transformer house outside the substation.

While most of the evidence above set forth was by no means uncontradicted, the weight of the testimony was, of course, to be determined by the jury. Viewing the record as a whole, and irrespective of any conclusion this court might reach from the same evidence, it cannot be said that the jury was unwarranted in concluding that, even assuming that the electricity could not directly arc a distance greater than 1.2 inches, defendant failed to exercise the required degree of care for the safety of its employé in requiring him, under the above-described conditions and in an inconvenient location such as that presented by the transformer cover, to work within 28½, or 31, inches of a live 22,000-volt wire and unprotected therefrom.

This, I take it, must be so in keeping with the rule generally accepted and uniformly invoked in the admeasurement of the degree of care required of electric companies for the safety of their employés, and which is to the effect that, while such companies are not required to operate their plants to the point of perfection in so far as concerns the material construction of the plant or the character of the apparatus and appliances, for the reason that they are not insurers of their employés against accident, nevertheless they are obligated to use reasonable care; that is to say, such care as, under all the circumstances, would obviously be required in a given situation in the construction, maintenance, and operation of their plants. Falling short of this, they will generally be held responsible for resultant injuries to employés. It is a reasonable corollary of this rule that the degree of care to be employed

by electrical companies in the maintenance and operation of their plants varies with the degree of danger dependent upon a particular situation, for obviously a prudent person, individual or corporate, must augment the character and quantity of the care according to the contingencies of differing and varying situations. Thus, if the danger of injury to an employé is but slight, as, for instance, in a situation involving the likelihood of contact with transmission wires carrying merely a harmless current of electricity, as do ordinary telephone and telegraph wires, ordinary care only will be demanded of the company in the maintenance and operation of such wires. On the other hand, where the transmission wires are heavily loaded with high voltage, a very high degree of care—indeed, the highest degree of care commensurate with human prudence and caution and consistent with the practical conduct of business—is required to guard against accident or death which inevitably follow contact with such high-voltage wires. Crosswell on Electricity, § 234; Curtis on Electricity, § 405. The rule is, perhaps, better stated in the case of *Ugla v. West End Street Ry. Co.*, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481, where it is said:

"The vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject-matter, the danger and force of the material under the defendant's charge."

This being so, then the question of whether or no the required care has been used, is, in the majority of cases, necessarily one for the jury, except when the court can say positively that no reasonable man would have acted in the manner complained of, or that a reasonable man must have acted in the manner complained of. *Lee v. Electric Light Co.*, 140 Pa. 618, 21 Atl. 405; *Southwestern Tel. & Tel. Co. v. Woughter*, 56 Ark. 206, 19 S. W. 575.

With this rule in mind, and having in mind, also, the facts above referred to, namely, the high voltage, the insecure footing afforded by the cover of the transformer, the youth and inexperience of plaintiff, among other circumstances, I cannot concur in the conclusion of the prevailing opinion that the corporation defendant was not guilty of negligence in the maintenance of its plant, or that part of its plant in which the plaintiff was injured while at work for the defendant. And surely, if in keeping with that rule it can be fairly said, as I think it can be so said, that the corporation defendant was, under all of the circumstances of the shown situation, negligent in not making a known highly dangerous place rea-

sonably safe to work in with the means at hand to do so, then in view of the further fact that the expenditure of the paltry sum of \$100 by the corporation defendant was all that stood between the plaintiff and reasonable safety from serious injury, it is not difficult to see and rightly say that the corporation defendant was indeed negligent out of all measure and beyond all allowance; in a word, that it was guilty of gross negligence.

I would find no difficulty in demonstrating that such gross negligence was the personal negligence of the corporation itself. But, in view of the fact that the prevailing opinion rests a reversal of the judgment solely upon the ground that the evidence shows no gross negligence on the part of the defendant, it would be an idle act to discuss the question of personal negligence or any of the several other questions involved upon the appeal.

LAWLOR, J. I dissent. I am in accord with the opinion of Mr. Justice LENNON, and shall confine myself to some additional observations. The main opinion rests upon a negative answer to the question:

"Was it negligence so to arrange the substation that a man was required to clean the wire distant  $28\frac{1}{4}$  inches from an uninsulated wire carrying a current of 22,000 volts?"

This conclusion is arrived at by a line of reasoning that we will take judicial notice that it is a "scientific impossibility" for a current of 22,000 volts to "jump" a distance of 21 inches; that this was not the place where the plaintiff was usually required to work, and that the known proximity of the wires made it imperative for him to "be alert to the perils of his position"; that, inasmuch as he admitted "flipping" the cleaning rag about in order to reach higher on the wire which he was wiping, and also to shake the rag free from dust, "it is evident" that the injury was occasioned by his carelessness rather than by any negligence of the defendant; that, moreover, in view of the "scientific impossibility" already referred to, it cannot be considered negligence for the defendant to fail to provide against such an extraordinary violation of all known rules of the conduct of electricity as the "jumping" of the current over a space of 21 inches; and, finally, again calling attention to the "scientific principle" that electricity will not "jump" a distance of 21 inches, it is declared that the evidence does not sustain the implied finding that defendant was guilty of negligence in failing to provide a safe place for the plaintiff to work.

May we take judicial notice that a 22,000-volt current will not "jump" 21 inches? The

general rule as to when a court will take judicial notice is stated in *Dunphy v. St. Joseph Stockyards Co.*, 118 Mo. App. 506, 523, 95 S. W. 301, 306:

"Courts should observe the utmost caution to avoid assuming knowledge of natural facts and laws that are beyond the scope of *common positive knowledge*." (Italics mine. See, also, 124 Am. St. Rep. 21, note.)

This rule is thus expressed in 15 R. C. L. 1127:

"Judicial notice will be taken of scientific facts which are universally known, \* \* \* but they must be of such universal notoriety *and so generally understood* that they may be regarded as forming part of the common knowledge of every person. \* \* \* Cognizance may not be taken of scientific matters of uncertainty or dispute or of insufficient notoriety." (Italics mine.)

And in *Curtis, The Law of Electricity*, p. 3, it is said:

"So dangerous a force as electricity must legally be considered in the same class as high explosives and other treacherous and destructive agents. \* \* \* The power and manifestations of which are fully comprehended only by experts."

See, also, *Brown v. Consol. Light, etc., Co.*, 137 Mo. App. 718, 109 S. W. 1032; *Campbell v. United Ry.*, 243 Mo. 141, 147 S. W. 788.

Several witnesses did testify that they had never known a current of 22,000 volts to "arc" more than 1.2 inches, but Reuben D. Bennett, an electrician, stated:

"Electricity is an unknown quantity. They presume that it will 'jump' so far. It never acts the same twice; there is no knowing how far it will go."

I do not think that the "arcking" distance of 22,000 volts has been proved to be so invariable as to attain the certainty of a scientific fact, or that it is a matter of such common knowledge, or so generally understood, as to entitle it to recognition under the theory of judicial notice.

The majority opinion, in discussing the plaintiff's duties in the cleaning of the transformer, states that—

"It was unnecessary to clean the surface of the copper wire, as the purpose of the cleaning was to avoid the danger of short-circuiting the current over the surface of the bushing."

The evidence was in conflict on this point. There was some testimony that it was unnecessary to clean the wires, but the chief operator at the substation testified that it was the practice to wipe the wire, as well as the bushing, and the plaintiff stated that such was the practice, and that on the occasion in question he had been ordered by the

chief operator to clean the wire. It seems to me, from this state of the evidence, that the jury may have found that it was customary to clean the wire, or, at any rate, that the plaintiff, in cleaning it, acted under the instructions of one in authority.

I am particularly impressed by the evidence from which the jury may have decided that the injury was the result of a false policy of economy in failing to erect a concrete wall between the station bus wires and the transformer. The complaint alleged that defendant's attention had, prior to the time when plaintiff was injured, been repeatedly directed to the dangerous proximity of the 22,000-volt wire. The chief operator testified that, in a conversation with defendant's electrical engineer, who controlled and supervised changes in substation construction, said, referring to the spot, where plaintiff was injured:

"'We have one awfully dangerous place to work here,' and I showed him this bus, how close it was to the 100,000, and where we had to get up in there to work. \* \* \* I told him it was absolutely unsafe. \* \* \* He says: 'I know it is pretty close. This place is not arranged just as we would like to have it, but we have not got money to spare now to make any changes.'"

This witness testified that he had had similar conversations with the superintendent of substations and the superintendent of operations, both of whom acknowledged to him that the place was unsafe, but said that the company could not afford to install safety appliances. As Mr. Justice LENNON points out, the expenditure of \$100 would have rendered the place safe. The defendant was under the duty of providing a reasonably safe place for the plaintiff to work, and it must be implied from the verdict, and the order refusing to grant a new trial on the claim of insufficiency of evidence, that the defendant failed to perform this duty. There is nothing in the Roseberry Act to indicate that the term "personal gross negligence" implies that actual knowledge of the dangerous condition of the premises must be brought to the attention of the officers of a corporation before the failure to remedy such condition becomes the negligence of the corporation.

I therefore conclude that it cannot be held, without invading the province of the jury, that, upon the application of the theory of judicial notice, or otherwise, "the plaintiff failed to establish that gross negligence upon which his cause of action was predicated," nor that the plaintiff was careless in wiping the wires, nor that the defendant was not guilty of personal gross negligence in failing to provide a barrier between the station bus wires and the transformer.

(183 Cal. 476)

## THOMPSON v. KOELLER et al. (L. A. 5371.)

(Supreme Court of California. Aug. 4, 1920.)

1. Bills and notes  $\S$ 489(1)—Complaint on note unconditional on face need not allege extrinsic condition and fulfillment.

In an action to recover on a note unconditional on its face and to foreclose a mortgage given to secure it, plaintiff need not allege the existence or fulfillment of a condition to the obligation, but if such condition is pleaded by defendants, he may, under the Code provision, that matter in the answer is denied, prove fulfillment of the condition without variance from his cause of action as alleged.

2. Executors and administrators  $\S$ 227(1)—Claim need not state extrinsic condition to liability on unconditional note.

A claim against a decedent's estate on a note unconditional on its face need not allege the existence and fulfillment of an extrinsic condition to the liability of decedent on the note.

3. Executors and administrators  $\S$ 227(1)—Claim need not state facts with particularity of complaint.

A claim against the estate of a decedent need not, under Code Civ. Proc.  $\S$  1494, prescribing the requisites of such a claim, state the facts on which the claim is based with the particularity required in complaint to recover on those facts.

4. Executors and administrators  $\S$ 227(2) — Claim on note to secure another note need not set out secured note.

Where decedent had given a note absolute on its face to secure the payment of a note by third parties, the payee of decedent's note need not set out the secured notes in the claim against decedent's estate, under Code Civ. Proc.  $\S$  1497, requiring a copy of an instrument on which the claim is founded to accompany the claim.

5. Appeal and error  $\S$ 762—Points first advanced in appellant's reply brief need not be discussed.

Points for reversal, which are advanced for the first time in appellant's reply brief, need not be discussed by the Supreme Court.

## In Bank.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Walter M. Thompson against Frederick Koeller and others. Judgment for the plaintiff, and defendants Frederick Koeller and another appeal. Affirmed.

Waldo M. York and J. H. Ryckman, both of Los Angeles, for appellants.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

OLNEY, J. This is an appeal by the two principal defendants from a judgment against them foreclosing a mortgage upon real prop-

erty given to secure a note for \$2,000. The facts are:

The note and mortgage were executed by the defendant Frederick Koeller and his wife, Louise Koeller, the latter of whom subsequently died and the administrator of whose estate, Walter H. Richards, is the other of the appealing defendants. The note and mortgage by their terms denote an absolute obligation to pay on the part of the Koellers, but were in fact given as collateral security for the payment of certain notes of third persons given the plaintiff for the purchase price of certain tractors which such persons were buying from him, and which he was willing to sell to them on credit secured by the Koeller note. These notes were not paid, and the purchasers of the tractors came into default upon them in an amount in excess of the Koeller note, with the result that the obligation of the latter, which in its inception was conditioned upon such default, became unconditional.

In this situation, Mrs. Koeller having died, the plaintiff presented to the defendant Richards as administrator of her estate a claim for the amount due on the note, specifying that the claim was upon the note, a copy of which was attached, and that the note was secured by mortgage, a copy of which was likewise attached. The claim, however, did not specify that the note had been given as security, and in particular did not set out copies of the notes for which it was security. The administrator neither allowed nor rejected the claim, and the statutory time for him to act having expired, the plaintiff brought the present action.

The plaintiff's complaint was in the usual form of a complaint in a foreclosure suit, setting out the note and mortgage in full, and alleging presentation of the claim against Mrs. Koeller's estate. The complaint, however, like the claim, did not set out that the note had originally been given as security. The only substantial defense pleaded in the defendants' answers was that the note had been so given, coupled with the averment that the notes of the third persons evidencing the primary obligation to the plaintiff had been discharged. At the trial the plaintiff introduced the note and mortgage in evidence, the note being overdue by its terms, testified that nothing had been paid upon it, and rested. The defendants then proved that the note had been given as collateral security, and rested. The plaintiff then sought to introduce evidence of the default on the notes which the note in suit had been given to secure. To this the defendants objected. The trial court, however, permitted the evidence, and at the conclusion of the trial found that the Koeller note had been given as security, but that default had been made upon the notes it was given to secure in an amount larger than the amount of the Koeller note, and gave judgment for the plaintiff.

The principal points made by the defendants on appeal are two. It is claimed first that the court should not have permitted the plaintiff, after the defendants had shown that the note in suit had been given as security, to prove the default in the obligations secured. The contention of the defendants is not a mere procedural one, as to which there could be no reasonable question, that the court might not in its discretion permit the plaintiff to reopen his case after he had once rested. Their contention goes much deeper, and is essentially that the evidence introduced made out a cause of action at variance with that alleged in the complaint. The particular point is that the complaint, in alleging merely the execution and maturity of the Koeller note and that it was unpaid, without alleging that it was given as security, sets out an unconditional obligation, while the proof showed a conditional obligation, that is, one conditional in its inception on a default upon the notes it was given to secure.

The second contention of the defendants is based upon much the same proposition. It is that the claim presented against the estate of Mrs. Koeller was insufficient, in that it, like the complaint, failed to set out that the note had been given as security, and in particular failed to set out copies of the notes whose payment it secured.

In support of both contentions, the defendants rely upon *Stockton Savings Bank v. McCown*, 170 Cal. 600, 150 Pac. 935. In support of the first, they rely particularly upon the following language from the opinion in that case:

"It needs no citation of authority to sustain the rule that in a suit against a surety the principal obligation and its nonpayment must be clearly set forth because the surety's liability is only conditional. But there is ample authority well illustrated by the following citations [citing a number of authorities]."

[1] Now there can be no question as to the correctness of the rule so laid down in a case where the instrument upon which the suit is brought is by its own terms conditional. If such an instrument is set forth in the complaint, or it otherwise appears from the allegations of the complaint that the obligation sued on was conditional, as, for example, if it appear that the note was given as security, the complaint plainly does not state a cause of action unless it also alleges the happening of the condition necessary on the face of the complaint to entitle the plaintiff to recover. None of the cases cited in *Stockton Savings Bank v. McCown* as authority for the rule goes any further than this.

But such a rule has no application whatever to a case such as the present, where the instrument sued on is unconditional by its terms, and the condition to which it is subject is created by extrinsic facts entirely. In such a case, although the instrument may be set

out in full in the complaint, there is nothing to show that the obligation is not absolute, and the complaint states a good cause of action. As a defense the defendant may allege and show, as the defendants did here, that the obligation was in fact conditional. When the defendant does this, however, he does not make out a variance between the instrument sued on and the one shown by the proof. The instrument shown by the proof is identical with the one pleaded. The facts which the defendant pleads and proves are by way of confession and avoidance of the case alleged by the complaint, not by way of denial of it. That this is so is demonstrated by the fact that the defendant cannot truthfully deny the facts alleged in the complaint, and in particular the fact of the execution of the exact instrument sued upon. The matter alleged in the answer, to wit, that the obligation of the instrument sued on was conditional, being by way of confession and avoidance, the plaintiff might at common law in turn avoid the effect of the matter so alleged by the defendant by replication or reply, alleging that the condition set forth in the defendant's plea or answer has in fact occurred, so that the existence of the condition in the first instance is no longer a defense. Under our system of pleading, there is no replication, but when new matter is pleaded in an answer by way of confession and avoidance, the plaintiff may by his proof either take issue as to its truth, or may avoid it by the showing of still further facts which destroy its validity as a defense. This is exactly what was done in the present case. The plaintiff proved the note which was overdue by its terms, and that nothing had been paid on it. By so doing he made out a *prima facie* case. The defendants did not deny this or controvert it in any way. They showed merely that payment of the note was conditional because it had been given and accepted as security. This was a good defense, unless there had been a default in the obligation secured, and even then was a good defense, except to the extent of such default. The plaintiff then by way of proper replication to this defense showed that a default on the principal obligation had in fact taken place, and to an extent in excess of that sought to be recovered on the security. The effect of this proof was to show, not that the plaintiff was entitled to recover on a different cause of action from that pleaded in his complaint, but that the defense which the defendants pleaded was not a good defense, that the contingency upon which the defendants were liable upon the note sued upon had in fact occurred.

The identical question under discussion was presented and decided in *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 1000. There an action had been brought upon a promissory note absolute by its terms, as was the note here. But the obligation upon the note was

in fact conditional, since it had been given for the last payment upon the purchase price of certain real property, and our decisions are that in such a case it is a condition precedent to a recovery upon the note that a deed to the property be tendered the vendee. The identical point was made that is made here, that the complaint should have alleged the sale agreement so as to show the conditional character of the obligation on the note, and the tender of a deed so as to show the happening of the condition. Upon this point the court said, in language which might well be used in deciding this case (148 Cal. 545, 83 Pac. 1002):

"On the authority of *Naftzger v. Gregg*, 99 Cal. 83 (33 Pac. 757, 37 Am. St. Rep. 23), it is said that the complaint is defective because it contains no averment of the agreement of sale and tender of a deed in compliance with its conditions. Some expressions in the opinion in that case imply that a complaint upon a promissory note in the usual form, good upon its face, can be rendered defective by reference to affirmative allegations in the answer. If this were correct, the defendant in such a case would, logically, be entitled to judgment upon the pleadings by reason of allegations in the answer, which by law are deemed controverted (Code Civ. Proc. § 462), and of the truth of which there is no evidence. This would be contrary to long-established rules of pleading and evidence. The decision cannot be given such effect. The course of pleading and procedure in such cases is well established, and it was followed in the case at bar. The defendants in their answer alleged the execution of the agreement showing the concurrent conditions necessary to be performed, and alleged nonperformance by plaintiff. Upon the trial plaintiff introduced in evidence the note sued on. This established all the allegations of the complaint upon which issue was taken, and he thereupon rested his case. Without further evidence he would have been clearly entitled to judgment for the amount of the note. The defendants, in support of the affirmative allegations of the answer, then introduced the agreement, and proved that the note was given as evidence of the debt for the price of the property. *Naftzger v. Gregg* is perhaps authority for the proposition that upon this being shown the burden lay upon the plaintiff to prove an offer to perform by tendering a conveyance sufficient to transfer the interest agreed to be sold. This we need not determine, for, as above stated, the evidence of such tender was sufficient, and upon this appeal it is immaterial which party introduced it."

See, also, *Bank of Paso Robles v. Blackburn*, 2 Cal. App. 146, 83 Pac. 262.

An examination of the opinion and also of the record in *Stockton Savings Bank v. McCown* shows that upon the point under discussion it is not in conflict upon its facts with *McGue v. Rommel* and the views we have just expressed. The complaint set out the note, and as a part of the note a statement written on its face that it was security for the payment of another note. There was no

allegation, however, of a default upon the note secured. In other words, the complaint set forth in effect a conditional obligation, and failed to allege the happening of the condition which alone would entitle the plaintiff to enforce the obligation, and therefore necessarily failed to state a cause of action. But such was not the case here. Here the complaint did state a cause of action, and the evidence which the plaintiff introduced after the defendants had rested was by way of proper replication in avoidance of the defense made. The plaintiff had a positive right to introduce such evidence, and the action of the trial court in permitting him to do so must be affirmed.

[2] Upon the second point made by the defendants, that the claim presented against Mrs. Koeller's estate failed to state that it was upon a note given as security or to set out a copy of the notes secured by it, the reliance of the defendants is also, as we have stated, upon the authority of *Stockton Savings Bank v. McCown*. And upon this point we can see no distinction between it and the present case. The very point of the decision there was that, where a claim is presented against an estate upon a note given as security for another note, the claim must contain a copy of the latter as well as the first. The claim in the present case is of just that character, and did not contain copies of the notes secured. The decision goes upon the principle, which it declares, that—

"The rule with reference to the presentation of claims is as rigid as the rule of pleading applying to a complaint."

Now, in the first place, it is evident upon a brief consideration that the rule actually applied in *Stockton Savings Bank v. McCown* is even stricter than the rule it states. It was not necessary for a valid complaint in that case that it set out a copy of the note for which the note sued on was given as security, or even to state its terms with any particularity. The only bearing of that note on the case was on the point of a default having occurred upon it, so that the condition upon which the note in suit was payable had in fact occurred. When the decision requires a copy of the note secured, as well as of the note on which the claim is based, to be attached to the claim, it requires more than would be required of a complaint, and goes further than the principle upon which it proceeds, that the sufficiency of a claim is to be tested by the rules as to the sufficiency of a pleading, and is in fact at variance with and opposed to that principle.

[3] In the second place, that principle is itself opposed to repeated statements by this court upon the very point. In *Pollitz v. Wick-ersham*, 150 Cal. 238, 250, 88 Pac. 911, 916, it is said:

"It is not required that a claim against an estate should state the facts with all the pre-

ciseness and detail required in a complaint, and the sufficiency of such a claim is not to be tested by the rules applicable to pleadings. It should, of course, as said in *McGrath v. Carroll*, 110 Cal. 79, 83 (42 Pac. 466), 'sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it,' and this, we think, the claim in question did."

In *Elizalde v. Murphy*, 163 Cal. 681, 689, 126 Pac. 978, 981, the claim as presented was anything but sufficient as a complaint, but the court said:

"The purpose of presenting a claim is to advise the party against whom the claim is presented of its nature. The Code nowhere defines the precise form of such a claim. Code Civ. Proc. §§ 1493, 1497, 1502. In *Pollitz v. Wick-ersham*, 150 Cal. 238 (88 Pac. 911), it is said: 'A claim against an estate is not required to state the facts with all the preciseness and detail required in a complaint, and its sufficiency is not to be tested by the rules of pleading.' Assuming that the presentation of a claim against the estate of Marre was necessary under the circumstances here shown, we are clear that the claim which was in fact presented was sufficient to comply with the law, to convey notice of the nature of the claim, of the circumstances out of which it grew, and its approximate amount, which manifestly was all that could be stated."

The spirit of these decisions at least also appears in the opinion denying rehearing in *Raggio v. Palmtag*, 155 Cal. 797, 806, 103 Pac. 312, and the rule they lay down was again expressly stated in *Western, etc., Co. v. Lockwood*, 166 Cal. 185, 196, 135 Pac. 496, 501, thus:

"It is claimed that the complaint does not state a cause of action, in that it does not show the presentation of a proper claim against the estate of deceased. No objection in this regard was made until long after the commencement of this action, and until long after the time for the presentation of claims had expired. We think that there is no force in the claim so made. To our minds, the claim presented was based upon the cause of action here asserted, and sufficiently showed the nature of plaintiff's demand to give the executors such information as was necessary to enable them to act upon it advisedly. It is not fatal to such a claim, especially in the absence of a demand for further particulars, that it is not drawn with the precision which would render a complaint good against a special demurrer."

None of these decisions is referred to in *Stockton Savings Bank v. McCown*, and apparently were not called to the attention of the court. In the subsequent case of *Doolittle v. McConnell*, 178 Cal. 697, 705, 174 Pac. 305, the court again repeats their language as stating the established law of the state, and makes no reference to *Stockton Savings Bank v. McCown*. Now that the question is before us again, we can but conclude that the rule of the decisions mentioned is in truth the

established law of the state, and that Stockton Savings Bank v. McCown should be overruled as contrary thereto. This conclusion is strengthened, if possible, by the fact that this rule is in accord with the requirements of the Code, while that of Stockton Savings Bank v. McCown is not. The whole matter of the presentation of claims against the estates of decedents is purely statutory and dependent upon the Code provisions, and there is not a word in the Code to the effect that a claim against an estate should set forth the facts upon which it is based with the precision and detail of a pleading. In fact, as was said in *Thompson v. Orena*, 134 Cal. 26, 29, 66 Pac. 24, 25:

"Not even the particulars of a claim already due and not contingent [the plaintiff's claim here was of that character] are required to be set out by the provisions of the section cited" (section 1494, Code Civ. Proc., prescribing the requisites of a claim).

[4] The object, indeed, of requiring the presentation of claims is very different from the object of a pleading in a contested matter. As stated in *Preston v. Knapp*, 85 Cal. 559, 561, 24 Pac. 811, 812, it is "to save to estates of deceased persons the costs and expenses of useless suits, suits to recover what would have been allowed and paid by the executor or administrator without suit." To subserve this object, both the Code and our decisions require, in the language of *McGrath v. Carroll*, 110 Cal. 79, 83, 42 Pac. 466, 468, quoted in *Pollitz v. Wickersham*, supra, and repeated in effect in *Elizalde v. Murphy*, supra, and *Western, etc., Co. v. Lockwood*, supra, that the claims "sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it." If a claim meets this general requirement, it is sufficient, unless it fails to meet some particular requirement of the Code. There are a number of such requirements, such, for example, as that prescribing the character of affidavit by which the claim must be supported, but the only one material here is the provision of section 1497, Code of Civil Procedure, that "if the claim be founded on \* \* \* an \* \* \* instrument, a copy of such instrument must accompany the claim." It has been held that if this provision is not complied with, a claim founded on a written instrument is defective. *Estate of Turner*, 128 Cal. 390, 60 Pac. 967. In the present case, as we have stated, copies of the note and mortgage executed by Mrs. Koeller were attached to the claim against her estate. The question is, Should there also have been attached copies of the notes which her note and mortgage were given to secure? It seems to us that it hardly requires argument to show that the claim against Mrs. Koeller's estate is not "founded," as that word is used in the Code, on the notes of third persons

which she never executed, but upon her own note, which she did execute. Putting it succinctly, it may be said that, while Mrs. Koeller was liable through her own note for the notes secured thereby, she was certainly not liable on them. The liabilities on the two are quite distinct and run against different parties, and the liability of Mrs. Koeller was founded on her own note, and not on notes to which she was not a party, even though her note was given to secure those. The claim against her estate was therefore not deficient in not setting out copies of those notes.

[5] There are a number of other points because of which the defendants and appellants ask for a reversal. They are all, however, of a minor character, and advanced for the first time in the appellants' reply brief. In view of this latter circumstance (*Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048; *Hibernia, etc., Society v. Farnham*, 153 Cal. 578, 96 Pac. 9, 126 Am. St. Rep. 129), we feel under no necessity for discussing them further than to say that we have looked at them and find none of them good ground for reversal.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SLOANE, J.

(183 Cal. 543)

**SOUTHERN PACIFIC LAND CO. v. SAN DIEGO COUNTY. (L. A. 5772.)**

(Supreme Court of California. Aug. 13, 1920.)

**1. Taxation  $\S$  543(6)—Complaint in action to recover taxes paid under protest held sufficient.**

A complaint, under Pol. Code,  $\S$  3819, to recover taxes paid under protest alleging plaintiff's land, worth 80 cents an acre, was assessed at \$1.50 per acre, also a systematic, willful, and intentional undervaluation of the lands of others, and their assessment at not to exceed 25 per cent. of true value, and that the board of supervisors, sitting as a board of equalization, by competent evidence without substantial contradiction, had full knowledge of such facts, and arbitrarily refused to equalize plaintiff's assessment with the others, held to state a cause of action, when construing the allegations liberally with a view to substantial justice, as required under a general demurrer by Code Civ. Proc.  $\S$  452.

**2. Taxation  $\S$  537—Willful refusal to reduce excessive valuation held fraud entitling plaintiff to recover excess taxes paid.**

Where plaintiff's property was assessed at nearly twice its real value, while other property was assessed in pursuance of a systematic, willful scheme, at not to exceed 25 per cent. of its real value, which was shown to the board of equalization by evidence without substantial contradiction, the board should have reduced plaintiff's valuation and its willful re-

fusal would seem to constitute "fraud" or something "equivalent to fraud," entitling plaintiff to recovery under Pol. Code, § 3819, for excess taxes paid under protest.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Southern Pacific Land Company against the County of San Diego. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Henry C. Booth, of San Francisco, for appellant.

W. F. Schuermeyer, Dist. Atty., and H. V. Mather, Deputy Dist. Atty., both of San Diego, for respondent.

ANGELLOTTI, C. J. This is an action brought under section 3819, Political Code, to recover taxes for the year 1917-18 paid by plaintiff under protest. A general demurrer to plaintiff's complaint was sustained, and judgment was thereupon entered for defendant. Plaintiff appeals from such judgment.

[1] The theory of the complaint is that the assessment of plaintiff's lands in said county upon which the tax was based was in part void, because the property was deliberately assessed at considerably more than its actual cash value, while all other property in the county was assessed systematically at not exceeding 25 per cent. of its actual cash value. According to the allegations of the complaint, plaintiff paid the whole tax under protest that the portion of the assessment in excess of a valuation of \$17,790 was illegal and void, and this action was duly brought to recover the alleged tax paid on such excess valuation.

The complaint alleges the assessment of plaintiff's lands on the assessment book for the year 1917-18 at the uniform valuation of \$1.50 per acre, "irrespective of the proportion of fair cash value borne by said lands to each other regarding said lands as parcels by government subdivisions," and that the same were not at any time mentioned in the complaint "of a value in excess of 80 cents per acre, treating said lands as an entirety." It further alleged due application by plaintiff to the board of supervisors of the county sitting as a board of equalization for a reduction in the valuation, and the denial, after hearing, of such application. It was further alleged "that it is true and it was shown to said board of equalization by competent evidence without substantial contradiction" that at the time said lands and all other lands in the county were assessed and equalized for the fiscal year 1917-18, there existed "a systematic, willful and intentional undervaluation of lands assessable by the county for the purpose of assessment upon the said county assessment roll, said undervaluation being at a percentage of true value, not to

exceed twenty-five per cent. (25%) for said fiscal year 1917-18"; "that the assessment and the equalization of said lands [plaintiff's lands] were each made arbitrarily and capriciously and without regard to their value, and without regard to and greatly in excess of said ratio of twenty-five per cent. (25%) so willfully, intentionally, and systematically adopted"; and "that said board of supervisors did not, as such board of equalization, during said month of July, 1917, or at all, change said ratio of not to exceed twenty-five per cent. (25%) so systematically, willfully, and intentionally adopted and carried out," nor change "the assessment made, as aforesaid, by said county assessor, and shown on said assessment book, so as to equalize the said assessment on said plaintiff's lands with the remaining assessments in said county." It was further alleged that such order denying plaintiff's application "was made with full knowledge of all the facts hereinbefore pleaded, and was made arbitrarily and capriciously, and without regard to said facts, and in disregard of the evidence then before said board showing said facts, which evidence was without substantial conflict or contradiction."

Construing these allegations liberally, with a view to substantial justice between the parties, which we are required to do as against a general demurrer (section 452, Code Civ. Proc.), they substantially state the following case: Plaintiff's lands in San Diego county had an average value of not to exceed 80 cents per acre, and were assessed upon the assessment roll at a uniform valuation of \$1.50 per acre. At the time of this assessment there existed in the county "a systematic, willful and intentional undervaluation of lands \* \* \* for the purpose of assessment upon the \* \* \* county assessment roll, at a percentage of true value not to exceed 25 per cent." This scheme was carried into effect on the assessment roll for the year with regard to the lands other than plaintiff's. All these matters were made to appear to the board of supervisors sitting as a board of equalization, "by competent evidence without substantial contradiction," and "without substantial conflict or contradiction;" but said board, with full knowledge of all such facts and without regard thereto, arbitrarily refused to equalize the assessment on plaintiff's lands with the remaining assessments.

Taking these to be the facts, as we must for the purposes of the demurrer, we are satisfied it must be held that plaintiff has stated a good cause of action. We do not understand it to be disputed that, as said by the Supreme Court of the United States in *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154, "it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of



one taxed upon the full value of his property." This statement finds ample support in the authorities, and was recognized by this court in *L. A. Gas & Electric Co. v. County of Los Angeles*, 162 Cal. 164, 168, 121 Pac. 384, 386, where we said:

"This is as true where the injurious effect so produced is caused by inequality of valuation as by any other cause, for, as said in *Judson on Taxation*, p. 608, 'it is obvious that where taxation is upon property that requires valuation, inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax.'"

[2] It must be conceded, of course, that it is thoroughly settled in this state that to our county boards of equalization has been confided the duty of determining "the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property so as to make all the assessments as equal and fair as is practicable," and that in discharging this duty "the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment so far as amount is concerned constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question," adjudicating necessarily that "the property is assessed at the same value proportionately as all the other property in the county," and that this adjudication "cannot be avoided unless the board has proceeded arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers, \* \* \* or unless there be something equivalent to fraud in the action of the board," and that "mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board." *Los Angeles Gas & E. Co. v. County of Los Angeles*, supra. In this case, however, the complaint substantially charges that the property of plaintiff was assessed at nearly twice its real value, while the other property in the county was assessed, in pursuance of a "systematic, willful, and intentional" scheme to so do, at not to exceed 25 per cent. of its real value, and that all this was shown to the board of equalization by evidence without substantial contradiction or conflict, which means, of course, that there was no evidence sufficient to give lawful support for a conclusion to the contrary, and that the board "with full knowledge" of these facts, and "without regard to said facts, and in disregard of the evidence, arbitrarily denied plaintiff's application for relief." In other words, the board of equalization, with the facts alleged proven before them, and with full knowledge of the existence of those facts, refused to take any action other than to deny plaintiff's application.

It seems to us that in such a situation there is to be found the "something equivalent to fraud" that it was said in *Los Angeles Gas & E. Co. v. County of Los Angeles*, supra, might entitle the taxpayer to relief in the courts, regardless of the denial of his application by the board of equalization.

It is not claimed that there was any actual fraud in the sense that there was any corrupt intent on the part of the board. Indeed, the complaint alleges that a majority of the members voting for the denial of the application stated at the time that, while the assessment was unjust, they deemed it proper for the validity of the assessment to be settled by the courts. But, according to the allegations of the complaint, there was a deliberate refusal by the board to so adjust the assessment values that plaintiff's lands would be assessed upon the same basis of valuation as the other lands in the county, the members knowing that as the assessment stood it was not upon the same basis, plaintiff's lands being assessed at nearly double their value, while the other lands in the county were assessed at only one-quarter of their value. With this knowledge it was the plain duty of the board to so reduce plaintiff's assessment valuation that its lands would be assessed upon the same basis of valuation as all the other property in the county, provided that basis was allowed to remain for such other property. Its willful refusal to do this, notwithstanding its knowledge of the facts, would seem to constitute "fraud," or "something equivalent to fraud," within the meaning of those terms as used in the decisions relative to review of the action of assessing officers, entirely regardless of the motive actuating the members of the board. The effect of this refusal to perform this duty was to allow an assessment to remain, which, in the words of the Supreme Court of the United States in *Greene v. L. & I. R. R. Co.*, 244 U. S. 499, 519, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88, constituted "a fraud upon the fully assessed property"—in this case upon the more than fully assessed property. An entirely different situation would be presented here, if the complaint did not show that the board had denied plaintiff's application with full knowledge of all the facts alleged.

We are satisfied that the facts alleged, if proved, would require a conclusion that the assessment of plaintiff's lands was invalid to the extent claimed, and that plaintiff's remedy was that given by section 3819, Political Code, viz. payment of the invalid tax under protest and an action to recover the same within the time specified therein. This, as we have already noted, is such an action. It follows, from what we have said, that the demurrer should have been overruled, with leave to defendant to answer.

The judgment is reversed, and the cause

remanded for proceedings not inconsistent with the views herein expressed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.; OLNEY, J.; LAWLOR, J.

(183 Cal. 188)

#### Application of HERMAN.

#### Appeal of HARBISON.

(L. A. 6147.)

(Supreme Court of California. June 14, 1920.)

#### 1. Action $\S$ 20—Proceeding for establishment of newspaper as one of general circulation a "special proceeding."

A proceeding by a publisher of a newspaper to have its standing as one of general circulation, as defined in Pol. Code,  $\S$  4460, ascertained and established, is a "special proceeding" within Code Civ. Proc.  $\S$  23, and not an "action" as defined by section 22.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action; Special Proceeding.]

#### 2. Newspapers $\S$ 1(5)—Supreme Court has jurisdiction of appeal in special proceeding for establishment of standing of newspaper.

Under Const. art. 6,  $\S$  4, an appeal lies to the Supreme Court from judgment in a special proceeding by a publisher of a newspaper to have its standing as a paper of general circulation, as defined in Pol. Code,  $\S$  4460, ascertained and established.

#### 3. Appeal and error $\S$ 151(2)—Contestant of newspaper publisher's application for establishment of paper as one of general circulation entitled to appeal.

Contestant of newspaper publisher's application to have its standing as one of general circulation, as defined in Pol. Code,  $\S$  4460, ascertained and established, held a proper party to the proceeding, and one aggrieved by judgment for the publisher entitling him to appeal, though without pecuniary interest, in view of sections 4458-4462.

#### 4. Appeal and error $\S$ 843(2)—Point of unconstitutionality of statute not involved in case will not be considered.

Question whether a valid judgment rendered in a proceeding to have the standing of a newspaper as one of general circulation within Pol. Code,  $\S$  4460, established, is conclusive or prima facie evidence of status of newspaper when in a future action the sufficiency of publication of notice or process is controverted cannot arise on appeal by contestant of the publisher's application for establishment of standing of paper; point whether provisions of section 4462 for such establishment are constitutional being abstract.

#### 5. Newspapers $\S$ 1(5)—Determination by superior court that evidence shows newspaper one of general circulation conclusive unless unsupported.

Under Pol. Code,  $\S$  4462, it is for the superior court on the publisher's application to

determine from the evidence whether a publication is a newspaper of general circulation as defined in section 4460, a determination which is conclusive on appeal unless it appears, as a matter of law, the evidence is insufficient to support the finding.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Newspaper of General Circulation.]

#### 6. Newspapers $\S$ 3(2)—Newspaper held not for dissemination of intelligence of general character; "newspaper of general circulation."

Newspaper published at a county seat held not for the dissemination of local or telegraphic news and intelligence of a general character, so that the contents did not come within the description of Pol. Code,  $\S$  4460, defining newspapers of general circulation for the purposes of publication of notices and official advertising.

#### 7. Newspapers $\S$ 3(2) — What Legislature meant by "newspaper of general circulation."

By the term "newspaper of general circulation," as used in Pol. Code,  $\S$  4460, the Legislature had in view a publication to which the general public would resort to be informed of the news and intelligence of the day, editorial opinion, and advertisements, to render it probable that notices or official advertising published therein would reach the public.

#### 8. Newspapers $\S$ 3(5)—"Bona fide subscription list of paying subscribers" to newspaper of general circulation defined.

The term "bona fide subscription list of paying subscribers," as used in Pol. Code,  $\S$  4460, specifying the requirements of a newspaper of general circulation for the publication of notices and official advertising, means a real, actual, genuine subscription list containing only the names of those paying in good faith regularly for their subscriptions, the assumption, in the absence of legislative specification of numbers of subscribers required, being that it meant the words "bona fide" were to be taken according to common acceptance.

#### 9. Newspapers $\S$ 3(5) — Newspaper's list a "bona fide subscription list of paying subscribers."

List of subscribers to county seat newspaper, including banks, creameries, produce markets, and others, some 25 subscribers in various lines of business, the paper having circulation in a number of towns and cities, held a "bona fide subscription list of paying subscribers" as required by Pol. Code,  $\S$  4460, to render the newspaper one of general circulation for the publication of notices and official advertisements.

#### 10. Newspapers $\S$ 3(2)—County seat newspaper held one devoted to interest of and published for particular class; "newspaper of general circulation."

Newspaper published at county seat held one devoted to the interest and published for the entertainment of a particular class, so as not to be one of general circulation for the publication of notices or official advertisements as defined by Pol. Code,  $\S$  4460, though cir-

culated in a number of cities and towns through three counties, and among at least ten professions, trades, and callings.

Angellotti, C. J., dissenting.

In Bank.

Appeal from Superior Court, San Bernardino County; Hugh H. Craig, Judge.

In the matter of the application of Basil W. Herman, publisher, to have the standing of the Daily Bulletin of San Bernardino, Cal., as a newspaper of general circulation, as defined in section 4460, Pol. Code, ascertained and established, contested by R. O. Harbison and others. From the judgment so establishing the status of the paper, the named contestant appeals. Reversed.

McNabb & Hodge, of San Bernardino, for appellant.

Bledsoe & Phipps, of San Bernardino (Leonard, Surr & Hellyer, of San Bernardino, of counsel), for respondent.

George D. Squires, of Redwood City, amicus curiæ, for California Press Ass'n.

LAWLOR, J. This is an appeal by R. O. Harbison, one of the contestants in the above-entitled matter, from a judgment in favor of the applicant, Basil W. Herman, to the effect that the Daily Bulletin, published by said Herman, "is a newspaper of general circulation as that term is defined in title 5 of the Political Code [sections 4458-4462], \* \* \* and entitled to print publications, notices by publication, official advertising, or public or legal notices." The appeal is presented under the alternative method.

Respondent has drawn his petition in conformity with the provisions of section 4462. The material allegations of the petition are as follows:

"That your petitioner, Basil W. Herman, at all times herein mentioned has been, and is now, the publisher of the said Daily Bulletin, a newspaper printed and published in the city of San Bernardino; \* \* \* that the said Daily Bulletin at all the times herein mentioned has been, and is now, a newspaper published for the dissemination of local and telegraphic news and intelligence of a general character; that said newspaper at all the times herein mentioned has had, and now has, a bona fide subscription list of paying subscribers; that said newspaper was established on the 23d day of June, 1916; \* \* \* that said newspaper has been established, printed, and published at regular intervals, every day except Sunday and legal holidays in the city of San Bernardino \* \* \* for more than one year next preceding the filing of this petition, to wit, from June 23, 1916, to the present date, September 12, 1917; and that said newspaper is not now, nor has it ever been, devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number of such classes, professions, trades, callings, races, or denominations."

Separate contests to this petition were filed by the appellant and W. S. Conger and O. M. Cannon, respectively. Each of the answers put in issue all of the material allegations of the petition.

Two contentions are made by respondent in his supplemental brief:

(1) That "the provisions of section 4462 \* \* \* furnish \* \* \* an exclusive remedy for the setting aside of such a judgment as was rendered herein," and a fortiori there is no appeal; and (2) that "the appellant herein has no right to appeal because he is not 'aggrieved' by the judgment under section 938 of the Code of Civil Procedure."

1. The Code of Civil Procedure provides:

"Sec. 22. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Sec. 23. Every other remedy is a special proceeding."

[1] It was said in the case of *In re Central Irrigation District*, 117 Cal. 382, 387, 49 Pac. 354, 356, citing the sections just quoted:

"It may be said, generally, that any proceeding in a court which was not under the common-law and equity practice either an action at law or a suit in chancery is a special proceeding."

In our opinion this is a special proceeding.

2. We shall next consider whether this court has jurisdiction to entertain an appeal in a special proceeding. The statute authorizing the proceeding does not provide for an appeal. Neither the former nor the present Constitution has ever in express terms, conferred upon the Supreme Court appellate jurisdiction in such cases. Appellate jurisdiction is, however, conferred by section 4 of article 6 of the Constitution upon the District Courts of Appeal. The decisions upon the question whether this court has appellate jurisdiction in special proceedings are not in complete accord. There are, on the one hand, *Appeal of Houghton*, 42 Cal. 35, *Bixler's Appeal*, 59 Cal. 550, and *In re Curtis*, 108 Cal. 661, 41 Pac. 793, each of these cases holding that this court has no such jurisdiction. The last-mentioned case, however, was a quasi criminal action brought under section 772 of the Penal Code, and the decision turned upon the summary character of the proceeding, the court saying:

"These proceedings are intended to be summary, and, as the Legislature has made no provision for a review of the action of the superior court, its judgment is final."

See *People v. McKamy*, 168 Cal. 531, 143 Pac. 752.

*Conant v. Conant*, 10 Cal. 249, 70 Am. Dec. 717, on the other hand, an action for divorce, held that the court is vested with—

"appellate jurisdiction in all cases, provided that, when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value [the sum fixed by the Constitution of 1849] unless the question of the legality of a tax, toll, impost, or municipal fine is drawn in question."

This case was affirmed on this point in *Knowles v. Yates*, 31 Cal. 82, which was an election contest.

In *Stockton, etc., R. R. Co. v. Galgiani*, 49 Cal. 139, the appeal was from a judgment of the county court confirming the report of commissioners in a proceeding to condemn land. An objection to the jurisdiction of the Supreme Court was interposed, but the court said on that point:

"Whether, under the provisions of article 6, § 4, of the Constitution, an appeal lies to this court in special cases cannot be considered at this day as an open question. In *Knowles v. Yates*, 31 Cal. 82, and *Day v. Jones*, 31 Cal. 263, this point was directly presented and decided. In numerous other instances this court has entertained jurisdiction in special cases. \* \* \* In view of these cases we do not think a reconsideration of the question at this time would be profitable, and hold that this court has jurisdiction of this appeal."

Justices Crockett and Wallace, who concurred in the *Houghton Case*, also concurred in the *Stockton Case*.

[2] Other cases in which this court has exercised such jurisdiction are *In re Market Street*, 49 Cal. 546; *Loomis v. Andrews*, 49 Cal. 239; *S. P. R. Co. v. Wilson*, 49 Cal. 396; *N. P. R. R. Co. v. Reynolds*, 50 Cal. 90; *Wilmington, etc., Co. v. Dominguez*, 50 Cal. 505; *Delphi School District v. Murray*, 53 Cal. 29; *San Jose v. Freyschlag*, 56 Cal. 8; and *Lord v. Dunster*, 79 Cal. 477, 21 Pac. 865. And, since the decisions in *Bixler's Appeal*, *supra*, and *In re Curtis* *supra*, it has been held that special proceedings in general are appealable to this court under the provisions of section 52 of the Code of Civil Procedure. *Morton v. Broderick*, 118 Cal. 474, 50 Pac. 644; *People v. Bank of San Luis Obispo*, 152 Cal. 261, 92 Pac. 481. The amendment in 1919 of that section took effect on July 22, 1919 (St. 1919, p. 88), subsequently to the date on which the petition for a hearing in this court was granted—June 2, 1919. Before it was amended that section read in part:

"The Supreme Court shall have appellate jurisdiction: \* \* \* 4. In all special proceedings."

We think it clear that an appeal lies to this court from a judgment in such a proceeding.

3. In support of the contention that the contestant Harbison has no right of appeal for the reason that he is not an "aggrieved" party, respondent argues that said contestant must show that, if the judgment is al-

lowed to stand, he personally will suffer substantial loss before he is entitled to take an appeal. Section 4458 provides that all publications, notices by publication, and official advertising required by statute to be given or made by public officials shall be given or made only in newspapers of general circulation. Section 4459 specifies the minimum size of type that may be used in printing such publications or notices. Section 4460 defines "a newspaper of general circulation." Section 4461 prescribes a penalty for the violation by a public official of any of the provisions of the three preceding sections. Section 4462 authorizes a proceeding in the superior court whereby a newspaper may "have its standing as a newspaper of general circulation \* \* \* ascertained and established." It is plain that the primary object of this legislation was to provide for adequate publicity for notices required by law to be published. This was sought to be accomplished by providing a method for determining whether publications claimed to be newspapers of general circulation are of the required standard. It is made a matter of concern to the general public. Section 4462 provides that any person may appear and contest the petition to have the status of the newspaper established, and that the decision and judgment of the superior court may be vacated on the motion of any person, whether a party to the original proceeding or not. It is not prescribed that the contestant shall have any pecuniary interest in the proceeding. Any person may appear and show that the newspaper in question is not a proper medium for the publication of legal notices because it does not present any or all of the essential attributes of "a newspaper of general circulation," as that term is defined in section 4460. It was said in the case of *In re Marks*, 45 Cal. 199, at page 216, discussing an act of the Legislature "to prevent extortion in office and enforce official duty":

"There is nothing, either, in the act which requires that Crane, who preferred this complaint, should aver or prove that he is a party in interest in the strict sense, or has himself sustained any special damage by reason of the official neglect complained of. The purpose of the statute was the wholesome one of authorizing any person who would take the duty upon himself to institute an inquiry into the conduct of certain public officers in the manner pointed out. It is not the personal interest of the complainant which the statute regards, but the higher and more important interest of the people \* \* \* in the honest and faithful discharge of official duties. \* \* \*"

[3] In our opinion, appellant was a proper party to the proceeding. While it is true that, strictly speaking, no judgment was rendered against him in the case at bar, nevertheless, since the public has an interest in the proceeding, and the trial court has decided adversely to the contentions of appel-

lant, he must be regarded as an "aggrieved" party for the purposes of this appeal. Indeed, if the position of the respondent on this point be sound, it is difficult to conceive of a party who would be "aggrieved" in such a proceeding where the original petition had been granted. Even if the contestant were the publisher of a rival newspaper, it could not be said that he had any pecuniary interest which had been directly affected by the decree; any prejudice which he might have suffered would be too incidental and remote. We have examined the cases cited by respondent in which it has been held that, in order that an appeal may be prosecuted, it must be shown by the record that the appellant is an aggrieved party in the sense that he has been deprived of a legal right by the judgment. None of these cases, however, is authority where the right of becoming a party is given by statute, and the public has a direct interest in the controversy.

4. During the oral argument here the point was suggested by one of the justices whether the provisions of section 4462 were not an invasion of the powers of the judiciary by the legislative branch of the government. This question had not been raised by the parties. It was adjudged by the court that—

"The Daily Bulletin \* \* \* is a newspaper of general circulation as that term is defined in section 4460, \* \* \* and is entitled to print publications, notices by publication, official advertising, public or legal notices."

In answer to the above suggestion appellant, in his reply to the supplemental brief of respondent, filed after the oral argument, takes this position:

"We believe the judgment rendered in the proceeding at bar does not conflict with any constitutional provision, if it is construed to be conclusive and binding only on the date rendered and on the publication of notices theretofore published in said paper. \* \* \* This judgment, if allowed to stand, undoubtedly validates any and all legal publications being made in the Bulletin the date the judgment was rendered. As to the validity of notices published after said date we submit the judgment as rendered would have no force whatever. If, however, the Legislature contemplated validating the publication of notices made after such judgment is rendered and until it is vacated, modified, or set aside under \* \* \* section 4462, then we respectfully submit that the portion of the section wherein it is declared 'but all publications made in such newspaper during the period it was adjudged to be a newspaper of general circulation shall be held to be valid and sufficient,' is an invasion by the Legislature of the province of the courts, and is therefore unconstitutional. This portion of the section is, in effect, a legislative declaration, without a hearing, of the truth of facts that may or may not exist, viz. that at any and all times after the judgment is rendered establishing a newspaper as one of general circulation until such judgment is vacated, said newspaper possesses

all the requirements set forth in section 4460 as necessary to be proved in order to be declared a newspaper of general circulation."

[4] The respondent has not answered this contention. The question whether a valid judgment rendered in such a proceeding is conclusive or prima facie evidence of the status of the newspaper involved when, in a future action, the sufficiency of the publication of notice or process in said newspaper is controverted, cannot arise here. The point made by appellant presents only an abstract proposition which we do not deem necessary or proper to consider. The rule on this point is thus stated in 12 Corpus Juris, 780:

"The constitutionality of a statute will not be determined in any case unless such determination is necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question. \* \* \* Where that portion of a statute which is involved in controversy is constitutional and complete in itself, the court will not consider a question as to the constitutionality of another portion of the statute. \* \* \* The question of the constitutionality of the statute will be determined only with reference to the parties who are before the court."

See, also, In re Daniels, 140 Cal. 335, 73 Pac. 1053; In re East Fruitvale Sanitary District Board, 158 Cal. 453, 111 Pac. 368; Brookes v. Oakland, 160 Cal. 423, 117 Pac. 433.

The effect of this judgment as evidence of the status of the Daily Bulletin in future proceedings is not involved here. As we have seen, appellant concedes that, in so far as the judgment is binding on the parties and conclusive evidence of the status of the paper on the date such judgment was rendered, "it does not conflict with any constitutional provision." On this assumption the question whether the judgment is conclusive or prima facie evidence of the status of the paper within the meaning of section 4460 is not presented by this proceeding. Section 4462, for the purposes of this discussion, may be divided into three parts: First, that part providing for the determination of the status of a paper in the first instance, where any one, as already shown, may appear and contest the petition; second, that part providing that the decision and judgment in the first instance may be "vacated, modified, or set aside"; and, third, that part which aims to give validity to "publications made in such newspaper during the period it was adjudged to be a newspaper of general circulation." In this proceeding only the first part of the section is involved; for neither in the petition nor in the judgment is it sought to make such judgment conclusive evidence of the validity of publications subsequently made. Our consideration therefore, is necessarily limited to the question

whether the finding declaring that the Daily Bulletin is a newspaper of general circulation is supported by the evidence.

5. Appellant contends that:

"The evidence is insufficient to justify or sustain the finding \* \* \* because said Bulletin: (1) Does not disseminate local or telegraphic news and intelligence of a general character; (2) has not a bona fide subscription list of paying subscribers; (3) is published for the entertainment and instruction of particular classes, professions, trades, and callings."

Section 4460 provides in part:

"A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers. \* \* \* A newspaper devoted to the interests, or published for the entertainment or instruction of a particular class, profession, trade, calling, race, or denomination, or for any number of such classes, professions, trades, callings, races or denominations when the avowed purpose is to entertain or instruct such classes, is not a newspaper of general circulation."

[5] Under section 4462 it is for the superior court to determine from the evidence whether a publication is a newspaper of general circulation as that term is defined in section 4460. This determination of the evidence is conclusive on appeal unless it shall appear, as matter of law, that it is insufficient to support the findings. The trial court has found "that all the allegations of petitioner's petition are true." We shall first consider the character of the matter contained in the paper. The publisher testified practically in the language of the statute, that "the paper is published for the dissemination of local and telegraphic news and intelligence of a general character." It is to be noted that the statute refers to local or telegraphic news. Both local and telegraphic news are not required, but there must be one or the other and intelligence of a general character. In *re Green*, 21 Cal. App. 138, 131 Pac. 91. Seven copies of the paper, which the publisher testified were "fairly representative," were introduced in evidence. A few telegraphic items are contained therein, but the publisher admitted they were not originally published in the Bulletin, and had been copied from other newspapers. For instance, the two "telegraphic" items in the issue of September 10 had appeared elsewhere on September 8, and the six "telegraphic" items in the issue of July 27 were published in another paper the day before. It is not suggested that the republication of telegraphic news was based on any arrangement with such other papers. No other kind of "telegraphic" matter appeared in the paper. The only current "news" is court calendars without any description of court proceedings, lists of new

suits filed, documents recorded and marriage licenses and building permits issued. The only legal notices which appear to have been published are those of this proceeding. There is no account of local events, casualties, hotel arrivals, or departures, personal items, and the like such as it might be expected would be found in a newspaper published at a county seat. Other than as above indicated there is no evidence of the collection or dissemination of local or telegraphic news or intelligence of a general character. There is but one editorial, and that appeared in the issue of June 25, 1917. The paper chiefly contains matter of a stereotyped nature, tables of temperature and rainfall for a period of 46 years and of altitudes at various points in that section of the state, names and locations of churches, hospitals, asylums, orphan homes, and clubs, the names and addresses of clergymen and others entitled to perform the marriage ceremony, the locations of fire alarm boxes, directories of public offices and officials, local, state, and federal tables of official fees, a directory of business buildings and halls, a list of public parks, and the location of the public library. Except for the belated "telegraphic" matter, the paper does not contain news of a general character in which the public at large would be interested. It is the general custom to publish editorial matter in a newspaper, and yet among the issues of this publication appears only a single editorial, as we have heretofore noted. The caption of the Bulletin declares that this is "the only paper published in the county that publishes an abstract of instruments filed in the clerk's and recorder's offices."

[6] It is clear to us that the purpose of this paper was not "the dissemination of local or telegraphic news and intelligence of a general character," and that the contents did not come within this description. Respondent relies on *In re Green*, supra. In that case it was held by the superior court that the Daily Recorder of Sacramento was not a newspaper of general circulation. The judgment was reversed by the district court of appeal. A comparison of these two publications shows a marked difference in purpose and contents. The Sacramento paper, in addition to certain stereotyped matter, contains news accounts of court and other official proceedings, including the activity of the California members of Congress; reviews of court decisions, general advertisements, personal notices and many items of local current events of a diversified character. In short, the paper appears to have been published for the dissemination of news and intelligence of every kind. Nothing in the nature of news, as that term is generally understood, is found in the publication here in question.

[7] By the term "a newspaper of general circulation" the Legislature had in view pub-

lications to which the general public would resort in order to be informed of the news and intelligence of the day, editorial opinion, and advertisements, and thereby to render it probable that the "notices or official advertising" would be brought to the attention of the general public. We think that the purpose of the statute would fail of realization if such a publication as the one involved in this proceeding were held to be a newspaper published for the dissemination of news and intelligence of a general character.

[8] The second contention of appellant is that the Daily Bulletin has not "a bona fide subscription list of paying subscribers." The statute itself does not specify how many subscribers there must be, but does require a "bona fide" list thereof. It seems to us that the term, as used in this connection, means a real, actual, genuine subscription list which shall contain only the names of those who are in good faith paying regularly for their subscriptions. On this question the court said in the Green Case:

"As to whether it is such a newspaper is manifestly a matter of substance, and not merely of size; and that it is of general circulation must depend largely upon the diversity of its subscribers rather than upon mere numbers."

But it is urged in the brief filed in behalf of the California Press Association as *amicus curiæ* that—

"The words '*bona fide*' \* \* \* mean that the subscription list shall cover a sufficient number of persons in a city or county to constitute an adequate medium for public advertising." (Italics ours.)

Here, as we have observed, the Legislature has not specified the number of subscribers required, and we must assume that it meant that the words "bona fide" were to be taken "according to their common acceptance." *Quigley v. Gorham*, 5 Cal. 418, 63 Am. Dec. 139; *Gross v. Fowler*, 21 Cal. 393; *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 968. On this point Herman testified as follows:

"Q. State whether or not this 'Daily Bulletin' has now and at all times since June 23, 1916, has had a bona fide subscription list of paying subscribers. A. Yes; at all times."

According to his testimony, the list included banks, creameries, produce markets, orange growers, mercantile agencies, real estate dealers and others. After naming 25 subscribers in various lines of business, the witness concluded on this point: "That, I believe, covers it." He further testified:

"The Bulletin has circulated in San Bernardino, in Redlands, in Colton, in Rialto, in Ontario, in Highland, in Victorville, in Pomona, in Los Angeles, and in Riverside."

[9] We are not prepared to hold, in view of the number and diversity of subscribers and

the territorial range of circulation, that this would not be "a bona fide subscription list of paying subscribers."

[10] In our opinion the paper is, in the language of the statute, "a newspaper devoted to the interests" and "published for the entertainment and instruction of a particular class. \* \* \*". It is true that, as has been shown, the paper circulated in ten cities and towns, scattered through three counties, among at least ten "professions, trades, and callings," but it appears to us that it was published chiefly to meet the needs of persons and concerns specially interested in information of an official nature, and that the other contents of the paper were merely incidental to this object. It may also have been the purpose of the paper to lay a foundation for recognition under the statute.

In view of our conclusion that the paper was not published for the dissemination of news or intelligence of a general character, and that it was published for a particular class, it must be held that the finding is not supported by the evidence.

Judgment reversed.

We concur: WILBUR, J.; LENNON, J.; OLNEY, J.

SHAW, J. I concur in the judgment on the ground that the evidence shows that the Daily Bulletin was not, at the time in question, a newspaper of general circulation published for the dissemination of news and intelligence of a general character.

I am not certain that the main opinion purports to determine that a judgment given under section 4462 of the Political Code declaring a particular newspaper to be a newspaper of general circulation is binding and conclusive as to the character of the newspaper as of the time it is given. It is my opinion that, in any other action or proceeding in which personal or property rights of persons not parties to the proceeding under section 4462 are involved, the judgment given in a proceeding under that section is of no force or value whatsoever. This question, however, does not appear to be raised by this appeal.

As to the other matters discussed, several of them are admittedly not involved in the question presented. I do not desire to express any opinion upon any of them. It is to be hoped that in the future the Legislature will refrain from such futile enactments.

ANGELLOTTI, C. J. (dissenting). I have no disposition to question the correctness of the conclusion of the court that in view of the facts shown by the record the publication here involved did not fully measure up to the requirements of our statutory definition of the term "newspaper of general circula-

tion." However, I do not desire to here express any definite conclusion on that question, as I think it should be held that the "decision and judgment" of a superior court in the proceeding authorized by section 4462, Political Code, is not reviewable on appeal. To my mind the matter is confided entirely and finally to the superior court of the county in which the paper is published, with the result that, in so far as the Legislature had the power to so provide, any notice, etc., published in a paper decided by such superior court to be a newspaper of general circulation, while such decision remains unrevoked by the superior court, must be held, wherever assailed, to have been published in a newspaper of general circulation. I think the manifest purpose of the section was to enable a paper about which some doubt might exist, as to being in fact a newspaper of general circulation, to obtain a certificate of standing, as it were, from the superior court of its county, which would have the effect of validating all publications therein while such certificate remained unrevoked, in so far as any legal requirement of publication in a newspaper of general circulation is concerned. Whether the Legislature had the power to give such effect to the superior court certificate of standing is another question which is not here involved and which cannot here be effectively decided. Being of the opinion that the intent of the section was to leave the whole matter in the hands of the superior court, and that no right of appeal from the "decision and judgment" given by such court was contemplated. I cannot concur in the judgment of reversal, and think the appeal should be dismissed as being from a nonappealable judgment or order.

(48 Cal. App. 276)

**FOWLER et al. v. THORNBERRY.**  
(Civ. 3420.)

(District Court of Appeal, First District, Division 1, California. June 22, 1920. Hearing Denied by Supreme Court Aug. 19, 1920.)

**1. Stipulations**  $\S$  14(7)—Stipulation held not to estop plaintiffs from taking advantage of certain evidence.

In an action for breach of contract for the repurchase of certain live stock, a stipulation on motion for change of place of trial that witnesses would testify that they made an examination of the animals, and that it could not be determined from such examination that the animals shown to the witnesses were the same animals sold by defendant to plaintiffs, held not to estop plaintiffs from taking advantage of evidence that the animals were capable of identification by defendant, the stipulation relating only to the particular examination of the animals, and was evidence, but not conclusive proof, of its contents.

**2. Sales**  $\S$  153—Offer of registered jennets with registration certificates held sufficient tender.

In an action for breach of contract to repurchase certain jennets, the contract of repurchase providing that the same jennets that were in the original purchase to a number not exceeding nine were to be sold, an offer by plaintiffs of the total remaining number of animals, together with their registration certificates, was sufficient, although they were unable to specify each particular animal according to its certificate.

**3. Sales**  $\S$  383—Evidence held to show that purchaser of registered jennets had reasonable means for their identification.

In an action for breach of contract to repurchase certain registered jennets, where the sellers were unable to identify the particular animals covered by the particular registration certificates, evidence held to sustain a finding that the purchaser had reasonable means of identification.

**4. Sales**  $\S$  333—Posting of notices for resale of property under execution presumed within township of sale.

In an action for breach of contract to repurchase certain registered jennets, where it appeared that plaintiffs, after defendant's refusal to repurchase, retained the animals to enforce their special lien under Civ. Code,  $\S$  3049, gave notice to defendant of the time and place of sale under section 3002, and sold them upon notice of sale of personal property under execution as provided in section 3005, the sale was not void because it did not appear that any of the places where notices were posted was within the township in which the sale took place, since it would be presumed that the law was obeyed, and that notices were posted within such township.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by A. J. Fowler and another against H. B. Thornberry. Judgment for plaintiffs, and defendant appeals. Affirmed.

Devlin & Devlin, of Sacramento, and M. F. Brittan, of Bakersfield, for appellant.

Kaye & Siemon and Alfred Siemon, all of Bakersfield, for respondents.

**WASTE, P. J.** Defendant appeals from a judgment in favor of plaintiffs for the sum of \$4,603.50 and interest, damages alleged to have been suffered by the plaintiffs because of the failure and refusal of the defendant to accept and pay for eight head of registered jennets.

The defendant, Thornberry, a dealer in live stock, entered into an agreement in writing with the respondents and G. P. Thornburg for the sale by him to them of 10 head of registered jennets, to be brought by Thornberry from Missouri, at an agreed price of \$6,000, the respondents and Thornburg to accept such jennets as might be selected by Thornberry as satisfactory stock,



the purchase price to be evidenced by promissory notes of different amounts. The jennets were shipped from Missouri by appellant in a lot containing 28 head. Upon arrival at the stockyard at Bakersfield, 10 jennets, identified by means of certain numbers burned into one of the hoofs of each animal, were sorted out by appellant and one of his employes, and were delivered to and were accepted by respondents and Thornburg. Some time later certificates of registration, containing the pedigree of each jennet and its registration number, were issued by the Standard Jack and Jennet Registry of America, and were sent to respondents and Thornburg, with a letter, directing the attention to the hoof numbers, and explaining that by reference to these numbers and the corresponding numbers on the certificates of registration each jennet could be identified.

Subsequently certain controversies arose between the parties regarding the qualities of the jennets for breeding purposes, and also concerning the guaranties made by Thornberry in respect to the foals that would be produced during the breeding season of 1914 and 1915. A new agreement was executed, which, after reciting that the parties desired to set aside all previous agreements, provided that the respondents and Thornburg should pay certain balances upon the promissory notes theretofore executed pursuant to the old agreement, and should sell to appellant a jack colt for the sum of \$500. It was further agreed that appellant would, at the option of respondents and Thornburg and on notice, purchase the 9 head of jennets (one having died), or as many as might be living and in reasonably good and sound condition, at the original purchase price of \$600 per head, it being specified that this stipulation should include "only the same jennets that were in the original purchase, and not exceeding nine head." In the event respondents and Thornburg exercised their option to sell, appellant was to receive, in consideration of the agreed purchase price, one-half of the colts foaled by the jennets between the date of the new agreement and the delivery of the animals, the method of selection being specified. At the time he signed this agreement, appellant knew from "hearsay," and, no doubt, from familiarity with the industry, that the hoof marks on the animals had become obliterated from being worn off. In due time respondents and Thornburg decided to exercise their option to sell the remaining 8 head of jennets (another one having died), and so notified the appellant.

Appellant and Albert Dill, a stock breeder, and respondent Hadlock went to respondent Fowler's ranch, near Bakersfield, for the purpose of examining the jennets. It was then discovered that 3 of the jennets were dead. Hadlock was unable to identify the

remaining 7 head. The parties then went to the office of the attorney for the respondents, who offered appellant the 10 registration certificates theretofore received, and demanded the sum of \$4,800. Appellant declared himself ready to buy the jennets, but declined to accept them unless the respondents could identify each one, with reference to the individual registration certificate, stating that as the animals were thoroughbred, buyers would require each to be identified as the one mentioned in her registration certificate. Respondents declared they were unable to identify the animals because the hoof marks which were upon the jennets at the time they were delivered had become obliterated. Appellant then requested respondents to pick out the three registration certificates of the three dead jennets. Respondents were unable to do so or to identify any of the living animals as the ones described in any of the 10 registration certificates. Appellant refused to accept delivery unless there was some means of identification whereby he could perpetuate the pedigree of the jennets and their progeny. Some time later the remaining 7 head of jennets were sold by respondents for the total sum of \$220. The present action was then commenced against appellant for recovery for his failure and refusal to accept or pay for the jennets and for damages for the value of the pasturage of the animals from the exercise of the option to the date of the sale.

The parties agree that their respective contentions may be stated as follows: Appellant contends that he agreed to purchase, at respondents' option, the same jennets which were in the original purchase contract, i. e., registered jennets, each one duly identified, and each one accompanied by its registration certificate, together with such of the progeny as he would be entitled to receive under the contract, also identified so as to permit the same to be registered. The respondents contend that they agreed to sell, at their election, the same animals they had purchased from appellant, collectively and regardless of identification or registration, that they tendered or offered to deliver the same animals, and that appellant Thornberry is liable for refusing to purchase them. The principal controversy turns upon the interpretation of the repurchase clause, the question being whether or not identification of the individual animals was a necessary incident and a part of the contract. The lower court has decided that it was not, and has decided in favor of the respondents' theory.

It appears that each of the registration certificates for the respective jennets contained, in addition to the numbers burned upon the hoofs, certain height, girth, bone, and hoof measurements, and a statement of the age of the animal, all of which were re-

quired by the rules and regulations of the Jack and Jennet Registry Association, and the lower court found that it would have been, and was, at all times possible for the appellant, or other persons skilled in such matters, to have identified each and every animal from the data given in the registration certificate, with a reasonable degree of certainty. This finding is supported by the testimony of the witness De Ganna, an employé of the appellant, called and qualified by him as an expert, by the testimony of the witness Dill, a breeder of jacks and jennets, also called and qualified as an expert by appellant, and by the testimony of appellant, who was a stock breeder of years' standing, well versed in the details of the business. The respondents and Thornburg knew little, if anything, of such matters.

[1] Appellant contends that the respondents were estopped from availing themselves of the effect of this evidence by a stipulation entered into in connection with the proceedings for a change of place of trial of the action. It was stipulated that in the event the motion was granted, witnesses Dill and De Ganna would testify that they made an examination of the animals on the 1st day of August, 1917, the date fixed by the option for the resale for the purpose of determining whether or not the jennets were the same animals sold by the appellant to the respondents, and "at said time, the defendant and said Albert M. Dill examined certain animals shown by the plaintiff, but that it could not be determined from said examination that the animals so shown to them were the same animals sold by defendant to plaintiffs at the time and in the manner as set forth in said complaint, and the plaintiffs also admit that it is true that it could not be determined from such examination that the animals so shown to said witness were the same animals as were sold by defendant to plaintiff's." We think, however, that the respondents' contention is correct, that a fair reading of the stipulation shows it to relate only to the particular examination of the animals made at that time, and not to any other. Moreover, the stipulation was merely to the effect that the witnesses would, if called, testify as indicated. The stipulation, therefore, became evidence, but not conclusive proof of its contents. *Blankman v. Vallejo*, 15 Cal. 638, 645; *Boggs v. Merced Mining Co.*, 14 Cal. 279, 358. The authorities cited by the appellant to the contrary only go to the effect that where there has been a stipulation in the course of the trial as to the facts, made as a substitute for evidence, and the findings are contrary to the facts as stipulated, they are unsupported by the evidence. That is not this case.

[2, 3] It would therefore seem that appellant's objection to receiving the animals under the terms of the option was not reason-

able. The trial court was correct in concluding that the offer of the respondents to return collectively the same animals received from appellant in the first instance was a sufficient compliance with the terms of the option, notwithstanding the inability of the respondents to specify each particular animal as demanded by the appellant, according to the registration certificate. Appellant agreed to repurchase "the same jennets that were in the original purchase and numbers not exceeding nine." Respondents tendered certain animals and all the registration certificates they had received from appellant with the animals. The court found that the jennets offered to the defendant were the "same identical jennets" sold to plaintiffs by defendant. It also found that appellant had the reasonable means of identification of the animals at hand. Both findings are supported by the evidence and conclude the controversy.

The evidence does not warrant appellant's contention that the time within which he might accept the tender of the jennets on repurchase was extended. He did, apparently endeavor to gain some additional time within which to pay or settle after the 1st of August, but the respondents had given him notice of the exercise of the option long before that date, and the obligation to repurchase the animals was imposed upon him as of that date.

[4] When the respondents tendered, and appellant refused to receive, the jennets under the option of repurchase, the respondents, regarding the transaction as a sale of personal property, retained the animals in their possession in order to enforce their special lien thereon. Civ. Code, § 3049. They subsequently sold them for the sum of \$220. They gave actual notice to the appellant of the time and place at which the property would be sold (Civ. Code, § 3002), and sold the animals in the manner and upon the notice of sale of personal property under execution. (Civ. Code, § 3005).

It was proved that notices of the sale were posted in three public places for the required time; but it was not shown that any of the places were within the township in which the sale took place. Appellant maintains that the sale was void for that reason. That contention would be sound if it appeared that the notices were not posted within the township. It does not so appear, and it will be presumed that the law was obeyed in that respect as the court has found. Whether or not the sale was irregular the appellant has suffered no injury. The court found that the jennets were of the value of \$220, the exact amount at which they were sold. Under the Civil Code, section 3311, subdivisions 1 and 2, the detriment caused by the breach of appellant's agreement to accept and pay for the jennets was therefore

exactly the same whether the property was resold or not.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

(48 Cal. App. 171)

JONES v. DELLA MARIA. (Civ. 3195.)

(District Court of Appeal, Second District, Division 2, California. June 14, 1920.)

1. Landlord and tenant §112(2)—Right to possession is waived by accepting rent accrued pending action.

The right to maintain an action for unlawful detainer after forfeiture of the lease for breach of covenant to give security is waived where the lessor after the action was begun accepted rent, as rent, not as the value of the use of the premises, which had accrued after the action was begun.

2. Landlord and tenant §112(1)—Acts or conduct of landlord may amount to "waiver" of forfeiture of lease.

A "waiver" is the intentional relinquishment of a known right or such conduct as warrants an inference of such relinquishment, and the forfeiture of a lease may be waived by the acts or conduct of the lessor without reference to any act by the lessee.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Waiver.]

3. Landlord and tenant §112(1)—Waiver of forfeiture defeats unlawful detainer though breach continuing.

An action for unlawful detainer is defeated by the waiver of the forfeiture for breach of covenant to furnish security after the action was begun, though such covenant was continuing and was subsequently breached, since the subsequent breach is available only in a new action commenced subsequent thereto.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action for unlawful detainer by James B. Jones against J. Della Maria. Judgment for plaintiff, and defendant appeals. Reversed.

Jas. W. Glassford and Hickox & Crenshaw, all of El Centro, for appellant.

J. Stewart Ross and R. B. Whitelaw, both of El Centro, for respondent.

FINLAYSON, P. J. This is an action for unlawful detainer, brought under subdivision 3 of section 1161 of the Code of Civil Procedure. Judgment passed for plaintiff and defendant appeals.

The complaint, in the form usual in such actions, alleges a lease of the premises by plaintiff to defendant, under a written lease,

for the term of three years and six months from and after October 1, 1916, at a monthly rental of \$50. In their lease contract the parties agreed that the lessee should execute a bond in the penal sum of \$1,000, with sureties satisfactory to the lessor, to guarantee the performance by the lessee of all his covenants and agreements. Defendant neglected to give such bond, and on November 11, 1917, plaintiff served a written notice demanding that defendant furnish the bond or redeliver possession. Defendant failed to comply with the demand, and plaintiff, on November 26, 1917, brought the action.

[1] At the trial plaintiff testified that in January, 1918, which was after he had commenced this action, he received from defendant rent up to the end of that month. According to this testimony he must have received, in January, 1918, rent for the months of October, November, and December of 1917, and for the month of January, 1918. The only construction of which plaintiff's testimony is susceptible is that the money received by him from defendant during the pendency of the action was paid to and accepted by him as rent due under the lease, and not as the value of the use and occupation of the premises by defendant after forfeiture of the lease.

The acceptance of such rent by plaintiff was a waiver of defendant's forfeiture of the leasehold and of plaintiff's right to maintain this action.

[2] The right to recover possession in an action such as this is based on the idea that the tenant has forfeited his leasehold. Notwithstanding the breach by a lessee of any covenant that he may have made in the lease contract, the lessor may or may not elect to treat the breach as a forfeiture of the lease. Here, by his notice to give the bond or redeliver possession, served November 11, 1917, and by this action for restitution of possession and the cancellation of the lease, plaintiff elected to treat the lease as forfeited. But, notwithstanding this election, he thereafter could waive the forfeiture of the lease and his right to insist thereon as a ground for restitution of possession and cancellation of the lease contract. This plaintiff did by accepting rent for months succeeding that in which he served upon defendant the three days' notice. Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right—an election by one to forego some advantage he could have taken or insisted upon. A person who is in a position to assert a right or insist upon an advantage may, by his words or conduct, and without reference to any act or conduct of the other party affected thereby, waive such right. Once such right is waived, it is gone forever; the person who has waived

the right will thereafter be precluded from asserting it. "The courts, not favoring forfeitures, are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture." *Queen Ins. Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51.

Under section 1161 of the Code of Civil Procedure the landlord, after giving the three days' notice there provided for, has the right to maintain an action for restitution of possession and cancellation of the lease. The attitude of the landlord, after such notice and the commencement of an action to cancel the lease, is that the tenant no longer is entitled to possession by virtue of the lease contract; that the tenant has forfeited his leasehold. Having elected to treat his tenant as no longer entitled to possession or to any right under the lease, the landlord's course must be consistent with this claim in the further progress of the proceeding that he has instituted. And if thereafter he accept rent accruing subsequently to the demand for possession or accruing subsequently to the commencement of the action, and accept it as rent *eo nomine*—that is, as payment under the original lease contract—he affirms that the lease is still in existence, and thereby waives the forfeiture that he has elected to enforce. By his own acts he admits the continuance of the lease, and waives any prior forfeiture. A landlord who thus recognizes a lease as a subsisting, operative contract should not be permitted to insist upon a past forfeiture, nor be permitted to assert that the contract is no longer a subsisting lease affording to the tenant all his contractual rights thereunder. *Guptill v. Macon, etc., Co.*, 140 Ga. 696, 79 S. E. 854, Ann. Cas. 1915A, 1249, and notes; *Kenny v. Sen Si Lun*, 101 Minn. 253, 112 N. W. 220, 11 L. R. A. (N. S.) 831, and notes, 11 Ann. Cas. 60. See, also, *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433.

[3] Respondent seeks to avoid the effect of this waiver of the forfeiture upon the theory that the covenant to give the bond was a continuing covenant and its breach a continuing breach. It undoubtedly is the rule that where the covenant is a continuing covenant and the breach a continuing breach, so that there is a continuing cause of forfeiture, the landlord, by accepting rent that has accrued

subsequently to any breach of such covenant, is not precluded from taking advantage of any forfeiture occurring after such acceptance of rent. *McGlynn v. Moore*, 25 Cal. 384; *Jones v. Durrer*, 96 Cal. 95, 30 Pac. 1027. But, though the waiver of the breach of a continuing covenant will not preclude the landlord from taking advantage of a cause of forfeiture that occurs subsequently to such waiver, the waiver will discharge any forfeiture occurring previously thereto. Therefore, even if as claimed by respondent, the covenant to give the bond be a continuing covenant and its breach a continuing breach, that fact does not help him here, because where, as here, the forfeiture relied upon as the basis of the landlord's right to maintain the action of unlawful detainer has been waived subsequently to the commencement of the action, it is of no consequence, so far as that action is concerned, that the covenant is a continuing covenant and its breach a continuing breach. Where the covenant is a continuing covenant, and the tenant continues to breach it after the landlord has waived his right to insist upon a past forfeiture of the lease, such continuing breach after such waiver may afford ground for again electing to treat the lease as forfeited by again giving the three days' notice required by the Code, and commencing a new action for restitution of possession and cancellation of the lease, based upon such renewal or continuance of the cause of forfeiture. But until the landlord renews his election to treat the lease as forfeited by giving a new statutory notice, and until he commences a new action to enforce such new cause of forfeiture, the tenant cannot be dispossessed for the past forfeiture that the landlord has waived by conduct that is consistent only with a recognition of the continued existence of the lease contract. In this action plaintiff must recover, if at all, upon the right of forfeiture that existed when he commenced his action. But that right he waived, after the action was commenced, by conduct inconsistent with its exercise.

Judgment reversed.

We concur: THOMAS, J.; WELLER, J.

(48 Cal. App. 327)

**VANCE v. SUPERIOR COURT, LOS ANGELES COUNTY, et al. (Civ. 3384.)**

(District Court of Appeal, Second District, Division 2, California. June 28, 1920.)

**Justices of the peace §34(2)—Objection to jurisdiction over the person waived by general appearance.**

Since the amendment of Code Civ. Proc. § 890, subd. 4, in 1905 (St. 1905, p. 44), so as no longer to provide expressly that objection that the action was brought in the wrong county might be made at the trial, that objection is waived by general appearance in the justice's and superior courts.

Petition by J. A. Vance prayed to be directed to Superior Court, county of Los Angeles, and Leslie R. Hewitt, Judge of said court for a writ of review. Petition denied.

Archie D. Mitchell, of Ontario, for petitioner.

**PER CURIAM.** The petition is denied. By his general appearance in the justice's and superior court petitioner waived his right to raise the question of jurisdiction. *Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 938, does not aid him. That case was decided when section 890, subdivision 4, Code of Civil Procedure, expressly provided that the objection that the action was brought in the wrong county might be made at the trial. In 1905 (St. 1905, p. 44) the section was amended, and subdivision 4 thereof now merely provides that the action may be dismissed "when the action is brought in the wrong county, or township, or city." Since the amendment, the subject of dismissal of such actions has been considered by the Supreme Court, and it has been uniformly held that objection to the jurisdiction of the person must be made by special appearance for that purpose; otherwise it is waived. *Olcese v. Justice's Court*, 156 Cal. 82, 103 Pac. 317; *American Law Book Co. v. Superior Court*, 164 Cal. 327, 128 Pac. 921.

(48 Cal. App. 156)

**BENTE et ux. v. REESE. (Civ. 3117.)**

(District Court of Appeal, Second District, Division 1, California. June 11, 1920. Hearing Denied by Supreme Court Aug. 9, 1920.)

**1. Vendor and purchaser §33—Reliance on statements by vendor necessary to establish fraud.**

Where there was no confidential relation between the parties to a sale of interest in mining claims except long friendship, and the vendor had knowledge of mining which the purchasers had not, the purchasers cannot recover

the payments made because of misrepresentations by the vendor without showing that in fact they relied on such misrepresentations.

**2. Vendor and purchaser §44—Evidence held not to show confidential relations warranting recovery of purchase money for misrepresentations.**

In an action to recover purchase money paid for an interest in a mining claim, evidence that the purchasers visited the claim with the vendor, and that the latter only represented that he believed valuable ore would be discovered therein because of the proximity of a paying mine, held not to show reliance on confidential relation between the parties, though they were old friends and purchasers who had no knowledge of mining.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by A. E. Bente and wife against Fred Reese. Judgment for defendant, and plaintiffs appeal. Affirmed.

E. J. Emmons, of Bakersfield, for appellants.

W. B. Beasley, of Bakersfield, for respondent.

**CONREY, P. J.** Action to recover the sum of \$1,500 received by the defendant to and for the use and benefit of the plaintiffs. Judgment in favor of the defendant, from which judgment the plaintiffs appeal.

An amended complaint was filed at the time of the trial, and by stipulation all of the allegations thereof were deemed to be denied. So far as pertinent to the questions presented here, the material facts alleged by the plaintiffs were that prior to the 23d day of April, 1918, when said money was paid over by the plaintiffs to the defendant, the defendant had represented that he was a mining man with knowledge of mines and minerals and a prospector, and that the plaintiffs believed the said statements; that the plaintiffs and each of them were absolutely ignorant of mines and minerals or anything connected therewith; that shortly prior to the 23d day of April, 1918, defendant informed the plaintiffs that he had options upon mining claims, and sent a plan of said mining claims, showing that they were intimately connected with the Cuddyback quicksilver mine; that the defendant informed the plaintiffs that a one-fifth interest in the said Cuddyback mine had been sold for \$70,000; that the defendant also took the plaintiffs to the said quicksilver mine and exhibited the rock and showed the plaintiffs through the said mine and brought to the knowledge of the plaintiffs the high price of quicksilver, and informed the plaintiffs that said mine was producing a flask of quicksilver and over every day; that the defendant informed the plaintiffs that the mining claims held under options by him were in the same kind of ground, and that there

was no reason why they should not be able to develop a valuable quicksilver mine upon said grounds; that, believing all the said statements of the defendant, and being absolutely ignorant in respect to mining property or minerals, plaintiffs relied solely upon the judgment, experience, and integrity of defendant, and, so, relying, on the 23d day of April, 1918, purchased a one-half interest in three mining claims for the sum of \$1,500; that at said time the defendant well knew that the said mining claims were not worth the amount demanded from the plaintiffs, and that plaintiffs were induced to invest their money with the defendant solely because of their long acquaintance and intimate friendship with each other; that at said time the defendant well knew that the said claims were valueless and without values, and that the defendant made the said representations to the plaintiffs knowing the same to be false, and for the purpose of inducing the plaintiffs to pay to the defendant said sum of \$1,500, and that without the said inducement made by the defendant, and without the reliance that the plaintiffs had in the defendant's promises and integrity and knowledge, the plaintiffs would not have so paid the said money; that the plaintiffs went upon the said land and stayed upon the said land "until they were informed that they had been buncoed"; that thereupon the plaintiffs investigated, and from such investigation demanded of and from the defendant the return of the said money, and offered a deed of the said one-half interest back to the said defendant, and in open court tendered to the defendant a deed properly executed, conveying to the defendant the said one-half interest purchased theretofore, which said offer was refused; that the defendant has refused and neglected to pay to the plaintiffs the said sum, or any part thereof, and that the said sum has not been paid nor any part thereof; that the said sum was so paid to the defendant on the 23d day of April, 1918, and a deed for one-half interest in the said three mining claims was executed by the defendant to the plaintiffs on said day; that all of the statements, inducements, and representations made by the defendant were false, fraudulent, untrue, and were known to be so by the defendant at the said time, and were made by the defendant for the sole purpose of inducing the plaintiffs to consummate said purchase.

The findings of fact made by the court concerning the matters before mentioned are the following:

"That defendant did not, on the 23d day of April, 1918, at or within the county of Kern, state of California, or elsewhere, or at any other time, receive from plaintiffs or either of them the sum of \$1,500, or any other sum to and for or to or for the use and benefit or use or benefit of plaintiffs, or either of them. That on or about the 23d day of April, 1918, plain-

tiffs paid to defendant at Tehachapi, Cal., the sum of \$1,500, as the agreed purchase price of and for an undivided one-half interest in three certain mining claims situated near said Tehachapi, in Kern county, Cal., and received from said defendant a deed conveying the said one-half interest in said mining claims so purchased. That prior to the payment of said \$1,500 and the delivery of said deed, plaintiffs negotiated with defendant upon the said purchase of said interest in said mining claims, and defendant conducted plaintiffs to and upon said mining claims, and exhibited them to plaintiffs, and indicated to them the boundaries thereof. That plaintiffs were given ample time to investigate and consider whether or not they should pay defendant the said sum of \$1,500 which was fixed by defendant as the purchase price of a one-half interest in said claims. That after consideration thereof, that said plaintiffs accepted the offer of defendant to sell to them said one-half interest in said mining claims for said sum of \$1,500, and so informed defendant, and thereupon, and on or about said 23d day of April, 1918, plaintiffs paid to defendant said sum of \$1,500, and received the deed heretofore referred to. That the statements, inducements, and representations made by defendant to plaintiffs respecting the said mining claims were not false, fraudulent, or untrue, nor were they known by defendant to be false, fraudulent, or untrue at the time of the making thereof, nor were such statements, inducements, or representations made by defendant to plaintiffs in and about the purchase of said one-half interest in said mining claims, falsely or fraudulently or untruthfully made by defendant for the sole purpose, or for the purpose, of inducing plaintiffs to consummate the purchase of said interest in said mining claims."

Appellants contend that the findings of fact are totally insufficient; that the evidence is insufficient to support the statements contained in the findings; that the plaintiffs were entitled to a finding under the evidence that the statements made by defendant to the plaintiffs concerning the mining claims were made under confidential relations, and were statements of an expert to one totally ignorant of the subject, and were, as a matter of law, for that reason equivalent to statements of fact; that judgment should be for the plaintiffs. Counsel relies upon the following rule of law as quoted from 20 Cyc. 60:

"Where there exists between the parties some relation whereby the purchaser, being ignorant of the facts, is justified in placing trust and confidence in the honesty and superior knowledge of the vendor, or where, in the absence of any particular relation, special confidence is placed in the vendor on account of his peculiar knowledge and the purchaser's ignorance, the rule of caveat emptor does not apply; and in such cases the purchaser may without further investigation rely on the vendor's statements, even where they might otherwise be deemed mere expressions of opinion or dealers' talk."

[1] There was no legal relation of special trust or confidence between the plaintiffs and the defendant in this case. The parties had been neighbors and friends; the defendant had some experience in the mining business and the plaintiffs had no such experience. These facts were known to all of them. The evidence shows that the plaintiffs had confidence in the integrity of the defendant, but it was further necessary for the plaintiffs to prove, not only that the defendant made false statements to them upon which they were entitled to rely, but also that, without investigating the facts for themselves, they relied upon those statements.

[2] Although we have not been furnished with any definite specification of particulars in which the evidence is insufficient to support the findings, we have examined the evidence as we find it extensively quoted in the briefs. It appears that immediately before the sale took place, the plaintiffs went to the mining claims, where the defendant was then residing, and remained on the ground several days; that they went upon the claims with the defendant and visited the neighboring Cuddyback mine; that at the time when the sale was made the defendant had not represented, and did not then represent, that quicksilver or the mineral cinnabar had actually been discovered on these claims. The parties plaintiff and defendant alike knew at that time that the claims were mere prospects, and that it was a mere matter of opinion that probably such minerals could be discovered and a cinnabar mine developed on these claims. The defendant did state that the ore was "there some place," and that the dikes or ledge on which the Cuddyback mine was located continued on into these claims, or that "it ran that way." He "worked out the trend of it on the hillside," and so exhibited the territory to the plaintiffs. It is very apparent, even from the testimony of the plaintiffs, that the representations made by the defendant concerning the value and mineral quality of these claims amounted to nothing more than that the defendant believed that probably valuable minerals would be found therein by the processes of development, and that when so found the claims could be sold at a profit. So far as the evidence shows, the defendant may have held and believed in that opinion, and ultimately it may prove to be well founded. It is true that the defendant had only paid \$400 or \$500 for his options on the claims, and that he was selling a one-half interest therein to his friends, the plaintiffs, for \$1,500. While this might be characterized as a very strong draft on friendship, it did not constitute fraud; for the defendant made no representation to the plaintiffs concerning the cost of the claims to him, nor did the plaintiffs make any inquiry on that subject. It is not claimed by the plaintiffs, nor is there any

evidence tending to show, that this was a case of a joint purchase of the property by the plaintiffs and the defendant from third parties in which transaction the parties were to pay equal amounts for their equal interests in the property purchased. The plaintiffs merely purchased from the defendant one-half of his interest in the claims at a price fixed by the vendor, which price the vendees were willing to pay.

Our conclusion is that the plaintiffs were not entitled to a finding that the statements made by defendant concerning the mining claims were made under confidential relations; and that the evidence is sufficient to justify the facts as found.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(48 Cal. App. 300)

**PETERKIN v. RANDOLPH MARKETING CO. (Civ. 2942.)**

(District Court of Appeal, Second District, Division 1, California. June 22, 1920. On Petition for Rehearing July 14, 1920; Hearing Denied by Supreme Court Aug. 20, 1920.)

1. Sales  $\S$  52(5)—Evidence held to show sale of fruit instead of consignment for sale on commission.

In fruit grower's action for breach of contract involving issue of whether plaintiff's fruit had been sold to defendant or had been shipped on consignment for sale on commission, evidence held to sustain jury's finding that defendant's agent had in fact purchased the fruit.

2. Appeal and error  $\S$  1002—Finding on conflicting evidence conclusive.

Jury's finding on conflicting evidence is conclusive.

3. Principal and agent  $\S$  119(1)—Plaintiff, suing on contract made with one known to have been acting as agent, has burden of proving agent's authority.

Plaintiff, having made contract with defendant's agent, knowing agent to have been acting as such, has burden of showing that agent, in making alleged agreement, was acting within the scope of his authority.

4. Principal and agent  $\S$  155(1)—Principal not liable on agent's contract not within actual or apparent authority.

Defendant, having received fruit shipped by plaintiff without knowledge that it was consigned otherwise than for sale on commission, was not liable to plaintiff on theory that its agent had actually purchased the fruit, in absence of evidence that agent had actual authority to make such contract, or that defendant through its agents had purchased the fruit, warranting conclusion that the making of such contract was within the agent's apparent authority.

## On Petition for Rehearing.

5. Appeal and error ⇨768—Court will assume that its attention has been called to all evidence relied on in support of the contentions of the parties.

Where the record is presented in a typewritten manuscript, and that portion thereof upon which the parties rely has been printed in the briefs, under Code Civ. Proc. § 953c, appellate court will assume that its attention has been called, not only to the points relied on, but to all evidence upon which the parties rely in support of their contentions.

6. Appeal and error ⇨832(5)—Rehearing not granted to enable party to present evidence not printed in brief.

Where the portions of the record on which the parties rely have been printed in their briefs, under Code Civ. Proc. §§ 953–953c, a rehearing should not be granted to enable either party to present evidence not printed in brief, and what in fact constitutes a new record.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by W. H. Peterkin against Randolph Marketing Company. Judgment for plaintiff, and defendant appeals. Reversed.

John H. Miller, of San Francisco, for appellant.

F. C. Drumm, of Orange, for respondent.

SHAW, J. In this action a judgment was entered upon the verdict of a jury for \$1,740.60 in favor of plaintiff, from which defendant appeals.

Plaintiff sues for himself and as assignee of one Whiting, both of whom were owners of orange groves upon which, in the fall of 1917, there were crops of fruit ready for market. Defendant was a corporation engaged in the marketing of such fruit. The claims of plaintiff and his assignor, as appears from the complaint, are that they delivered their fruit to defendant for shipment upon an agreement by the latter whereby it guaranteed a price, f. o. b. at Anaheim, of a certain stipulated sum per packed box of oranges, less a certain sum for picking, packing, and commission to be received by defendant; while, on the other hand, defendant asserted the fruit was consigned to it for marketing on a commission basis, without purchase or guaranty as to price at which it was to be sold.

The record is presented in a typewritten transcript, and counsel for both parties, recognizing the rule prescribed by section 953c, Code of Civil Procedure, have printed in their briefs that portion of the record upon which they rely to sustain their respective contentions.

It appears that defendant's principal place of business was in the city of Los Angeles; that it had a house in Orange county where

it received and packed fruit for shipment; that J. C. Gow, who was a soliciting agent, called upon plaintiff and Whiting and solicited the handling and sale of their fruit crop by defendant on commission; as to all of which there is no controversy in the evidence. A conflict, however, arises as to the nature of the oral agreement under which the fruit was delivered to defendant. The testimony of both plaintiff and his assignor tends to prove that Gow came to them with a proposal to ship on consignment, which they declined; that thereafter, in an interview with Gow, he agreed to guarantee plaintiff a stipulated price for the fruit, out of which defendant was to receive 65 cents per box for picking, packing, and marketing. And like testimony was given by Whiting as to the agreement made with Gow. Plaintiff testified as follows: "It is my theory that I sold the fruit to the Randolph Marketing Company"—and, further:

"I considered it a purchase; if the fruit brought more than the price agreed upon, I was to have the excess. \* \* \* It was understood that the fruit was subject to inspection at the other end. \* \* \* If the fruit had been rejected on inspection, it would have reduced my claim."

[1-3] Notwithstanding testimony of defendant contradicting plaintiff's theory as to the meaning of the contract, the evidence of plaintiff tends to prove his asserted theory, and upon such conflict the conclusion of the jury must, as to the nature of the contract made by the defendant's agent, be deemed conclusive. Gow, however, was acting in the capacity of an agent, and while it is conceded by defendant that he was empowered to solicit contracts for consignments of fruit to it, to be picked, packed, and sold on commission, it denies that he had authority, either express or implied, in acting for defendant, to either purchase fruit or guarantee a price at which it was to be sold f. o. b. or otherwise. Since plaintiff and his assignor dealt with Gow, knowing him to be acting as an agent of defendant, the burden was upon them to show that he in making the alleged agreement was acting within the scope of authority conferred upon him so to do. While counsel for respondent concedes that no express power was conferred upon Gow to either purchase or guarantee the price of the fruit delivered to defendant, he nevertheless insists that he was clothed with ostensible authority to make the agreement, and hence, since as claimed it recognized and adopted like contracts made by him with others, defendant is estopped from denying that Gow as its agent was authorized to make the alleged agreements. Conceding this to be the law, our attention is directed to no evidence whatever, either



printed in the brief or contained in the typewritten transcript, which in the slightest degree tends to show that defendant had, through its agents or otherwise, purchased fruit at a stipulated price or guaranteed the price thereof, or shipped fruit other than on consignment for sale on commission.

[4] The trial court, in recognition of the law, properly instructed the jury that in order to entitle plaintiff to recover they must find:

"That in the making of said agreements with said Gow as the said agent of the Randolph Marketing Company, the plaintiff and said O. H. Whiting acted in good faith and with ordinary care, and that the making of such agreements was within the actual or apparent scope of the authority of said Gow."

Admittedly there was no actual authority conferred upon Gow to make the contracts, and, as stated, our attention is directed to no evidence tending to show any act on the part of defendant from which the conclusion can be drawn that he had apparent authority to make such contracts for and on behalf of defendant, which, upon delivery of the fruit, received it without knowledge or information that it was consigned otherwise than in the ordinary course for sale upon commission.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

#### On Petition for Rehearing.

PER CURIAM. [5, 6] Respondent's petition for a rehearing herein is denied. In presenting this appeal both parties, as stated in the opinion, printed in their briefs the portions of the evidence, taken from the typewritten transcript, upon which each of them relied. In his petition for a rehearing respondent does not base his claim thereto upon the fact that in considering the evidence so printed we arrived at an erroneous conclusion, but now for the first time in his petition for rehearing he asks us to reconsider the case upon evidence printed therein to which no reference was made in presenting the appeal. In deciding the case the court, as it was justified in doing, assumed that both parties not only directed our attention to all of the points upon which they relied, but likewise to all the evidence upon which they relied in support of their respective contentions; and having, as we believe, properly decided the case thereon, a rehearing should not be granted to enable either party to present what in fact constitutes a new record; that is, evidence which they did not deem of sufficient importance to print in their briefs as required by section 953c, Code of Civil Procedure, which requires one availing himself of the provisions of

sections 953, 953a, and 953b, Code of Civil Procedure, in appealing from a judgment or order, to print in his brief such portions of the record as he desires to call to the attention of the court. And where, as in this case, it appears that the parties exercise such right, and submit the appeal, another hearing thereof upon other evidence than that first presented at the hearing should not be granted. Otherwise repeated hearings of the same case must be had by the court.

(48 Cal. App. 199)

#### THOMAS v. LAYER et al. (Civ. 3111.)

(District Court of Appeal, Second District, Division 1, California. June 15, 1920. Hearing Denied by Supreme Court Aug. 12, 1920.)

#### 1. Sheriffs and constables §151—Sureties on bond indemnifying constable liable without demand by indemnitee.

The sureties on a bond given to indemnify a constable against all loss and liability which he might sustain by retaining attached property are liable as soon as the constable's liability is fixed by judgment against him, and no demand is necessary before suit is begun against them.

#### 2. Sheriffs and constables §151—Action on bond indemnifying constable maintainable without appeal from judgment against constable.

A constable may maintain an action on a bond given to indemnify him against liability for retaining attached property without prosecuting an appeal from the judgment rendered against him in favor of the adverse claimant of the attached property.

#### 3. Sheriffs and constables §151—Action on bond indemnifying constable maintainable pending appeal by principal from judgment against sheriff.

A constable may maintain an action on a bond given to indemnify him against liability or for retaining attached property pending an appeal prosecuted by the principal on the bond from the judgment against the constable, especially where it was not shown that there was any merit in the appeal, and it was dismissed before trial of the action on the bond.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Charles R. Thomas against Adam Layer and others. Judgment for plaintiff, and defendants appeal. Affirmed.

C. Franklin Baxter and Thomas A. Sanson, both of Los Angeles, for appellants.

J. H. De La Monte and Rupert B. Turnbull, both of Los Angeles, for respondent.

JAMES, J. Defendants appeal from a judgment entered against them. The action was brought upon an undertaking given by Wilson, as principal, and Layer and Schenck,

as sureties, to indemnify the plaintiff, who was a constable, for a liability which might accrue against him. Wilson was plaintiff in a certain civil action, in which action he required the plaintiff, as constable, to attach an automobile, which automobile was later claimed by a third party. Upon the demand of the third party the constable was about to release the property, when the undertaking was given upon which this action was brought. Because of his retention of the property after the third party's demand, the constable was subjected to a suit, and judgment was recovered therein against him by one Bunnell, who was the third party referred to.

There was evidence showing that, upon this action of Bunnell being brought against the constable, the latter's attorney called upon the appellants to assist in the defense of that action, and it appears that two counsel were employed by one or the other of the sureties (appellants here), and that such counsel did appear at the trial in defense of the action. Appellant Laver, one of the sureties, makes the point here that he was not permitted to take part in the defense of that action; but there was ample evidence before the trial court to entitle the inference to be drawn that he was not only well informed of all of the proceedings in that case, but that the counsel, other than counsel for the constable, did represent the sureties, and both of them, with authority, or at least their consent. After the judgment was rendered in favor of Bunnell against the plaintiff here, execution was taken out and money belonging to the plaintiff was attached, whereupon notice of appeal was given and an undertaking prepared and filed for the purpose of staying execution. On this undertaking Laver signed as one of the sureties, but later refused to justify, and the constable by his own means procured a stay bond and caused the same to be filed. While the appeal was pending in this court and undecided, the plaintiff brought this action to enforce the liability assumed by Wilson and his sureties, the appellants here. Before the action was tried, plaintiff dismissed his appeal in the Bunnell Case in this court and satisfied the judgment below.

[1] Defendants contend that the complaint in this action failed to state facts sufficient to constitute a cause of action, because it did not allege that demand had been made upon the appellants for the payment of the judgment. Plaintiff in his complaint set out the undertaking executed by appellants, which undertaking, as appears by its terms, was to indemnify the constable against "all loss and liability which he, the said constable, his heirs, executors or administrators, shall sustain or in any wise be put to, for or by reason of the said attachment, seizing, levying, taking, or retention by the said con-

stable, in his custody, under said attachment, of the said property claimed as aforesaid. \* \* \* By allegations following, the facts that the judgment had been rendered against the plaintiff, the amount thereof, and that the defendants had failed to hold the plaintiff harmless as agreed, and had failed to pay the amount of the judgment, and that the whole amount thereof was unpaid, were set forth. We think it was not necessary to allege, under the terms of the contract of indemnity, that demand had been made upon the appellants before the bringing of this action. The amount of their liability had become fixed by the judgment, and there was no term of the undertaking which relieved appellants from satisfying the judgment until after demand made. *Murdock v. Brooks*, 38 Cal. 596; *Pierce v. Whiting*, 63 Cal. 538; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2. The contract here, as before noted, was one of indemnity. In interpreting the liability of sureties under such a contract, the Supreme Court, in *Showers v. Wadsworth*, 81 Cal. 270, 22 Pac. 663, said:

"The contract was in substance a contract of indemnity. In form it was to furnish a bond of indemnity. \* \* \* The indemnity was against liability, and hence there was a right of recovery upon the contract as soon as the liability was incurred."

In *McBeth & Compton v. McIntyre*, 67 Cal. 49, the court said:

"As has been seen already, the indemnity given the constable was not only against actual damage, etc., but also against all liability therefor; and therefore, the moment the judgment was entered in favor of *McBeth & Compton* against the constable, the latter became liable for the amount of it, and thereupon a cause of action arose in his favor upon the bond."

We quote also from *Tunstead v. Nixdorf*, 80 Cal. 647, 22 Pac. 472:

"His liability attached the moment he refused, on demand, to surrender the property to the execution debtor, and that liability was fixed and determined by the judgment of *McCue* against him. The same judgment fixed the liability of the defendants in this action to the plaintiff. \* \* \* It would have been different if the bond had only indemnified the sheriff against actual damages. In such case the sheriff could not recover until he had actually been compelled to pay the judgment recovered against him. *Oaks v. Scheifferly*, 74 Cal. 478. The bond in suit was security against liability on the part of the plaintiff, and not against actual damages only, and his liability attached under the original execution."

[2] The liability of this constable became determined as to its amount when the judgment of the third party (Bunnell) was entered against him. The constable was not required to take an appeal from that judgment at his own cost and expense; neither was he required to prosecute any appeal taken by

him to its conclusion. He had the right to rest upon the judgment and require the principal and sureties on the undertaking of indemnity to pay the amount for which he had become liable, and he was at liberty to bring his action against the principal and sureties without himself first satisfying the judgment. In *Showers v. Wadsworth*, supra, the court, in addition to the language which we have quoted, observes:

"The sheriff having made a proper request that the indemnifier should litigate the claims against him, it is immaterial whether the indemnifier did so or not. If he neglected to do so, the judgments would be conclusive against him. 'If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former.' Civ. Code, § 2778, subd. 5. If he took charge of the litigation, the judgments are equally conclusive. Civ. Code, § 2778; *Dutil v. Pacheco*, 21 Cal. 442, 82 Am. Dec. 749."

[3] The fact that at the time this action was brought the appeal of the plaintiff Thomas in the Bunnell Case was pending and undetermined, we think did not affect the right of the plaintiff to enforce his claim against the appellants upon the liability assumed under their contract. Moreover, it appears, as has already been observed, that before the trial of this action the appeal of Thomas was dismissed and the judgment of Bunnell was satisfied. It does not appear, if that question is material here at all, that there was any merit in that appeal, or that the judgment as entered in favor of Bunnell against the plaintiff was in any wise improper as to its foundation or amount. We think that the judgment as entered herein is a just one, and we find no error sufficient to sustain appellants' plea for reversal.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(48 Cal. App. 237)

# PEOPLE v. PORTER. (Cr. 489.)

(District Court of Appeal, Third District, California. June 18, 1920. Hearing Denied by Supreme Court Aug. 16, 1920.)

## 1. Rape §53(5)—Evidence held to sustain a conviction of assault with intent to rape.

In prosecution for assault with intent to rape an 11 year old girl, evidence that defendant went to the house where he knew the girl was alone with other children, with no particular business, and his own admission as to his acts, with the exception of the attempt charged, held sufficient with testimony of the girl to sustain a conviction.

## 2. Criminal law §1159(4) — Testimony of prosecutrix must be given credit on appeal from conviction.

On appeal from a conviction of assault with intent to rape a girl because of insufficiency of the evidence, the testimony of the prosecutrix must be given full credit.

## 3. Rape §48(2) — Evidence of fact of complaint is admissible, but not details thereof.

In a prosecution for assault to rape, evidence that prosecutrix made complaint after the crime was admissible, but not the details of the complaint, including the name of the party complained against.

## 4. Criminal law §695(5)—Objection held not to raise point that question to witness as to complaint stated defendant's name.

In a prosecution for assault to rape, an objection to a question as to whether prosecutrix made any complaint with reference to defendant because it was too indefinite and uncertain does not raise the point that the question was improper because it contained defendant's name.

## 5. Criminal law §1170½(1)—Naming defendant in prosecution as to complaint by prosecutrix held not prejudicial.

The fact that a question as to complaint by prosecutrix after the commission of the offense named defendant was not prejudicial, where there was no pretense that prosecutrix had grounds for complaint against any one else, and the jury would have inferred that complaint was against defendant if his name had not been mentioned.

## 6. Criminal law §1170½(6)—Witnesses §375—Question as to animus of witnesses held improper, but not error as construed by trial court.

Though a question asked defendant as to why prosecutrix and her mother told the story they did against him was in improper form, it was not prejudicial error to overrule an objection to it after the court had stated that in effect it asked whether defendant knew of any reason why prosecutrix and her mother should have any prejudice against him.

## 7. Criminal law §366(4) — Evidence held to show defendant was present when declaration of prosecutrix was made.

It was not error to admit testimony as to a declaration by prosecutrix at the time of the alleged offense on the theory of *res gestæ*, though the witness did not testify that defendant was present, where the witness did state that she heard the voice of a man whom she did not see, and the testimony of prosecutrix showed that defendant was the only man with whom she was talking at that time and place.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Richard Porter was convicted of assault with intent to rape and he appeals from the judgment of conviction and the order denying his motion for new trial. Affirmed.

W. H. Carlin and W. P. Rich, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

**BURNETT, J.** The defendant was convicted of an assault with intent to commit rape, the prosecutrix being of the age of 11 years. The appeal is from the judgment and an order denying the motion for a new trial.

[1] The first claim made by appellant is that the evidence is insufficient to support the verdict of the jury. With this contention we cannot agree. The mother of the prosecutrix conducted a rooming house in the city of Marysville wherein she resided with her four children. About the 9th of May, 1919, the defendant became a roomer therein, and remained continuously for a short time, and afterwards was there at irregular intervals for a night or two. On the 20th of August, about 8 o'clock in the morning, he returned to the lodging house for the purpose of getting some laundry that he had left there. He met and talked with the mother who, in addition to her duties in connection with the lodging house, was also working in the Marysville Steam Laundry. He asked to see the children, and particularly Elsie, the eldest one. The mother said the children were in bed, and he could not see them then, but must wait until some other time. He insisted upon seeing Elsie, the eldest child, but upon being again informed by her that the children were in bed, and he could not see them at that time, he took his laundry and accompanied the mother down the stairs to the sidewalk, and thence toward the laundry until he came to the telephone station, where he parted with the mother, stating that he was going to telephone. A short time thereafter he left the telephone station and returned to the lodging house. As to what occurred then we have the testimony of the little girl, Elsie, which it is sufficient to quote as follows:

"About 10 minutes after Mr. Porter and my mother left he returned and knocked at the door and said he wanted to come in. I told him he couldn't come in. He said, 'Well, get dressed,' and so I got up and got my clothes and came out, and went out on the porch. He said, 'I hear your mother is going to send you to Grass Valley.' I said, 'Yes, she is thinking of sending you there.' He said, 'I will come up and get you out.' I said, 'You can't get us out.' He said, 'Yes, I can, I know one of the Sisters up there.' I said, 'Do you know the Sister Superior?' He said, 'No.' I said, 'You can't get us out unless you know Sister Superior.' He didn't say anything more about Grass Valley. Then we went in the hall and sat down. He wanted me to sit on his lap, and I said, 'No, I can sit here.' I sat down on a bundle of laundry in front of the telephone. There were two bundles of laundry there, and so I sat down. He wanted me to kiss him, and I

wouldn't do it. He said he guessed he would have to go. He picked up his laundry and started down the stairs. I started back to the kitchen, he followed me there. He chased me in the corner and started to unbutton his pants. I pushed away from him, and ran over to the other side of the room. He came right after me, and sat down in the chair by the table, tried to pull me over his lap, just then my sister came out of room 1. He jumped up and ran over to the other side of the house. Then he said he guessed he would have to go. He gave me a dollar. I showed him mamma's new dress. Then he said he guessed he would have to go, and wanted me to kiss him, and I wouldn't do it, so he gave me \$1, and said he would give me \$5 next time he came in. At the time he started to unbutton his clothes he chased me over in the corner, he started to unbutton his pants I said, 'You let me out.' He said, 'I won't hurt you.' At the time he came over and sat down in a chair and wanted me to sit on his lap his clothes were buttoned. At the time he was sitting on the chair by the table he had hold of my bloomer leg, just had hold of my bloomer at the bottom. He was then trying to pull me over on his lap. Before I started back to the kitchen he got hold of my arm and tried to pull me in room 6, and I said I would tell mamma, and he said 'Oh, no.'"

[2] We cannot say that it is an irrational conclusion from the foregoing that the defendant is guilty as charged. In the testimony of the girl is found at least some evidence of every element of the crime. We must accord, of course, full credit to her statements, and, so reviewing the record, we must hold that the case is governed by the principle announced in *People v. Johnson*, 181 Cal. 511, 63 Pac. 842, and *People v. Moore*, 155 Cal. 241, 100 Pac. 688.

Indeed, the situation is fairly disclosed in the following statement of the trial judge in denying the motion for a new trial:

"I am bound by the verdict of the jury, and in that respect at this time I am almost in the same position, an appellate court would be, looking at the evidence, if there is evidence there, even though it may be conflicting, that would support the verdict, I am to be bound by that verdict unless I think there has been a miscarriage of justice. The incriminating circumstances of this case it is not necessary to comment on, but they are these: He knew the children were there alone, unprotected; he had been told by the mother he couldn't see them at that time; goes away with her, and then immediately returns; has no business to go up there at all; then according to his own story corroborates every detail of the girl's story, except the incriminating circumstances of unbuttoning his pants and trying to force her into the room 6 with moderate force; he followed her into the kitchen for the purpose of hearing her read a letter; the jury may have wondered why the mail carrier was not produced who delivered that letter; the testimony that he forced her into a corner of the room, unbuttoned his pantaloons, afterwards seizing her by the bloomers—those circumstances were sufficiently incriminating to justify the jury in finding a

verdict of guilty of assault, of the crime charged. There are no atrocious details to indicate that he ever had in his mind to use more than moderate force, perhaps overcome resistance by blandishments than any other way, but there was sufficient to indicate his purpose to gratify his passions; I think there is no escape from it."

[3] Appellant claims that the court erred in overruling his objection to the following question:

"I will ask you Mrs. Simmons, if, on the 20th day of August, 1919, in the morning about the hour of 8 o'clock, if Elsie made any reference to the defendant—made any complaint to you with reference to Richard Porter?"

In *People v. Wilmot*, 139 Cal. 103, 72 Pac. 838, the Supreme Court said:

"The rule enunciated by the authorities generally, and by all the decisions in this state, is in all cases to admit evidence of the fact of complaint, and in no case to admit anything more, \* \* \* for, as said by Greenleaf, 'the evidence when restricted to this extent is not hearsay, but in the strictest sense original evidence. When, however, these limits are exceeded, it becomes hearsay in a very objectionable form.' It is clear that to allow any mere statement of the prosecutrix as to the details of the affair, or as to the name of the person accused by her, to be given in evidence would be to allow hearsay evidence to prove the offense."

It is thus apparent that the only possible objectionable portion of the question was in the use of the name of the defendant. The district attorney so framed the question probably to identify the complaint, in other words, to show:

"That the complaint related to the matter being inquired into, and not to a complaint wholly foreign to the subject." *People v. Swist*, 136 Cal. 520, 69 Pac. 223.

Manifestly, the question would have been meaningless if it had not been directed to this particular instance, but it would have been better if the district attorney had otherwise identified the complaint and avoided the use of said name. It may be added that the learned trial judge correctly stated the rule as follows:

"You are prevented from going into detail. \* \* \* It may be given in evidence that the complaining witness, shortly after the alleged occurrence, made complaint to some person if that is the fact."

[4] But appellant's counsel failed to point out that specific infirmity in the question. The objection was:

"To which we object as incompetent, immaterial, irrelevant, calls for hearsay testimony, no foundation laid, it is indefinite and uncertain, and particularly we specify the indefiniteness and uncertainty of the question."

There was no suggestion that the question contained too much. Indeed, the principal objection was that it contained too little; that it was too indefinite and too uncertain. A similar objection had been made before, but there was no claim that the question went too far. This particular objection was therefore waived.

[5] We may add that since it was proper to identify the complaint in some manner, it is difficult to see any prejudice in the use of the name of the defendant for that purpose.

There is no kind of pretense that the prosecutrix had any cause for complaint against any one else, arising that day, and if the question had been the entirely proper one, "Did Elsie on August 20, 1919, make any complaint as to the treatment she received that morning?" the jury would naturally and inevitably understand that the reference was to the treatment of her by the defendant. The significance of the interrogatory was indeed not substantially affected by the use of the defendant's name.

[6] Another criticism of appellant is based upon this part of the record:

"Q. Now, Mr. Porter, you state that your relations with this family have always been friendly? A. They have.

"Q. When did they become otherwise?

"Mr. Carlin. Objected to as incompetent, immaterial, irrelevant, not cross-examination; that is an inference to be drawn by the jury to be argued by counsel, and the reasons for it too.

"The Court: Overruled. A. I don't know as they ever did. \* \* \*

"Mr. Maxwell: Can you tell this jury here why they (the prosecutrix and her mother) told that story?"

This question was also objected to, but the court overruled the objection, stating:

"He has testified the relationship was pleasant, and the question is cross-examination along that line; if he knows any reason why they should have any feeling to testify against him, that is what it amounts to.

"Mr. Carlin: To such a question I might not object.

"The Court: That is what I take the question means."

The answer was:

"No, I couldn't tell why they told it, I am no mind reader."

The question in form was objectionable. But we think it must be assumed that the witness accepted the court's interpretation of its meaning, and answered accordingly. In other words, the question must have been understood as though the witness had been asked if he knew of any animus or prejudice on the part of said witnesses that might influence their testimony. Appellant, indeed, expressed himself as not averse to a question of that character. Moreover, re-

ardless of this question and answer, it is quite apparent from the testimony of appellant that he knew of no reason why these witnesses should perjure themselves. If he had known of any fact tending to discredit their testimony, of course, he would have mentioned it. Indeed, his testimony uniformly was to the effect that he was upon terms of friendship and intimacy with the whole family of which the prosecutrix was a member. The answer to the question was then simply the conclusion or inference which the jury must necessarily have reached from a consideration of the other testimony of the defendant, that is, that he did not know of any improper motive which might have influenced said witnesses. The question should have been reframed in accordance with the suggestion of the court, but, even if we concede error, we do not think the matter is of sufficient gravity to justify a reversal of the judgment.

[7] Appellant also criticizes the action of the court in allowing Mrs. Simmons to testify that about 8 o'clock in the morning of the alleged assault, while occupying a room in said lodging house, she heard the prosecutrix say: "I am going to tell mamma." An objection was made to the question upon the general ground, and that it was hearsay, and particularly that no foundation had been laid, in that it did not appear that the remark was made to the defendant, or that he was present at the time. Of course, the theory of the prosecution was that the witness heard the remark that was made by the prosecutrix at the time of the alleged assault, and that the testimony as to such declaration was admissible as evidence of the *res gestæ*. *People v. Vernon*, 35 Cal. 51, 95 Am. Dec. 49. The rule is familiar, and would undoubtedly apply if the identification of the statement was sufficient. This seems to be the gravest question in the case. The witness heard a man's voice, but she did not recognize it as that of the defendant, since she was not familiar with his voice, nor did she see him on that occasion. But it was not required that the whole question of identification should be established by the testimony of this witness. It appears from the testimony of the prosecutrix that she and the defendant were in the hall at or about that time, and that he was the only man with whom she conversed. The jury were entirely justified, from all the circumstances in the case, in concluding that said statement was a part of the conversation with defendant as related by the prosecutrix, and, hence, we think, the court committed no error in admitting the testimony. At any rate it cannot be said that the verdict was influenced at all by said testimony. The jury must have reached their conclusion from a consideration of the testimony of the prosecu-

trix, and this, as we have seen, is sufficient to establish the crime. No other point demands attention.

The learned counsel for appellant have presented an able and plausible argument in favor of their client, but after a careful reading of the record, we think it must be said that to reverse the case would be to exceed the limits prescribed for the exercise of power and authority by a reviewing court. The judgment and order are affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

(48 Cal. App. 70)

**BARBER ASPHALT PAVING CO. v. ARMSTRONG et al. (Civ. 3414.)**

(District Court of Appeal, First District, Division 1, California. June 4, 1920.)

**Municipal corporations & §519(6)—Lien under last of successive improvement proceedings paramount.**

As between special taxes under successive street improvement proceedings, the lien of the special taxes under the last proceeding prevails.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by the Barber Asphalt Paving Company against Edith R. Armstrong and others. Judgment for defendant and cross-complainant Chester A. Bell, and plaintiff, also a cross-defendant, appeals. Affirmed.

Arthur M. Ellis, of Los Angeles, and Chas. A. Gray, of San Francisco, for appellant.

Richard J. O. Culver, of Los Angeles, for respondent.

WASTE, P. J. Plaintiff brought this action against a number of defendants, seeking to quiet its title to certain real property situated in the city of Manhattan Beach. The defendant Chester A. Bell filed a cross-complaint, seeking a like decree, and judgment was entered in his favor. The plaintiff appeals.

The question presented for determination is one arising between plaintiff and cross-defendant Barber Asphalt Paving Company and the defendant and cross-complainant Chester A. Bell. There is no dispute between them as to the facts; the controversy being purely one of law. Each claims title to the property in question by a deed from the treasurer of Manhattan Beach, issued pursuant to a sale after delinquency on a street improvement bond.

The board of trustees of the city of Manhattan Beach initiated certain proceedings for the grading and paving of Highland avenue, under the Vrooman Act (St. 1885, p. 147, as

amended). Jurisdiction was duly acquired and the work was ordered. The contract for the work was entered into between the superintendent of streets of Manhattan Beach and the plaintiff, February 5, 1914. The assessment for the work was recorded October 6, 1914. On December 8th following a bond was duly issued against the lot, under the Bond Act of February 27, 1893 (St. 1893, p. 33). No payments of either principal or interest being made on the bond, the lot was sold by the city treasurer on the demand of plaintiff on the 24th day of March, 1916. The certificate of sale was issued, and in due time deeds followed, vesting the title to the lot in plaintiff.

The proceedings, under which the defendant Bell claims, provided for the construction of a sidewalk on Highland avenue, and were also had under the Vrooman Act. They were subsequent in each respective step to those for the paving of Highland avenue, which resulted in the bond sale, by which plaintiff claims. The assessment for the work was recorded December 8, 1914, and the bond was issued January 8, 1915. The city treasurer sold the lot after delinquency in payment, on defendant Bell's demand, April 22, 1916, certificate of sale was issued, and the deed followed in due time.

The sole question for consideration is one of priority between two claimants, each resting his title in a street improvement proceeding. When the appeal in this case was instituted the question was a novel one. Since then, however, the precise point has been passed upon, and decided by the Supreme Court, in *Woodill & Hulse Electric Company v. Young*, 182 Pac. 422, 5 A. L. R. 1296, in which a rehearing was subsequently denied by the entire court. The question may therefore be deemed settled.

After a thorough examination of the matter, the Supreme Court, in that case, held that there is no such essential or inherent difference in those special taxes, arising under street improvement proceedings, as to deprive their lien of the benefit of a rule accorded to the lien of general taxes. In both instances the taxing power operates in rem, on the property itself, without regard to different or conflicting interests of ownership, and the universal and general rule is that in proceedings to enforce the payment of taxes, the last tax levied, and sought to be enforced, is superior and paramount to the lien of all other taxes, claims or title. Applying this rule, the court held that the last lien in point of time, under street improvement proceedings, must prevail.

The judgment is affirmed.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

# ALEXANDER v. PANAMA MACARONI CO. (Civ. 3308.)

(District Court of Appeal, First District, Division 1. California. July 6, 1920.)

1. Principal and agent ⇐23(5)—Evidence held to prove that offer to make brokerage contract had never been accepted.

In an action for breach of contract making plaintiff exclusive selling agent for defendant's goods for specified period, evidence held to sustain finding that defendant's proposal was never accepted.

2. Appeal and error ⇐1010(1)—Finding supported by evidence controlling.

Trial court's finding, supported by the evidence, is controlling.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by William B. Alexander against the Panama Macaroni Company. Judgment for defendant, and plaintiff appeals. Affirmed.

A. H. Foster and Albert A. Kidder, Jr., both of Los Angeles, for appellant.

Rupert B. Turnbull, W. G. Van Pelt, and B. A. Weyl, all of Los Angeles, for respondent.

KNIGHT, Judge pro tem. This action was brought to recover damages for breach of contract. Judgment was for the defendant, and plaintiff appeals.

The basis of the appellant's action is a letter dated April 9, 1915, addressed to Alexander-Callen & Co., and signed by respondent, which appellant contends constituted a contract whereby the firm of Alexander-Callen & Co., a copartnership, of which appellant was a member, was made the exclusive selling agent for respondent's goods for a period of 10 years. Said letter reads as follows:

"We hereby agree to make you our exclusive selling agents for ten years beginning today and expiring April 9th, 1925. We will pay you a commission of fifteen cents per case (case contains 24 packages), when goods are introduced and the price of flour is normal. Said commission to be paid at end of each calendar month. We reserve the right to refuse business where customers' ratings do not justify credit. In consideration of the above commissions, you are to show an increase in our sales each consecutive year, unless impossible, such as panic, etc., causing business to decrease generally. We reserve the right to make the selling prices. The idea of this agreement is to work together in good faith, in building up a good business for the factory. We are to be consulted on all matters such as the territories you are to sell in, and how the goods are to be sold."

Respondent denies that said letter constituted the contract between the parties, and

claims that it was intended to be, and in fact was, a mere offer which was never accepted by appellant and was by the respondent, on December 2, 1915, withdrawn, and that the only contract ever existing between the parties was an oral one, whereby an agency was continued from month to month, and that on February 9, 1916, said oral agreement was terminated. Respondent also relies upon two other defenses, the first of which is that appellant, at the time said letter was written, was a member of a copartnership, which was, subsequent to the date of the letter and prior to the alleged breach, dissolved by the retirement of one of the members of the firm, which fact, respondent contends, terminated any contract of agency which may then have existed. The other defense is that the creation of the agency as contemplated by said letter was made dependent upon the price of flour being "normal," and respondent claims that at no time since the 9th day of April, 1915, has the price of flour been or is it now normal.

The court found for respondent on all the issues, and it would seem that it is not necessary for us to extend our discussion beyond the defense first mentioned, for the reason that the question of whether or not the parties in fact operated under said offer as contained in said letter of April 9, 1915, as contended by appellant, or whether said offer was afterwards withdrawn and the parties operated under an oral agreement from month to month, as contended by respondent, was purely a question of fact for the trial court, and upon which question the record shows there is a substantial conflict. In support of the conclusions reached by the trial court the evidence shows that at no time during the business relation between the parties did said copartnership sell the goods of respondent pursuant to the terms of the letter of April 9, 1915. Previous to that date respondent paid commissions of 6 and 8 per cent. on sales. After the letter of April 9, 1915, they paid a commission of only 5 per cent. In said letter the commissions were fixed in the sum of 15 cents per box. On December 2, 1915, respondent wrote to said Alexander-Callen & Co. as follows:

"You have been serving us in the distribution of our goods on a basis of 5% of the sales. At the present time there is no account unpaid between us, other than the current month. On April 9th, 1915, we submitted to you a written offer for you to handle our products on a commission basis of 15c per case (case containing 24 packages). This offer was conditional upon the price of flour being normal, and at no time

since April 9th has flour been normal, and the prospects are at the present time that, due to the war troubles in Europe, it will not again reach a normal level for at least twelve to eighteen months. This offer has never been accepted by you, and we hereby withdraw the offer, for the reason that it has not been accepted; for the reason that flour has not been normal, and that there is no immediate prospect of its reaching a normal level; and for the further reason that there has been, since the date of April 9th, a change in the personnel of your company. We hereby withdraw our offer of April 9, 1915."

Notwithstanding that, said copartnership in reply to said letter stated that the terms of said letter were not agreed to, it nevertheless continued to sell the product of respondent under an arrangement different from that stated in said letter of April 9, 1915, until February 9, 1916, at which time respondent informed said copartnership that it would no longer fill any orders received from said copartnership, and that it intended to solicit the trade itself, which it afterwards did.

[1, 2] According to the testimony of William F. Schiffer, who was the president of the respondent company at the time these transactions took place, the said copartnership did not operate under the terms of said letter of April 9, 1915. The price of flour was a matter which seemed to have made it impossible to adopt any definite arrangement for the sale of the goods, and pending such uncertain and unsettled conditions the parties operated under the tentative agreement from month to month, and received a commission of 5 per cent. on their sales. During that period conversations were had between the parties, wherein appellant protested against the low commissions of 5 per cent. and as a result an adjustment was effected whereby respondent contributed toward the payment of the salaries of two members of said copartnership to the extent of paying one of them \$25 per week and the other \$15 per week for the months of May, June, and July, 1915, besides defraying certain traveling expenses of the members of the firm while selling respondent's goods. This and like testimony shown by the record was sufficient to support the trial court in finding that the proposal contained in the letter of April 9, 1915, was never accepted, and that it was consequently inoperative. Therefore under the established rule the conclusions reached by the trial court are controlling.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.



(48 Cal. App. 175)

(191 P.)

**McDUFF v. McDUFF. (Civ. 3311.)**

(District Court of Appeal, First District, Division 1, California. June 14, 1920.)

**1. Husband and wife  $\Leftrightarrow$  257, 264—Profits from real estate bought by husband prior to marriage not community where resulting from increase in real estate values.**

In an action by husband to quiet title to land purchased with the proceeds of property he had bought before marriage, evidence held to show that the profits on the first transaction were in no sense due to any improvements made through the activities or capacity of spouses, but resulted from the natural enhancement of real estate values, since such profits were not community, and the land was the husband's separate property.

**2. Husband and wife  $\Leftrightarrow$  257—Method of computing husband's value of husband's interest in business.**

The proper method of determining the value of husband's interest in a business in which he was engaged at the time of his marriage is to allow the usual interest to the husband on the amount invested on the basis of a long-time investment well secured.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action to quiet title by William Gilbert McDuff against Sarah Frances McDuff. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 187 Pac. 37.

Nathan Newby, of Los Angeles, for appellant.

Percy Hight, of Long Beach, for respondent.

**KNIGHT**, Judge pro tem. This action was brought by plaintiff against his wife to quiet title to certain real property situate in the city of Long Beach, in which the defendant claims a community interest. Judgment was for plaintiff, and defendant appeals.

In the year 1881, four years prior to the marriage of the parties, plaintiff purchased a farm in Kansas for \$5,000, paying \$2,500 in cash and trading an interest in other property valued at \$2,500. The \$2,500 in cash was borrowed by plaintiff, and plaintiff gave a mortgage covering the farm to secure its payment. In the year 1913 plaintiff sold the Kansas farm for \$11,500, and, after paying off the mortgage, which then amounted to \$3,500, received a net balance of \$8,000 in cash. Of that sum he invested \$4,000 in the property in controversy here, upon which he borrowed \$8,500, and erected four houses thereon. Plaintiff is a carpenter and contractor by trade, and contributed some of his time to the construction of the houses.

Appellant contends that part of the profits derived from the sale of the Kansas farm,

and with which the purchase of the Long Beach property was made, were the result of the activity, ability, and capacity of plaintiff and defendant, and are therefore community property. The findings and judgment of the lower court are in effect a holding to the contrary, and the only question on this appeal is whether or not there is sufficient evidence to sustain such findings and judgment.

At the time respondent acquired the Kansas farm it was fenced, improved with a dwelling and other structures, a small portion of it was planted to fruit trees and vines, and some of it was covered with a growth of timber. After plaintiff and defendant were married and moved onto the property, no permanent improvements of a substantial character were made. During their occupancy of the property 38 acres were planted to orchard, the cost of the trees being met by increasing the mortgage, but the orchard was an entire failure on account of being destroyed by "borers." The house was destroyed by fire, but was rebuilt with the money received from the insurance, together with \$900 more, which plaintiff borrowed from his father. Other farm outbuildings were constructed, but the cost thereof did not exceed \$200. They were built with rock obtained on the farm and with lumber cut on the premises by a mill on shares.

[1] It is quite clear from the evidence stated that the activity of the parties added nothing to the value of the property. It is true that from the time plaintiff and defendant moved onto the farm in 1885 until they vacated it in 1906, they worked thereon as farmers usually do, but the proceeds were used, not to improve the property, but to pay the living expenses of the family and the taxes and interest, and at times there was scarcely enough produced by the farm to meet the ordinary expenses, plaintiff being obliged to engage in outside enterprises, the proceeds from which he devoted to the support of his family. After plaintiff and defendant vacated the farm in 1906 it was leased to various tenants for a rental of \$500 a year, which was sufficient to pay the interest and taxes without drawing upon the personal earnings of plaintiff or defendant. Upon a full examination of the record it is obvious that the increase in the value of the farm from the time of the purchase in 1881 to the time of the sale in 1913 was due alone to the natural enhancement of real estate values, and not to any improvements made thereon through the activity, ability, or capacity of plaintiff or defendant.

[2] It has been held that the proper method of determining the value of a husband's interest in a business in which he was engaged at the time of his marriage is to allow the usual interest to the husband on the amount invested on the basis of a long investment,

well secured. *Pereira v. Pereira*, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; *Estate of Gold*, 170 Cal. 621, 151 Pac. 12. Measuring the instant case by that rule, the allowance of a moderate rate of interest on the sum of \$2,500, which represented the net value of the farm at the time of its purchase, for a period of 28 years, would bring the entire investment up to as much as, if not more, than plaintiff received net for the property in 1913, and by such computation no allowance is made for the natural enhancement in the value of the property.

We are of the opinion that there is ample evidence to support the conclusions of the lower court, and the judgment appealed from is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(48 Cal. App. 204)

**McKUNE v. McKUNE. (Civ. 3324.)**

(District Court of Appeal, First District, Division 1, California. June 16, 1920.)

**1. Venue — 67—Affidavit of residence held to state fact, not conclusion.**

An affidavit in support of defendant's motion for change of venue that defendant was a bona fide resident of another county, where she lived with her child and supported herself, states a probative fact, not a mere conclusion, and is sufficient if uncontradicted.

**2. Venue — 68—Affidavit denying change of residence held a conclusion.**

Where the affidavits in opposition to defendant's motion for change of venue of an action for divorce showed that before the commencement of the suit defendant had left the matrimonial residence, and had gone to another county, where she still remained, a denial in the affidavit that defendant resided in the other county merely stated a legal conclusion.

**3. Venue — 68—Evidence held to establish change of residence by defendant.**

Evidence on a motion for change of venue of a divorce action, which showed that defendant had left her husband's home and had gone to another county, with part of her belongings, five days before the commencement of the action, held sufficient to show residence in the other county, though she had left some of the belongings of herself and infant daughter at her former residence.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action for divorce by Walter T. McKune against Anita McKune. Defendant's motion for change of venue was denied, and defendant appeals. Reversed.

Rohe, Jeffers & Devin, of Los Angeles, and John O'Gara, of San Francisco, for appellant. Samuel T. Bush and William Sea, Jr., both of San Francisco, for respondent.

KNIGHT, Judge pro tem. This is an appeal from an order denying defendant's motion for a change of place of trial from the city and county of San Francisco to the county of Los Angeles. The action is one for divorce, and was commenced on March 7, 1918. Summons was served on March 14, 1918. The motion for change of place of trial was heard and determined upon the affidavits of the parties.

[1] In defendant's affidavit it is stated:

"That at the time of the commencement of this action, and from since the 2d day of March, 1918, and at this time she is a bona fide resident of the county of Los Angeles, state of California, where she now lives with her infant child, and is supporting herself and child by her own efforts and with the aid of her friends, and without any aid or support from her husband, the plaintiff."

There can be little doubt that the above statement is one of a probative fact, and was sufficient of itself, if uncontradicted, to justify the granting of her motion. *O'Brien v. O'Brien*, 16 Cal. App. 103, 116 Pac. 692. In the case last cited the court had under consideration a similar affidavit, and it was held that, although the allegation may in a sense involve a legal conclusion, nevertheless, on a motion of this character, in the case of the defendant's affidavit, wherein, without qualification, he states his residence to be at a certain place, without giving other facts to support the statement, such allegation should be construed to be and treated as the statement of a probative fact. It follows that, unless the statements of fact in plaintiff's affidavits are sufficient to raise a conflict, the motion of defendant should have been granted.

[2] Plaintiff filed two affidavits. In the second one he specifically denied the statement of the defendant above quoted, and, in addition, set forth facts relating to the defendant's separation from him and her subsequent departure for Los Angeles, in the following manner:

"That on the 27th day of February, 1918, said defendant remained that night in a separate room in the Ford Apartments, where plaintiff and defendant resided, and that on the 28th day of February, 1918, said defendant stayed at the Marshall Hotel, in the said city and county of San Francisco; that at the time said defendant left the apartment occupied by said plaintiff and defendant on the 27th day of February, 1918, said defendant did not remove all her belongings or clothing or wearing apparel, or the clothing or wearing apparel of the child of said plaintiff and defendant, from said Ford Apartments, but left part of said

belongings and said clothing and wearing apparel in the apartment occupied by said plaintiff and said defendant, and part in the basement of said Ford Apartments, where said plaintiff and defendant resided, for a long period of time after said defendant left the apartment of said plaintiff and defendant, and during the time up to or about the 2d day of April, 1918, while said defendant was staying, as plaintiff is informed, in the county of Los Angeles."

In the first affidavit of plaintiff it is, among other things, stated that defendant departed for the county of Los Angeles "on or about the 2d day of March, 1918, and only five days before this action was commenced," and that "until the 2d day of March, 1918, Anita McKune, the defendant above named, resided with the plaintiff in the city and county of San Francisco, state of California, and that said plaintiff and defendant for two years prior to the commencement of this action continuously resided in the city and county of San Francisco." It will thus be seen that the facts are undisputed that the defendant left the apartments of plaintiff on February 27, 1918, with her child, taking part of her belongings with her, and on March 2, 1918, five days prior to the commencement of this action, departed for the county of Los Angeles, where she thereafter continued to reside, and was residing at the time she made her affidavit of residence on April 2, 1918.

In this state of the record we are of the opinion that the defendant's motion should have been granted. It is true that plaintiff specifically denied the statement of defendant that she was a resident of the county of Los Angeles, but such denial amounts to no more than plaintiff's conclusion, which was based upon and must be considered in connection with the other matters stated in his affidavit, which show without conflict that five days prior to the commencement of the action defendant departed for Los Angeles, and that she was actually living there at the time of the commencement of the action and at the time of the making of her affidavit in support of her demand for a change of place of trial.

[3] Respondent contends, however, that defendant's intention to return to San Francisco was shown by the fact that she did not remove all of her belongings from the apartments of plaintiff when she separated from him on February 27, 1918, but only a portion of them, and because she stored the belongings which she had removed in the basement of the apartment house in which plaintiff and defendant had previously lived. We do not believe that the acts of defendant can be so

interpreted. It appears that defendant left plaintiff on February 27, 1918, on account of disagreements between them, and within a few days thereafter departed with her child for Los Angeles. The short period of time which elapsed between her departure for Los Angeles and the filing of this motion was scarcely sufficient within which to remove all of her belongings had she been disposed to do so, and the fact that she did not do so cannot be accepted as indicating her intention to return to San Francisco in the face of her sworn declaration that from and after March 2, 1918, she was a bona fide resident of Los Angeles county. The establishment of her residence depended entirely upon her intention, and she knew her intention better than any other person. As was stated in *O'Brien v. O'Brien*, supra:

"The defendant himself knows better than any other person whether he has established a legal residence in a particular city or county. He knows, or must be assumed to know, what his intention is with respect to becoming or not becoming a resident, in the legal sense, of a place to which he 'moves.'"

*Marston v. Watson*, 20 Cal. App. 465, 129 Pac. 611, cited by respondent, does not help him. In that case it was held that the affidavit of the defendant, wherein she stated that she was a resident of another county, was a mere conclusion, and should be disregarded, in view of the counter affidavits, showing clearly that at the very time the defendant claimed that she was a resident of such other county she was then, and for some time prior thereto had been, actually living in the county in which the action was brought, and that therefore the statement of the defendant as to her residence was not and could not be true. In the instant case it is undisputed that the defendant, five days prior to the commencement of this action, departed for Los Angeles, where she subsequently actually lived, and on April 2, 1918, the date on which she made her affidavit, was actually living in that county. These facts, coupled with her positive statement that she was "a bona fide resident" of that place during that time, entitled her to a change of place of trial.

None of the other matters set forth in the affidavits are material. They relate to contributions made by plaintiff to the defendant's support while she was separated from him, and to the matter of the convenience of witnesses.

The order appealed from is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

(48 Cal. App. 86)

**SUTTORI v. PECKHAM et al. (Civ. 3152.)**

(District Court of Appeal, Second District, Division 1, California. June 7, 1920. Hearing Denied by Supreme Court Aug. 2, 1920.)

**1. Fish  $\S$  17—Finding of catching within three miles of shore warranted.**

Evidence held to authorize a finding that white sea bass caught with a net, prohibited by Pen. Code,  $\S$  636, had been caught within three miles of the shore of Santa Catalina Island, so to make the fishing illegal, giving no title or right of possession to the fish.

**2. Fish  $\S$  17—Catching of fish illegally gives no ownership.**

One's catching of fish in certain waters with a net, being prohibited by law and a criminal act, gives him no ownership or right to possession of the fish.

**3. Fish  $\S$  8—State may regulate taking.**

The state may regulate the taking of fish in its waters, and make the taking thereof with a net an offense.

**4. Trever and conversion  $\S$  16—Ownership or right of possession necessary for action.**

For one to maintain action for conversion he must at the time of the alleged conversion have had the ownership or right of possession of the articles.

**5. States  $\S$  12(3)—Boundaries, and consequent jurisdiction to regulate fishing, embrace three-mile limit around Santa Catalina Island.**

The boundaries of California, defined by its first Constitution as extending three miles into the Pacific, "also all the islands \* \* \* along and adjacent to the Pacific Coast," embrace the waters around and within three miles from the shore of Santa Catalina, one of such islands, by St. 1915, p. 589, included in fish and game district No. 20, so that its jurisdiction, under Pol. Code,  $\S$  33, coextensive with its boundaries, authorizes Pen. Code,  $\S$  634½, and section 636, subd. 7, making it a misdemeanor to fish with a net therein.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Nick Suttori against J. J. Peckham and another. Judgment for defendants, and plaintiff appeals. Affirmed.

C. W. Pendleton and B. M. Marble, both of Los Angeles, for appellant.

A. J. Hill, Co. Counsel, and J. Allen Davis, Deputy Co. Counsel, both of Los Angeles, for respondents.

CONREY, P. J. Action to recover damages for alleged conversion by the defendant of five tons of fish, being the property of the plaintiff. Judgment in favor of the defendants, and the plaintiff appeals therefrom.

The court found that at the time of the alleged conversion the plaintiff was not the owner of nor was he entitled to the posses-

sion of the fish mentioned in the complaint, and that it was not true that at said time, and while the plaintiff was the owner of and entitled to the immediate possession of the said fish, the defendants wrongfully took and carried away said personal property and converted the same to their own use. Appellant contends that these findings are not sustained by the evidence.

All of the fish included in this controversy were white sea bass. According to the testimony produced by the plaintiff, he was the master of a boat called the Jupiter, and on the 25th day of June, 1917, with his crew, he was fishing in that boat at Santa Barbara Island. Off the coast of that island, according to his testimony, he caught four tons of sea bass. Later in the day, and while four miles distant from Santa Catalina Island, he cast his net and caught in it about three tons of sea bass. The run of the tide and the pull of the loaded net drifted the boat to a point which was a mile or less from the shore of the island. At this place the defendant Staples, who was a deputy sheriff of the county of Los Angeles, overhauled the boat, arrested the men, and took the whole outfit to Avalon, Catalina Island, being in the township where the defendant Peckham was justice of the peace. Here the fish were landed. A complaint was filed before the justice, sitting as a magistrate, charging the plaintiff and members of his crew with the crime of misdemeanor, committed by violation of the provisions of section 636 of the Penal Code. The defendants were held to answer, and an information was afterwards filed against them in the superior court by the district attorney, which information was afterwards dismissed by the court. After taking possession of the fish, the defendant Staples telegraphed to the fish and game commissioner at Los Angeles, stating what he had done, and asking what disposition he should make of the fish. The commissioner declined to act officially in the matter, as Staples was not a deputy of the commissioner; but the commissioner conferred with the sheriff, and telegraphed Staples that the sheriff "advised to hold about 100 pounds fish as evidence and return the rest to fisherman." On the same day, June 26th, Peckham, purporting to act as justice of the peace, made an order entitled in the cause pending before him, in which he recited that the fish were liable to spoil unless disposed of, and ordered Staples to ship and deliver the fish to the Los Angeles Examiner, a newspaper in the city of Los Angeles, for free distribution by said newspaper to the poor of said city. Staples then sent to the Los Angeles Examiner the said fish, or so much thereof as was in a condition fit for shipment.

The defendant Staples testified that he only took the fish which he knew were alive

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when he made the arrest; that they were all alive when he went aboard the boat; that the fish would not live more than 15 minutes after being taken out of the net. James J. Bates, a witness for the defendants, by occupation a fisherman, testified that he had had extensive experience in fishing in the waters of the Pacific Ocean. Concerning the habits of the white sea bass, he stated:

That they are migratory fish. "Ordinarily I would not say that you could find these white bass upon the surface out from the shore three or four miles. \* \* \* I don't think I have ordinarily seen these out at sea. I would not see them more than three miles away from shore ordinarily."

The defendant Staples, testifying concerning the habits of white sea bass, said:

"White sea bass are around the island all summer. I have never seen a school of white sea bass on the surface away from shore."

[1-4] From the evidence thus produced, the court was justified in believing that all of the fish in question had been taken by the plaintiff with a net from the waters of the Pacific Ocean within three miles from the shore of Santa Catalina Island. This fact was sufficient to justify the court in finding that the plaintiff was not the owner nor entitled to the possession of the fish, if the taking of the fish with a net and within three miles of that island was prohibited by law and was a criminal act.

"The fish within our waters constitute the most important constituent of that species of property commonly designated as wild game, the general right and ownership of which is in the people of the state (Ex parte Maier, 103 Cal. 476, 483, 42 Am. St. Rep. 129), as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign, coming to us from the common law, and preserved and expressly provided for by the statutes of this and every other state of the Union." *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 Pac. 374, 89 L. R. A. 581, 58 Am. St. Rep. 183.

Laws regulating the taking of wild game and fish and imposing penalties for the violation of such laws are fully within the legislative power of the state and do not destroy any right of property. *Ex parte Kenneke*, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177. It should need no citation of authorities to establish the proposition that no person can acquire title or right of possession to property of the state by the act of taking possession thereof illegally. But the plaintiff cannot maintain this action if at the time of the alleged conversion he had neither ownership nor right of possession in the goods alleged to have been converted. *Hilmer v. Hills*, 138 Cal. 134, 70 Pac. 1080.

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This brings us to a consideration of the statutes regulating the taking of fish.

[5] The act of taking fish other than with hook and line "within three miles of shore line of Santa Catalina Island" is a misdemeanor, according to the provisions of section 634½ of the Penal Code. The act of taking fish with a net within the limits of fish and game district No. 20 is made a misdemeanor by the terms of section 636, subdivision 7, of the Penal Code. In section 21 of the act to divide the state of California into fish and game districts (Stats. 1915, p. 589), it is provided that "fish and game district 20 shall consist of and include the island of Santa Catalina, with the state waters surrounding said island." If the state waters surrounding that island extend three miles from the shore of the island, then the territorial limits described in section 634½ of the Penal Code are identical with district 20.

Appellant, while conceding that the sovereignty of the United States "extends one marine league at sea in all directions from the shore of the island in question," contends that the state of California has no jurisdiction over any of the waters surrounding any of the islands along this coast below low tidewater mark. The boundaries of the state of California, as declared in its first Constitution (Const. 1849, art. 12) and recognized by the act of Congress admitting the state into the Union (Act Cong. Sept. 9, 1850, c. 50, 9 Stat. 452), are defined as extending "three English miles" into the Pacific Ocean, "also all the islands, harbors, and bays along and adjacent to the Pacific coast." The sovereignty and jurisdiction of this state extend "to all places within its boundaries as established by the Constitution," subject only to the terms of any cession or law under which any part of such places has been or may be ceded to, purchased, or condemned by the United States. *Pol. Code*, § 33.

Under these conditions it has been held that a liability created by a California statute for the act of one person causing the death of another was enforceable where the tortious act was committed on a ship at sea 2 miles from the shore of the mainland. The court held that "the jurisdiction of the state of California over the sea is that of an independent nation," and cited authorities to the effect that such jurisdiction extends into the sea to the distance of a marine league. *Humboldt Lumber Manufacturers' Ass'n v. Christopherson*, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

There appears to have been no decision made hitherto, either sustaining or overruling the contention here made by appellant, viz. that jurisdiction over the waters surrounding any of the islands along the California coast below tidewater mark was never conferred upon the state of California. It is our opinion that the contention so made

by appellant is without merit. It has been said that the term "coasts" includes "the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified." *Wheaton's International Law*, (8th Ed.) § 178. It is not denied that Santa Catalina Island is within the state of California and is a part of the county of Los Angeles. Every reason which in the nature of things justifies the state in extending its jurisdiction over the subject of fishing rights to the distance of 3 miles from the shore of the mainland equally applies to a like distance from the shore of any island which is a part of the state.

Appellant suggests that subdivision 7 of section 636 of the Penal Code, in so far as it applies to district 20, is unconstitutional and void, on the authority of *Ex parte Bailey*, 155 Cal. 472, 101 Pac. 441, 31 L. R. A. (N. S.) 534, 132 Am. St. Rep. 95. That decision declared void a municipal ordinance which prohibited the use of fish nets and seines at places less than 1000 feet from any wharf, dock, or pier located in said town. The court held that the evident object of the ordinance was to protect fishing with hook and line from the wharves of the town. For that reason it was decided that the ordinance was an attempted interference with the exclusive right of the people of the state in the ownership of wild game and fish and of the state to the control thereof. The case does not at all sustain appellant's position.

The conclusions above stated render it unnecessary to discuss other grounds of appeal presented by appellant and discussed in the briefs.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(48 Cal. App. 178)

### GRISWOLD v. FRAME. (Civ. 2814.)

(District Court of Appeal, Second District, Division 1, California. June 15, 1920.)

#### 1. Executors and administrators § 52—Evidence held to warrant inference of want of consideration for note.

Evidence that plaintiff's intestate, who was payee of the note sued on, had stated when the note was given that the money delivered to the maker was due him from her as part of their mother's estate, and that the note was taken only to protect her records, held sufficient to sustain an inference that there was no consideration for the note.

#### 2. Evidence § 432, 469—Parol evidence admissible to show want of consideration or satisfaction of note.

While no evidence is admissible to prove that a plain and unambiguous written contract

was intended to impose a greater or less obligation than its terms import, such evidence is always admissible to show want of consideration or payment or other satisfaction of a promissory note.

#### 3. Evidence § 269(2)—Declarations of plaintiff's intestate, showing want of consideration for note given her, are competent.

Under Code Civ. Proc. § 1870, subd. 2, making competent the act, declaration, or omission of a party, declarations of plaintiff's intestate at the time the note sued on was given to her which showed want of consideration for the note are competent.

#### 4. Evidence § 220(1)—Declarations of grantor as to intention made in presence of intestate, are competent.

In an action on a note given plaintiff's intestate by her brother, where the defense was want of consideration because the money represented thereby was due maker of the note from the intestate as part of their mother's estate, declarations by the mother, since deceased, as to her intention in granting property to intestate, made in the presence of intestate, are admissible against plaintiff under Code Civ. Proc. § 1870, subd. 8, making competent an act or declaration of another in the presence and with the observation of a party and his conduct in relation thereto.

#### 5. Executors and administrators § 52—Proof that money represented by note was intended as discharge of obligation or gift shows want of consideration.

Evidence that the money given defendant by plaintiff's intestate, for which he executed the note sued on, was given by the intestate to discharge a moral obligation to distribute proceeds of their mother's estate, or was intended as a gift to defendant, is sufficient to show want of consideration for the note, though it does not establish a legal obligation by plaintiff's intestate to pay the money to defendant.

Appeal from Superior Court, Tulare County; M. L. Short, Judge.

Action by Joseph J. Griswold, as administrator of the estate of Margaret E. Griswold, deceased, against J. M. Frame. Judgment for defendant, and plaintiff appeals. Affirmed.

Stephen G. Long, of Long Beach, and E. I. Feemster and Middlecoff & Feemster, all of Visalia, for appellant.

Marley Fisher, of Lindsay, and Power & McFadzean, of Visalia (D. E. Perkins, of Visalia, of counsel), for respondent.

JAMES, J. This action was brought to recover on a promissory note. Defendant's defense of want of consideration was sustained by the trial judge, and the appeal is taken from the judgment which was entered in his favor.

Margaret E. Griswold was the sister of the defendant. Her first husband, Lumereau, died in the year 1909, and the promissory note in question was made on March 6, 1911, which

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was prior to the time that the sister married Griswold, who appears here as the administrator of her estate. The promissory note sued upon was among the effects of plaintiff's intestate. In establishing his defense of want of consideration for the making of the note, the defendant, in substance, testified: That prior to the death of his and Mrs. Griswold's mother he had resided in Goldfield. That at the last illness of his mother, who resided with Mrs. Griswold (then Mrs. Lumereau), he was called home to Lindsay, Cal. That just before the death of his mother his sister urged him to buy an interest in a business at Lindsay, and that he replied that it would require \$1,000 more than he then had, and that she (Mrs. Lumereau) said:

"I will get you the \$1,000, if you will go in with him," \* \* \* and I said, 'Well, I have got to go back to Goldfield, and while I am back there I will think it over and write what I will do,' and while I was back to Goldfield I was thinking over that matter, and got the second call that mother was worse, and then I came back. Q. And about when was it that she got the money and let you have it? A. It was some time in March, because I went in with him, I think, on the 1st of April of that year."

He further testified that the money was obtained by Mrs. Lumereau from the First National Bank; that he was present when the arrangements were made for it; that his sister, Mrs. Lumereau, said that she would get the \$1,000 and let him have it, because it was coming to him from his mother's estate; that the note in suit was given by him at his sister's request; that "she told me that she would not take a note at all if she didn't have to keep her accounts straight, that she wouldn't exact the note at all, but she had things to attend to, that she had to keep straight, and consequently she thought it best to take a note; she said she would destroy it, or do away with it, when things were straightened up." Witness Reed, cashier of the bank at which Mrs. Lumereau obtained the \$1,000 which she delivered to defendant, testified that Mrs. Lumereau obtained the money upon her own note from the bank as a loan; that he asked her what she was going to do with the \$1,000 that she wanted to borrow, and she said:

"My brother is figuring on going into business with Mr. Frame—or Mr. Forster, and I want \$1,000 to help him pay for an interest, and this, that is the money that I owe him, coming from his mother's estate."

This was all of the testimony covering the immediate transaction touching the giving of the note by Frame to Mrs. Lumereau. It was further shown in evidence that the mother of defendant and Mrs. Lumereau had at one time been possessed of a quarter section of land, one half of which she sold, the remaining half of which she conveyed to Mr. and Mrs. Lumereau by grant deed which instrument of conveyance indicated an intent that

the grantees were to take the same as joint tenants with right of survivorship. Another witness, Sims, testified that after Lumereau's death she had a conversation with defendant's mother, in which the defendant's mother stated, in substance, that she had deeded the property to Mr. Lumereau, "and Mr. Lumereau had to take care of her as long as she lived; \* \* \* she told me that herself, that she had deeded them 80 acres to Mr. and Mrs. Lumereau, to take care of her as long as she lived." Another witness, Waltenbaugh, testified that she occupied a close relation of friendship and as a business confidant with defendant's mother and Mrs. Lumereau, and that defendant's mother and Mrs. Lumereau once sent for her after Lumereau's death, and that the mother, in the presence of Mrs. Lumereau, stated that—

"She had given Mr. Lumereau a deed to that place, in case she should become a burden in her old age he would record that deed after her death, but if he died first, that deed was to be divided among her four children, provided Jerry ever returned, and, if not, between the three. But if she died first, it was their property, and when she went to sell it, she found he had recorded it without her knowledge or consent and without the knowledge of Mrs. Lumereau."

It is the contention of appellant that all of this testimony given as to statements made by the sister of the defendant (plaintiff's intestate) and the mother of defendant, is hearsay and incompetent. Further, that by his defense and the evidence offered to sustain the same the defendant attempted to vary the terms of a written contract, which the law does not permit to be done.

[1] Leaving aside for the moment a consideration of those questions, and taking the testimony of the defendant in the view that it was competent, in connection also with the testimony of the cashier of the bank, it seems to furnish sufficient to warrant the inference that Mrs. Lumereau, when she delivered the \$1,000 to defendant, delivered the money either as a gift to him or in discharge of an obligation which she assumed rested upon her in connection with the distribution of property obtained from her mother. To the statement of the facts as already narrated may be added the further one that plaintiff's intestate, during all of the years which elapsed subsequent to the making of the note, made no demand on the defendant for the payment of any interest.

[2] It is established law that where a written contract is plain and unambiguous in its material terms no evidence can be admitted to prove that it was intended to impose greater or less obligations than those terms import. In other words, no collateral agreement of a different kind may be imposed by parol upon a plainly worded contract. It is always permissible, however, to show the want of consideration for the making of a contract, or that the contract has been dis-

charged by direct payment, accord, and satisfaction, or in any of the several manners by which parties may extinguish their contractual obligations. *Cohen v. Goux*, 48 Cal. 97, was a case where the defendant sought to show in his own behalf that a note was signed without consideration and as a mere accommodation to the plaintiff. The plaintiff objected that the note carried on its face a consideration and was the best evidence. The objection was sustained. The judgment was reversed, the Supreme Court saying:

"That the defendant was at liberty, as against the plaintiff here, to show want of consideration for the making of the note, and that such want of consideration, if shown, amounted to a full defense to the action, are propositions too plain to admit of discussion."

In *Treadwell v. Himmelmann*, 50 Cal. 10, the court said:

"The evidence offered by the defendant in support of the special defense set up in the answer was improperly excluded. It did not contradict or vary the written instrument declared upon. On the contrary, the offer was to prove an executed parol agreement, in the nature of an accord and satisfaction. There is no difference in principle between this case and *Hapgood v. Swords* (2 Bailey S. C. 305), which was an action on a promissory note; and the defense was that at the time of the execution of the note it was agreed by parol that if the defendant would procure a purchaser for certain land of the plaintiff at a specified price, the plaintiff would surrender the note; and the defendant procured the purchaser at the stipulated sum."

The judgment in that case was reversed. In *Howard v. Stratton*, 64 Cal. 487, 2 Pac. 263, the court briefly disposed of a similar contention by saying:

"The court erred in excluding evidence tending to prove that there was an agreement between *Tyson* and *Stratton*, by which the former agreed to let the latter have the rancho on which he lived in consideration of his giving *Tyson* a home and support during the residue of his life, and that the notes sued on in this action were given by *Stratton* to *Tyson* to secure the performance by *Stratton* of said agreement on his part, and that he had performed the same. The admission of such evidence would not violate the rule which forbids the introduction of parol evidence to contradict or vary a written contract."

See, also, *Schultz v. Noble*, 77 Cal. 80, 19 Pac. 182.

In *Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645, evidence as to declarations of a deceased husband was excluded where the wife was seeking to show that the interest of the husband in money deposited in bank had been transferred to her. The court there said:

"But the superior court erred in excluding evidence of the oral declarations of *Moses Sprague* at and about the time he signed the orders upon which his wife drew the deposits. It does not appear from the bill of exceptions

what was the particular reason for these rulings, but in the brief of respondent they are defended upon the ground that the effect of the declarations would be to contradict or vary the terms of the written orders. \* \* \* The question here is not governed by subdivision 4 of section 1870 of the Code of Civil Procedure, but by subdivision 2 of that section."

[3] This decision is very pertinent here as establishing the competency of the evidence as to the declarations of plaintiff's intestate. Subdivision 2 of section 1870, Code of Civil Procedure, referred to in the decision, provides that "the act, declaration, or omission of a party" is competent evidence against him.

[4] The statements of the mother of defendant, made in the presence of plaintiff's intestate, was competent evidence under subdivision 3 of the same section, which provides that testimony is competent of "an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." See, also, *Rice et al. v. Howland*, 147 Mass. 407, 18 N. E. 229; *Greenleaf on Evidence*, vol. 1 (16th Ed.) § 284. We have already called attention to the fact that one of the witnesses testified as to such declarations made by the mother with respect to the property that she had transferred to Mr. and Mrs. Lumereau. We do not concede that the testimony of the witness, *Sims*, as to the conversation with the mother of plaintiff's intestate and without the presence of Mrs. Lumereau, was competent; but that testimony was offered by appellant in rebuttal.

[5] If it were essential to the defense of the defendant to have shown that the Lumereaus were legally bound to account to him for the \$1,000 represented by the promissory note as a share of his mother's estate, we would be compelled to say that the evidence was insufficient to establish that legal condition. This for the reason that the deed given by the mother of defendant to the Lumereaus expressed no limitation or condition upon the quality of title conveyed, and because the oral declarations made by said mother after the delivery of her deed and after the death of Lumereau would not be competent evidence to establish the fact claimed. We think, however, that the main question is not to be so resolved; that the question of the intent of plaintiff's intestate when she delivered the \$1,000 to the defendant and took the note is to be ascertained. The evidence seems sufficient to show that defendant's sister assumed at least to be under a moral obligation to give this money to the defendant. If the moral obligation existed alone and the legal obligation was absent, then the transaction would result in a gift induced by the view of Mrs. Lumereau that she should provide her brother with the money. If a gift were consummated, then the consideration was that of a gift and there would be left no further



consideration to support the promissory note, for the transaction in which it was given would already have been fully executed on both sides. We are satisfied that the evidence is sufficient to sustain the findings, and that the trial judge committed no prejudicial error in the rulings made during the course of the trial.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(48 Cal. App. 213)

**WILLIAMS v. STEARNS. (Civ. 2117.)**

(District Court of Appeal, Third District, California. June 17, 1920. Hearing Denied by Supreme Court Aug. 18, 1920.)

**1. Appeal and error §907(3)—On appeal on judgment roll, evidence is presumed to support findings.**

Where the appeal is on the judgment roll alone, it must be presumed that the findings were sufficiently supported by the evidence.

**2. Appeal and error §931(7)—Findings presumed to refer to oral contract so as not to show ratification of written lease.**

On judgment roll, appeal from denial of damages for cancellation of a lease, where the court found that the lease was not executed by defendant, but also found that plaintiff entered into possession of the property described in the lease, and that defendant gave notice of termination of the lease contract of a certain date, it must be presumed in support of the judgment that the last finding related to the oral lease alleged in the answer, so that it did not establish a ratification of the written lease.

**3. Landlord and tenant §86(1)—Tenant held estopped by representations from demanding a longer term.**

A tenant in possession, under a lease giving him the option to have an additional term, who represented to the landlord that he had no further use for the property, and would soon surrender possession, and knew that the landlord, relying on such representation, was negotiating a lease with another for the same property, is estopped to claim the right to a further lease.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Fred L. Williams against F. L. Stearns. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert L. Williams, of Los Angeles, for appellant.

W. H. Jamison, Frederick Gros, and C. E. McDowell, all of Los Angeles, for respondent.

HART, J. Plaintiff brought the action to recover as damages from defendant the difference between the agreed rental value of

certain premises in the city of Los Angeles, belonging to defendant, under a so-called option agreement, and the reasonable rent of said premises for a period of two years. From a judgment that plaintiff take nothing by his action he prosecutes this appeal.

There is before us a record, prepared according to the alternative method of appeal, but appellant states that he refers to and relies only upon the following portions thereof: The amendment to complaint, the answer to amendment to complaint, the findings of fact and conclusions of law, and the judgment. The appeal is therefore really upon the judgment roll alone.

The basis of the action is a certain "lease contract," dated Los Angeles, June 12, 1916, and addressed to plaintiff at San Francisco. It contains the following provisions:

"Mr. Fred L. Williams, party of the first part, and Stearns Gas Engine Works, party of the second part, hereby agree to the following contract as follows: Party of the second part agrees to lease to the party of the first part the present front office, a space near such office for exhibition purposes, and the machine shop situated and located on premises at 1003 N. Main St., Los Angeles, Cal., for the sum of eighty dollars per month payable as follows: One hundred dollars upon signing this contract, receipt for which is hereby given, sixty dollars on July 12, 1916; this being the date from which said lease shall start; these two payments form the payments for the first and the last month under this lease which is to run for a period of four months from July 12, 1916. All payments thereafter shall be eighty dollars a month in advance.

"The party of the first part shall have the option at any time before the expiration of this lease, to take over the entire lower floor; leasing the same for a period of from two to three years, at the rate of \$150.00 a month payable in advance each month, except the last three months of said optional lease, payment for which shall be paid on the date of signing the optional lease. This option shall continue as long as this temporary lease."

Provision was then made for the privilege of using certain tools by Williams and the division of operating expenses between the parties, and the instrument proceeded:

"It is understood that either party to this lease may bring same to a close upon one month's notice in writing, and in the absence of such notice it is to be understood that the lease shall continue monthly. The above is to apply only after the four months period covered by this lease, but this lease to continue in the absence of notice monthly."

The instrument was signed:

"Stearns Gas Engine Works, by Francis A. Stearns, Party of First Part. By Fred L. Williams, Party of the Second Part."

It was alleged that Francis A. Stearns, who signed said instrument on behalf of the

first party, was at the time "made the agent of defendant authorized in writing, subscribed by defendant, to make and sign said lease." It was then alleged that plaintiff entered into possession of said property and paid rent therefor, amounting to \$1,163.29, to and including the month beginning with May 12, 1917; that, in reliance upon said contract, plaintiff also expended \$150 in making certain improvements on the property; that, on or before May 17, 1917, "pursuant to the terms of said agreement plaintiff elected and orally notified defendant of his election to exercise the option stipulated and agreed to under said agreement to take over the entire floor of the premises described therein," which included the use of certain mentioned personal property, machinery, etc.; that on said date plaintiff notified defendant in writing of his said election, which writing was addressed to "Stearns Gas Engine Works and Francis A. Stearns, Esq.," and stated:

"You and each of you will please take notice that the undersigned, Fred L. Williams, party of the first part, in that certain agreement executed with the Stearns Gas Engine Works, as party of the second part, said agreement in writing being dated June 12, 1916, \* \* \* hereby notifies you that said undersigned hereby exercises his option under the terms of said agreement [stating the terms thereof]. The undersigned does hereby offer to pay said last three months' rental, to wit, the sum of four hundred and fifty dollars, upon the execution of said new lease, together with the first months advance rental, and does hereby request that you execute said new lease with the undersigned at the expiration of the present lease, to wit, on June 12, 1917. \* \* \* This notice confirms oral notice given you prior to receipt of notice of cancellation from you."

Signed by Fred L. Williams.

On the same day the following notice, on the letterhead of the defendant, was served upon plaintiff:

"Mr. Fred L. Williams, Los Angeles, Calif. Dear Sir: According to the terms of our contract of June 12th, we hereby give you notice of the termination of said lease contract. Very truly yours, Stearns Gas Engine Works, F. L. Stearns."

The refusal of defendant to accept said rental or to lease to plaintiff said premises is alleged, and it is then stated:

"That since said notice was served upon plaintiff and not before, defendant has informed plaintiff that said agreement to lease and option to lease was not valid and enforceable for two reasons, namely, that his son, Francis A. Stearns, who signed said agreement was at said time a minor, and, further, was not authorized in writing by defendant to sign said lease; that prior to said information plaintiff had no knowledge or information that said agreement was not, or that defendant claimed that it was not, enforceable and valid"; that had plaintiff been so informed he would not have entered in-

to said lease or expended the money which he did, and that the representations made by defendant that Francis A. Stearns was duly authorized to execute said agreement were false, and made with intent to defraud plaintiff.

The answer specifically denied all the material allegations of the amendment to the complaint. Among such denials were the following: That defendant entered into or executed the written agreement set forth in the complaint and subscribed by Francis A. Stearns as the agent of the defendant; that said Francis A. Stearns was the agent of the defendant or authorized to execute said written agreement for or in behalf of the defendant; that the defendant represented to plaintiff at any time that said Francis A. Stearns was authorized by it to make or enter into said written agreement for or on its behalf; that the plaintiff entered into and took possession of the premises described in said purported written agreement under said agreement or in pursuance of the terms thereof, but alleged in effect that the plaintiff entered into the possession of said premises under an oral agreement between him and the defendant, made on the said 12th day of June, 1916. The answer then sets up the following affirmative defense:

"That on or about the month of January, 1917, plaintiff notified and represented to the defendant that plaintiff would not have any use for the said premises beyond a short time, to complete certain experiments then pending, and would shortly surrender the premises to the defendant, \* \* \* and on the 21st day of February, 1917, the said plaintiff again notified and represented to defendant that plaintiff would shortly surrender the said premises and thereafter a contract for the use of said premises was entered into by this defendant with one B. C. Donnelly; \* \* \* that thereafter and on or about the 5th day of April, 1917, plaintiff notified and represented to plaintiff that he would shortly surrender the said premises to defendant, and thereafter the defendant entered into a further contract with said Donnelly; \* \* \* that throughout said negotiations and at the time of making the aforesaid contracts, plaintiff knew and was informed that the defendant believed and relied on the aforesaid notices and representations made by plaintiff to defendant, and that defendant but for such belief and reliance would not have entered into said negotiations and made the said contracts with said B. C. Donnelly of February 21st, 1917, and April 5th, 1917."

The court found that at the time of the execution of said "lease contract" Francis A. Stearns was not acting as an agent of the defendant, and was not authorized in writing to make said agreement; "that the defendant made no representations to plaintiff that said Francis A. Stearns was authorized to execute said lease, and that said instrument was executed by said Francis A. Stearns without the knowledge or consent of the defendant." It was also found that

the plaintiff entered into the possession of the premises and property described in said "lease contract" on or about July 15, 1916, etc. It was then found that the cancellation notice of May 17, 1917, was served upon plaintiff before the latter served the defendant, on the same day, with the written demand for a lease; that plaintiff made no tender of rent for any period of time subsequent to June 12, 1917; "that plaintiff and his workmen ceased work at said premises on or about June 9, 1917, and notified and represented to defendant that he had abandoned said premises and intended to claim no rights therein under the aforesaid lease or otherwise." The court also found to be true the allegations in the answer as to plaintiff, notifying defendant that he would have no further use for the premises and as to the entering into of a contract with said Donnelly. It was further found generally that those allegations of the complaint as to which specific findings were not made are untrue, and that the allegations or denials of the answer as to which like findings were not made are true.

Four points are made by appellant for a reversal of the judgment, to wit: (1) That by reason of service by the defendant of the notice of May 17, 1917, referring to "our contract of June 12th," the defendant ratified the lease contract made by Francis A. Stearns; (2) that until that time and by such purported ratification, any statements made by the plaintiff to the defendant could not operate as an estoppel against plaintiff; (3) that plaintiff did not abandon his rights under the lease contract; (4) that if the acts of plaintiff were sufficient to estop him from demanding any rights as against the defendant under the Francis A. Stearns contract, then the alleged act of the defendant in ratifying said contract operates as an estoppel upon the defendant sufficient to prevent him from taking any advantage of any opportunity to establish an estoppel against the plaintiff, and the matter is therefore set at large.

[1] This being an appeal from the judgment, on the judgment roll alone, the presumption must be indulged that the findings were justified by and derive sufficient support from the evidence. The findings of fact, as made by the court, plainly speak for themselves, and are upon their face decisive of the case against the appellant.

[2] As above shown, the court found that the purported written contract of lease was not executed by Francis A. Stearns by the authority of the defendant, and that the latter made no representation to the plaintiff that said Francis A. Stearns was authorized to make any such contract for or in its behalf; and, while the court found that the plaintiff entered into the possession of the premises and property described in said

contract of lease, it did not find, either specifically or otherwise, that the plaintiff entered into and took such possession under or by virtue of said contract or in pursuance of the terms thereof. It is true that the court did not specifically find that the plaintiff entered into the possession of said property under some other agreement of contract between the parties than the written agreement, but it is also true that the answer, in effect alleges that such possession was taken under an oral agreement entered into between the parties on the date of the execution of the purported written contract of lease, and that the court's general finding that all the denials and allegations of the answer were and are true necessarily embraces a finding that possession was taken by the plaintiff under said oral agreement; that is to say, such a finding is necessarily implied from the general finding referred to. It follows, therefore, that the written notice which the court found had been given to the plaintiff by the defendant of the termination of the "lease contract of June 12th" must be understood and construed to refer to the oral agreement, and not to the purported written contract. This view results from the familiar rule that findings must be so construed as to support the judgment if such a course may consistently and reasonably be adopted. "It is elementary," as the Supreme Court says in *People v. McCue*, 150 Cal. 195, 198, 88 Pac. 899, 901, "that if findings of fact are reasonably susceptible of such a construction as will support a judgment, they must receive that construction rather than one that will not so support it." See, also, *Hayne on New Trial and Appeal*, § 242, subd. 6.

The consequence of the situation as to the findings, as above explained, is that the discussion in the brief of the appellant of the proposition that the defendant, by reason of the written notice given by it to the plaintiff of the termination of the lease, ratified the purported written lease, and is therefore estopped from asserting that said writing was executed without its authority, is beside the legal issues presented on this appeal. In other words, the point as to the asserted ratification by the defendant of the alleged written contract, and that the defendant is foreclosed the right by estoppel arising upon and from such ratification to deny for any reason the validity and binding force of said writing, is wholly without pertinency or force under the state of the findings, as we feel that we are required to view them.

[3] The court found, as has been shown, and so found presumptively from sufficient evidence, that the plaintiff, in the months of January and February, 1917, verbally notified the defendant that he would shortly have no further use of the premises, or any portion thereof, and that thereupon the de-

tenant entered into negotiations with the said Donnelly for the leasing of the same to the latter; that the plaintiff was aware of these negotiations with Donnelly, and that the defendant, relying upon the notices so given to it by plaintiff that he intended within a short period of time to vacate and surrender said premises, did enter into contracts of lease with said Donnelly whereby the latter was to take immediate possession of all and every portion of said premises and the machinery and equipments belonging to the business conducted on said premises; that but for the fact that it relied upon said representations and notices by the plaintiff that he intended to quit and surrender to the defendant the said premises and property the latter would not have entered into the negotiations and contracts referred to with said Donnelly; that the plaintiff, after the defendant's transaction with Donnelly, having failed and refused to surrender said property as voluntarily promised by him, the defendant thereupon served upon him the notice of the termination of the lease, which, under the findings, involved a mere tenancy at will, or from month to month. Thus an estoppel arose against any right the plaintiff might otherwise have had to complain of the action of the defendant in entering into a contract with Donnelly whereby it leased the premises and property in question to the latter and in refusing, as a consequence, to make a further contract of lease of said premises and property to the plaintiff. In other words, the defendant, having in reliance upon the statements of the plaintiff that he would within a brief period of time surrender the premises, because he would have no further use therefor, entered into the contracts whereby it leased the premises and property in question to Donnelly, the plaintiff at all times having knowledge of the pendency and prosecution of the negotiations culminating in the said lease to Donnelly, an estoppel was thereby raised against plaintiff to claim the right to a further lease of the premises.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

(48 Cal. App. 135)

**FRASCONA v. LOS ANGELES RY. CORPORATION.** (Civ. 3193.)

(District Court of Appeal, Second District, Division 2, California. June 10, 1920.)

**1. Trial**  $\Leftrightarrow$  393(3)—Written findings of fact necessary unless waived.

Where findings were not waived, the trial court must give its decision in writing, including

written findings of fact under Code Civ. Proc. § 632.

**2. Appeal and error**  $\Leftrightarrow$  1071(1) — Failure to make findings of fact ground for new trial or reversal.

The provision of Code Civ. Proc. § 632, requiring written findings of fact, is for the benefit of the court and the parties, and failure to make such findings is prejudicial to such parties, and requires reversal.

**3. Trial**  $\Leftrightarrow$  396(1)—Findings of fact should answer issues made by pleadings.

Where it is not necessary that findings should follow the precise language of the pleadings, it is essential that they be so drawn that the truth or the falsity of every material allegation can be demonstrated therefrom, and the findings must answer the questions put by the pleadings.

**4. Negligence**  $\Leftrightarrow$  119(4) — Recovery only on proof of act alleged.

Recovery can be had only on the proof of the specific act of negligence alleged.

**5. Carriers**  $\Leftrightarrow$  322—Finding of careless operation of car supports averment that car started before plaintiff alighted.

Where a complaint alleged defendant's act of negligence in starting the street car before plaintiff alighted, a finding that defendant operated its car in a negligent manner, thereby injuring plaintiff, is insufficient.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Mary Frascona against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

A. E. T. Chapman, of Los Angeles, for respondent.

**FINLAYSON, P. J.** This is an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a common carrier of passengers, while plaintiff was a passenger on one of its street railway cars. The case was tried by the court without a jury. Judgment passed for plaintiff, and defendant appeals. The principal question involves the sufficiency of the finding upon the issue of defendant's negligence as alleged in the complaint.

The complaint alleges a specific act of negligence on defendant's part. After alleging that, while she was riding as a passenger on defendant's street car, plaintiff requested the conductor to let her off at the intersection of San Pedro and Sixteenth streets, in the city of Los Angeles, and that the conductor thereupon gave the motorman the signal to stop, the complaint proceeds to allege that—

"Said car was brought to a standstill, and while this plaintiff was attempting to step from the bottom step on said car to the ground, said

car was suddenly started forward, and this plaintiff was violently thrown upon the ground."

The answer denies that the car was brought to a standstill; denies that, while the car was standing still, plaintiff attempted to alight; denies that, while plaintiff was alighting, the car was suddenly started forward; and alleges that before the car had reached the customary and usual stopping place at the intersection of Sixteenth and San Pedro streets, and while it was still in motion, plaintiff carelessly and negligently attempted to step on the ground and fell.

There was a sharp conflict in the evidence. Plaintiff and her witnesses testified that the accident happened as alleged in the complaint; while the witnesses for defendant, with equal positiveness, testified that plaintiff stepped from the car before it had come to a standstill.

Instead of a finding showing the truth of the averment of negligence as made in the complaint, we are left to conjecture whether the trial court may not have attributed the accident to some other and wholly different act of negligence. Instead of a finding that the accident happened as specifically described by plaintiff in her complaint, the court's finding of negligence is couched in most general terms. The sole finding upon the issue of negligence is this:

"That defendant corporation operated said street car in a careless and negligent manner, then and there injuring plaintiff, Mary Frascóna, and that said carelessness and negligence of the defendant corporation was the direct and proximate cause of plaintiff's injuries."

[1] Unless findings are waived—and here, as the record shows, they were not—the trial court must give its decision in writing, i. e., it must file written findings of fact. Section 632, Code Civ. Proc. The right to findings is a substantial right, as inviolate, under the statute, as that of trial by jury under the Constitution. *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273.

[2] The Code provision requiring written findings of fact is for the benefit of the court and the parties. To the court it gives an opportunity to place upon record, in definite written form, its view of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which the judgment rests. To the parties it furnishes the means, in many instances, of having their cause reviewed without great expense. It also furnishes to the losing party a basis of his motion for a new trial; he is entitled to know the precise facts found by the court before proceeding with his motion for a new trial, in order that he may be able to point out with precision the errors of the court in matters either of fact or law. *Bard v. Kleeb*, supra; *Savings & L. Soc. v. Burnett*, 106 Cal. 539, 39 Pac. 922; *Polhemus*

*v. Carpenter*, 42 Cal. 385. "The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error, entitling the complaining suitor to reversal." *Huntington v. Vavra*, 36 Cal. App. 355, 172 Pac. 168. See, also, *Tucker v. United Railroad*, 171 Cal. 704, 154 Pac. 835.

[3] While it is not necessary that the findings should follow the precise language of the pleadings, it is essential that they be so drawn that the truth or falsity of every material allegation can be demonstrated therefrom. The purpose of findings "is to answer the questions put by the pleadings." *Dam v. Zink*, 112 Cal. 93, 44 Pac. 332. The province of the court is to determine, not to raise, issues. And a finding upon a fact not in issue can form no element in determining the appropriate judgment to be rendered. *Commissioners v. Barnard*, 98 Cal. 199, 32 Pac. 982. The plaintiff must recover, if at all, upon the case as made by his complaint, and not on some other which he might have made.

[4] For these reasons, to sustain a judgment for the plaintiff in an action the findings must be responsible to the issues as tendered by the complaint; and, where specific facts are put in issue, it is the duty of the court to find the facts specifically. "The findings must be specific on the issues presented, and judgment will be reversed if they are not so." *Franklin v. Franklin*, 140 Cal. 609, 74 Pac. 155. "It is well settled," says the Illinois court in *Chicago City Ry. Co. v. Gates*, 135 Ill. App. 186, "that the allegations of the declaration and the proof must agree, and that when a specific act of negligence is alleged, the recovery can only be on proof of such specific act, and not on proof of negligence not alleged."

[5] When put to the proof of these elementary rules, the finding of negligence in this case fails to meet the test. The complaint alleges one distinct and specific act of negligence, namely, starting the car before plaintiff had alighted. The finding is not at all specific; it could hardly be more general than it is. It is no more than this: That defendant operated its car in a careless and negligent manner, thereby injuring plaintiff. Such a finding is broad enough to include an almost infinite number of acts of negligence, each differing radically from the specific act alleged by plaintiff as the ground of her action for damages. Having carefully defined and described in her allegation of negligence the particular negligent act with which she charges defendant, we must assume that the latter came into court prepared to meet the charge that it committed that specific negligent act, and not some other act of negligence in the operation of its car that plaintiff might have alleged, but did not. If the judgment

against defendant be upheld, it is not entirely beyond the realm of possibility that the trial court did not believe that defendant had been guilty of the precise act of negligence pleaded by plaintiff, but did believe, and intended to find, that in some other and radically different respect defendant had negligently operated its car, thereby causing the injuries.

For these reasons we are constrained to hold that the failure of the trial court to make a finding responsive to the issue as tendered by the complaint was prejudicial error for which the cause must be remanded for retrial.

Judgment reversed.

We concur: THOMAS, J.; WELLER, J.

(48 Cal. App. 263)

**BANK OF NEWMAN v. MONTEREY COUNTY GAS & ELECTRIC CO. (Civ. 3404.)**

(District Court of Appeal, First District, Division 1, California. June 21, 1920. Hearing Denied by Supreme Court Aug. 19, 1920.)

**Corporations §471—Guaranty held not increase of bonded debt without consent of stockholders.**

A contract of guaranty, executed by a corporation, "For value received, M. C. G. and E. Company agrees to and with the holder of this bond and the attached coupons, that if the several sums of money agreed to be paid thereby are not paid in the manner therein stated, as they severally become due, then and in that event the M. G. & E. Company will pay the same," held on its face to have been issued for value received, and not to be an attempt to increase the bonded indebtedness of the guarantor without the proceedings required to be taken by corporations under Civ. Code, § 359, and was valid.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Bank of Newman against the Monterey County Gas & Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wise & O'Connor, of San Francisco, and Goldman & Altman, for appellant.

Chickering & Gregory and Thos. H. Breeze, all of San Francisco, for respondent.

**RICHARDS, J.** This is an appeal from a judgment in favor of plaintiff in an action to recover upon a certain written agreement executed by the defendant whereby it undertook to guarantee the payment of certain bonds issued by the Monterey & Pacific Grove Railway Company, a corporation, upon which bonds default in payment had been made by said last-named corporation. The guaranty

in question was indorsed upon each of the bonds issued and sold by the Monterey & Pacific Grove Railway Company, and was in the following form:

**"Guaranty of Payment.**

"For value received, Monterey County Gas & Electric Company, a corporation, agrees to and with the holder of this bond and the attached coupons, that if the several sums of money agreed to be paid thereby are not paid in the manner therein stated, as they severally become due, then and in that event the Monterey Gas & Electric Company will pay the same.

"This contract is duly authorized by a resolution of the board of directors of the Monterey Gas & Electric Company."

The trial court rendered its judgment in plaintiff's favor for the amount due upon the bonds held by it bearing this guaranty. The defendant has appealed from said judgment, the only contention which the appellant makes upon this appeal being that the guaranty of the said bonds of the Monterey & Pacific Grove Railway Company by the appellant was an attempt to increase the bonded indebtedness of the guarantor; and, since said guaranty was not founded upon the proceedings required to be taken by corporations under section 359 of the Civil Code relating to the creation or increase of a bonded indebtedness, said guaranty was void.

We are unable to agree with the position taken by the appellant in this regard. The guaranty in question appears upon its face to have been issued for value received, and there is nothing in this record to indicate that it was not issued in good faith and in the regular course of the business of the corporation issuing the same. It does not purport to have any relation to any past bonded indebtedness of the appellant, or to have been issued in the form or with the intent of creating or increasing any bonded indebtedness of the corporation; but, on the other hand, it appears as to both its form and substance to belong to that class of written instruments which include promissory notes, checks, bills of exchange, and like obligations of corporations or of individuals issued in the ordinary course of business. The term "bonded indebtedness" has never been held to apply to or include this class of obligations, but as used in the Constitution and statutes has had reference to those more formal transactions of both municipal and private corporations which require such prerequisites as elections, or the express approval of stockholders, in order to their creation, and which when thus permitted take the express form of bonds either secured by liens upon property or payable by means of public taxation.

The Supreme Court of this state in the case of *Underhill v. Santa Barbara, etc., Co.*, 93 Cal. 300, 28 Pac. 1049, in construing the term "bonded indebtedness" as found in sec-

(191 P.)

tion 11 of article 12 of the Constitution having reference to the obligations of private corporations, has held that a note and mortgage issued by such a corporation is not a bonded indebtedness within the meaning of said provision of the Constitution. To hold otherwise would be to extend the language of the Constitution to practically every form of indebtedness which a private corporation could create, and to require in every case the consent of its stockholders to the creation of such indebtedness and to the issuance of the writing which would evidence the same. The only authorities cited by the appellant herein as sustaining its position are those from other jurisdictions wherein by the express terms of their statutes the consent of stockholders is required to guaranties by one corporation of the bonds of another. Such cases are not in point in this state, wherein no such statutory requirement is to be found. Judgment affirmed.

We concur: WASTE, P. J.; WELOH, Judge pro tem.

(48 Cal. App. 298)

**BOWEN v. HICKEY. (Civ. 3090.)**

(District Court of Appeal, Second District, Division 1, California. June 22, 1920.)

Appeal and error  $\Leftrightarrow$  1071(1)—Judgment for defendant held justified, notwithstanding erroneous finding.

Where in forcible entry and detainer it appears that on plaintiff's demand defendant surrendered possession, a judgment for defendant held proper, notwithstanding an erroneous finding that in plaintiff's absence defendant unlawfully entered and took possession of the land.

Appeal from Superior Court, Riverside County; Wm. D. Dehy, Judge.

Forcible entry and detainer by Theodore Bowen against Seth Hickey. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank O. Prescott, of Los Angeles, and Burton E. Hales, of Redlands, for appellant. F. E. Dunlap, of Los Angeles, and H. F. Bridges, of Sierra Madre, for respondent.

CONREY, P. J. In this action of forcible entry and detainer, the plaintiff appeals from a judgment entered in favor of the defendant.

The complaint alleged that on the 23d day of November, 1912, and for more than four years previous thereto, plaintiff was in the peaceable and actual possession and entitled to the possession of the real property described in the complaint; that on the 23d

day of November, 1912, during the absence of the plaintiff therefrom, the defendant unlawfully entered upon said land and took possession of the same. On these allegations the court made its findings in favor of the defendant. The evidence is not sufficient to support those findings, but, on the contrary, without conflict, sustains the allegations in the complaint.

The complaint next alleged that on the evening of the 23d day of November, 1912, plaintiff made a demand in writing upon the defendant to deliver up to plaintiff the possession of said premises, but the defendant refused, and still refuses after a period of five days, to surrender possession, etc. The evidence shows, and the court found, that the notice was served as stated. But the court found that—

"Thereupon, pursuant to said demand, defendant surrendered possession thereof to plaintiff, and that defendant does not still unlawfully hold or continue in possession of same, against the form of the statute in such cases made or provided."

The evidence is sufficient to sustain this finding. Immediately upon service of the said notice, the defendant and the persons with him left the premises, taking with them their wagon and implements and everything that they had brought to the land. The defendant testified that it was his intention at that time to surrender possession of the land to the plaintiff, and that he did not at that time give any thought as to his future action with reference to the land. It is true that the evidence further shows that 28 days later the defendant again went into possession of the premises, and still remained there at the time of the commencement of this action on January 13, 1913. It does not appear that any notice demanding possession by the plaintiff was ever served other than the notice of November 23, 1912. At the time of said transactions in November and December, 1912, the plaintiff was occupying a house erected by him on a part of the premises in question, and his occupancy thereof was not disturbed by the defendant. Since the evidence justified the court's finding in favor of the defendant to the effect that he surrendered possession to the plaintiff in response to the notice given, it becomes immaterial that the findings first mentioned were not sustained by the evidence. If those findings had been favorable to the plaintiff, the appropriate judgment nevertheless would have been in favor of the defendant.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

(48 Cal. App. 206)

**SHERWOOD et ux. v. ROBERTSON.**  
(Civ. 3235.)

(District Court of Appeal, First District, Division 1, California. June 17, 1920.)

**1. Mortgages**  $\S$  257—Assignee of nonnegotiable note held not bound by equities in favor of mortgagor.

While an assignee of a nonnegotiable note and mortgage takes them subject to all the equities and infirmities which could be urged by makers against the original mortgagee, if the assignee uses proper diligence and makes reasonable inquiry to ascertain what, if any, outstanding equities there are in favor of the mortgagor, and after having used such diligence and made such inquiry he finds no circumstances which would lead a reasonable person to believe that the full consideration had not passed or that equities were outstanding, he takes the paper free from equities which the mortgagor might otherwise have asserted.

**2. Estoppel**  $\S$  72—Note and mortgage will not be reformed to detriment of innocent purchaser in view of rule as to two innocent parties.

Where a mortgage in terms secured a straight loan evidenced by a note, while in fact the consideration was payable in installments, as a building was constructed by mortgagor, and the mortgagee sold the note and mortgage for their face value, the mortgagor having notice thereof, but failing to apprise the purchaser that all the consideration had not been paid, the note and mortgage will not be reformed at the mortgagor's instance to express the true consideration, since under Civ. Code,  $\S$  3543, where one of two innocent persons must suffer by the act of the third, he by whose negligence it happened must be the sufferer.

**3. Reformation of Instruments**  $\S$  29—Failure of purchaser of note to make inquiry held not to permit reformation.

Where a mortgagee sold for full value a note and mortgage to an innocent purchaser without notice, and the consideration had not in fact been fully paid to the mortgagor, failure of the purchaser to inquire of the mortgagor as to the amount of advances did not constitute negligence, where mortgagor had an opportunity to explain the condition of the loan to the purchaser before the purchase, and therefore the note and mortgage will not be reformed at the mortgagor's instance.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Suit by C. S. Sherwood and wife against Maria Robertson to reform a note and mortgage. Judgment for defendant, and plaintiffs appeal. Affirmed.

John B. Haas, of Los Angeles, for appellants.

Lewis Cruickshank and Vincent B. Vaughan, both of Los Angeles, for respondent.

**RICHARDS, J.** This appeal is from a judgment in favor of the defendant in an

action instituted by the plaintiffs for the purpose of having their promissory note and mortgage in the hands of the defendant so reformed as to express the amount actually due upon said note and to secure that amount.

The defendant was the holder of said note and mortgage by virtue of an assignment to her of the same from the original payee thereof. The facts attending the execution of these instruments by the plaintiffs are undisputed and may be summarized as follows:

On August 1, 1917, the plaintiffs executed and delivered to one Joseph M. Gore their promissory note for the sum of \$2,300 and interest, due three years after date, giving as security for said note their mortgage upon a certain piece of real estate in Los Angeles county, which mortgage was recorded upon the date of its execution. The transaction upon the face of these instruments appeared to be a straight loan of \$2,300 to the plaintiffs, but it appeared at the trial that the money for which said note and mortgage were given was to be used by said plaintiffs in erecting two buildings upon the mortgaged premises, and was to be advanced from time to time by the mortgagee to them as the erection of said structures progressed. This plan was carried out to the extent that between the date of said loan and the 15th day of September, 1917, the said mortgagee had advanced on account of said loan the sum of \$895. On or about said last-named date said Gore undertook to sell said note and mortgage to the defendant herein, an old lady having some money which she desired to have safely invested. The sale of said securities was being negotiated by one R. W. Martin, who on September 15th took one Arthur J. Madison, a son-in-law of the defendant, to inspect the property which was the subject of the mortgage. They found the plaintiff Mr. Cedric Sherwood upon the premises. As to the conversation which occurred there between Mr. Madison and Mr. Sherwood there is a dispute in the evidence; but Mr. Madison, who was acting as the agent of the defendant, testified that he spent from 15 minutes to half an hour looking over the property after being introduced to Mr. Sherwood by Mr. Martin as a gentleman who was looking at the property with a view to buying the mortgage, and that in the course of that time Mr. Sherwood stated to Mr. Madison that both bungalows were rented to be occupied as soon as completed, and that the property was worth approximately \$4,500; and when Mr. Madison stated that the property looked like a nice piece of property, and as it was new was a good loan, Mr. Sherwood answered, "Yes; he thought so." Mr. Martin corroborates that portion of the testimony of Mr. Madison wherein the latter stated that Mr. Sherwood was informed that



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Mr. Madison might buy the mortgage if it was all right. Two days later the defendant herself went out to see the property, accompanied by Mr. Martin, and she testified that she was there introduced to Mr. Sherwood by Mr. Martin as a prospective purchaser of the note and mortgage, and that, to quote her own language:

"I said to Mr. Sherwood, 'It looks like a good loan; I have to be pretty careful; I haven't very much money, and I have to be very careful how I let it;' and he said it was a good loan; my money would be safe, and everything was all right. \* \* \* Mr. Sherwood stated that the interest was to be paid on it; I think he said there would be no trouble."

Mr. Martin also corroborated Mrs. Robertson in her testimony to the effect that she was introduced to Mr. Sherwood as "the woman with the money, and if the loan suited her she would possibly buy it." A few days later Mrs. Robertson bought the note and mortgage from Gore, paying to him the full face value thereof. The assignment of the mortgage to her was recorded on September 26, 1917, and on the following day the plaintiffs brought this action to have the instruments reformed.

Upon the trial of the cause the court accepted the statements of Mrs. Robertson and her agent, Madison, as to the substance of the conversations between them and the plaintiff, Cedric Sherwood, who, it is conceded, was acting not only in his own behalf, but as agent for his wife, during the course of these interviews; and the court thereupon made its findings in favor of the defendant, holding that the plaintiffs were liable to her for the full amount of said note and mortgage and were not entitled to have the same reformed.

[1] The plaintiffs upon this appeal attack these findings as unsupported by the evidence in the case, and they also insist that the said decision of the court is against law. The question which is thus presented is one of estoppel. It is conceded by both parties to this appeal that a note and mortgage are to be read together and are nonnegotiable, and hence that an assignee thereof takes them subject to all the equities and infirmities which could be urged by the makers thereof against the original mortgagees. This admitted rule of law has, however, this exception, that if the assignee of the note and mortgage uses proper diligence and makes reasonable inquiry to ascertain what, if any, outstanding equities there are in favor of the mortgagor, and if, having used such diligence and made such inquiry, he finds no circumstances which would lead a reasonable person to believe that the full consideration had not passed for the execution of said note and mortgage, or that there were any equities outstanding in favor of the mortgagor, and if, having used such diligence and

made such inquiry with such result, he takes the assignment of said note and mortgage, paying in good faith full value therefor, he takes the same free from such equities as the mortgagor might otherwise have asserted. The respondent herein relies upon this exception to the general rule, and depends upon the evidence of the interviews held between herself or her agent and the plaintiff Cedric Sherwood as sufficient to sustain such exception and to work an estoppel against the Sherwoods to deny their full liability upon said note and mortgage.

[2] In support of this view the respondent cites the case of *National Hardwood Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881. We are unable to find any distinction between that case and the case at bar. The facts of the two cases are practically identical; and the Supreme Court in the case before it fully applies the principle of estoppel for which the respondent herein contends, and we can see no escape from the application of that principle to the facts of the case at bar. The cases cited by the appellants from other jurisdictions cannot be held to be availing in the face of the decision of our own Supreme Court upon this subject; and while it is true that the compulsion laid upon the plaintiffs herein to pay the full face of their note and mortgage works a hardship upon them, the adoption of the other view would work a greater hardship upon the respondent, who appears throughout to have acted with the utmost good faith. The plaintiffs at the time of their interviews with the defendant and her agent had their opportunity to enlighten them both as to the extent of the advancements which had been made upon said loan; and, this being so, the rule laid down in section 3543 of the Civil Code that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer," is to be given application to the facts of the case at bar. The plaintiffs herein, by giving to Gore their note and mortgage in the form in which these were given, put it in the latter's power to exhibit the same to a purchaser thereof, and to induce the belief in such purchaser that these instruments were good for their full face value. They could easily have avoided this consequence and sufficiently protected themselves and any assignee of their securities by an insertion in their mortgage of a recital showing that the same was given for advances yet to be made. Not having done this, they must be held, as between themselves and this defendant, to be the parties by whose negligence the wrong occurred from which one or the other of them must be the sufferer.

[3] The appellants, however, insist that the respondent herein was also negligent in not requiring from Gore upon her purchase of these securities a statement from the mak-

ers thereof as to the amount then due. Ordinarily this might be true; but in the case at bar the necessity for such a statement was obviated by the direct interview with Sherwood and by the opportunity then afforded to him to explain the exact condition of the loan. We are satisfied that the evidence in the case was sufficient to sustain the findings of the court in the defendant's favor, and that there is no error disclosed by the record upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KOFORD, Judge pro tem.

(48 Cal. App. 360)

**SMITH v. ROSS, Sheriff of Santa Barbara County.** (Civ. 3360, 3390.)

(District Court of Appeal, First District, Division 2, California. June 29, 1920. Hearing Denied by Supreme Court Aug. 26, 1920.)

**1. Justices of the peace §59—Facts conferring jurisdiction must be shown.**

A justice's court being one of limited jurisdiction, one relying on its judgment must show affirmatively every fact necessary to confer jurisdiction.

**2. Justices of the peace §122(2)—In action on oral contract, summons served out of county not basis for default judgment.**

A justice has no jurisdiction of defendant so as to authorize default judgment against him, action being on an oral contract, and service of summons on him being outside the county in which action was brought, which is prohibited by Code Civ. Proc. § 848, in an action in such court, unless on a written contract of a certain class.

**3. Justices of the peace §135(4)—Negating of remedy at law necessary to restrain execution on default judgment without jurisdiction.**

Suit to enjoin enforcement of an execution on a default judgment of a justice who had not acquired jurisdiction will, on the ground that there is an adequate remedy at law by motion in the justice's court to set aside the execution, not lie, at least in absence of allegation that such motion was made and denied, or of other facts showing special circumstances of fraud or hardship.

**4. Pleading §34(4) — Facts presumed stated as strongly as truth permits.**

It is to be presumed that the pleader has stated the facts as strongly as the truth will permit.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by W. D. V. Smith against James Ross, Sheriff of Santa Barbara County. From an adverse judgment and order, plaintiff appeals. Affirmed.

W. P. Butcher, of Santa Barbara, for appellant.

W. C. Wilde, of San Diego, for respondent.

**BRITAIN, J.** The plaintiff appeals from a judgment entered after his refusal to amend his complaint on demurrer being sustained with leave to amend, and also from an order setting aside a temporary restraining order. The judgment must be affirmed on the ground that the complaint did not show sufficient facts to constitute a cause of action for equitable relief by injunction, and this result renders unnecessary consideration of any matters presented by the appeal from the collateral order.

Summarized, the complaint shows that the plaintiff is a resident of the county of Santa Barbara and was never a resident of San Diego county; that he was sued by one Creamer in a justice's court in the latter county, on a claim based on an oral contract, made payable in Santa Barbara; that no part, note, or memorandum of the contract was in writing; that summons in the action was served on the plaintiff in Santa Barbara county; that default judgment was entered in the action; that an abstract of the judgment was filed in the office of the county clerk of San Diego county, and an execution thereupon issued to the defendant sheriff of Santa Barbara county; and that the defendant as such sheriff will, unless restrained by injunction, levy upon property of the plaintiff in Santa Barbara county to satisfy the judgment which the plaintiff alleges to be void. It is further alleged that the plaintiff, in the event of such levy, will suffer great and irreparable injury, and that he has no speedy or adequate remedy at law.

It is provided by section 848 of the Code of Civil Procedure that in a suit in a justice's court the summons cannot be served outside of the county wherein the action is brought except "when the action is \* \* \* against a party who has contracted in writing to perform an obligation at a particular place, and resides in a different county, in which case the summons may be served in the county where he resides."

[1] The justice's court being of limited jurisdiction, one relying on its judgment must show affirmatively every fact necessary to confer jurisdiction. *Rowley v. Howard*, 23 Cal. 401. Under the facts pleaded and assumed for the present purpose to be true, it is shown that the default judgment was entered without jurisdiction of the person of the defendant by service of summons in that action.

[2-4] It does not follow that the plaintiff in the present action stated sufficient facts to warrant the relief demanded in his complaint. No facts were alleged from which the legal conclusion could properly be drawn that he had not a plainer, speedier, and more

adequate remedy at law than in equity. Upon authority it was determined in this state as early as 1887 that injunction will not lie to restrain the enforcement of an execution issued on a default judgment in a justice's court in a suit where the justice had not acquired jurisdiction, for the reason that the defendant has an adequate remedy at law by motion in the justice's court to set aside the execution. *Luco v. Brown*, 73 Cal. 3, 14 Pac. 366, 2 Am. St. Rep. 772. It may be that, if such a motion were made and denied, or other facts were alleged showing special circumstances of fraud or hardship, a court of equity might be moved to grant injunctive relief, but no such facts are set forth in the complaint under consideration as were shown in a case on which the appellant chiefly relies, and which does not sustain his contentions. *Newman v. Barnet*, 166 Cal. 423, 132 Pac. 588. In that case it was shown on the trial that the plaintiff in equity had applied for relief in the justice's court, and that it was denied. In this case the plaintiff did not allege that he had made any application for the relief the law provides, and under the rule that it must be presumed the pleader has stated the facts as strongly as the truth will permit, the conclusion is irresistible that no such application was made.

The judgment and order appealed from are both affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(48 Cal. App. 343)

**WILSON v. SAN FRANCISCO-OAKLAND TERMINAL RYS. et al. (Civ. 3314.)**

(District Court of Appeal, First District, Division 1, California. June 28, 1920.)

**1. Release §57(2)—Fraud in securing release for personal injuries may be shown by circumstantial evidence.**

In a personal injury action, where plaintiff claimed that signing of a release resulted from misstatements and fraudulent misrepresentations, plaintiff was not required to show a direct connection between one of the parties making such representations and the defendant, but was entitled to prove fraud and conspiracy by circumstantial evidence.

**2. Release §17(2)—Defendant may not rely on release secured by misrepresentations of agents or others.**

In a personal injury action, whether or not there was any connection between one who by misrepresentation or fraud induced plaintiff to sign a release and defendant street railway's claim agent, the defendant corporation should not be allowed to take advantage of an unfair settlement thus made.

**3. Release §58(6)—Whether release for personal injury is tainted with fraud is a jury question.**

Whether a release for personal injury is tainted with fraud is a question for the jury.

**4. Release §56—Plaintiff may prove that she was a profound neurasthenic when induced to sign.**

If plaintiff was a profound neurasthenic at the time of the execution of the release for personal injuries, the release should under the law be scrutinized with even more care than if she were in a normal condition, and she was entitled to prove such physical condition when executing a release which she claimed was fraudulently procured.

Appeal from Superior Court, Alameda County; William S. Wells, Judge.

Action by Ada P. Wilson against the San Francisco-Oakland Terminal Railways and others, in which only the named defendant answered. Directed verdict and judgment for defendant, and plaintiff appeals. Reversed.

Ostrander, Clark & Carey, of Oakland, for appellant.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco (Chapman & Trefethen, of Oakland, of counsel), for respondent.

KNIGHT, Judge pro tem. This action was brought by plaintiff to recover damages for personal injuries claimed to have been sustained by her through the negligence of the defendant corporation while she was riding as a passenger on the street car of said defendant corporation. The action was tried by a jury, and the court directed a verdict in favor of the defendant. Judgment was entered accordingly, from which plaintiff appeals.

The defendant corporation was the only defendant answering, and it pleaded a release executed by plaintiff to the effect that she had accepted from said defendant corporation the sum of \$200 in full settlement of her claim and had discharged said defendant corporation from further liability. After the jury had been impaneled and sworn, counsel for defendant corporation called the court's attention to the release pleaded in its answer. Plaintiff admitted the execution of said release, but claimed that it was procured through the fraud and conspiracy of the agents of the defendant corporation, and was therefore not binding upon plaintiff. The court thereupon directed that the evidence bearing on said release be first presented. Defendant corporation then offered said release in evidence, after which plaintiff, in support of her claim of fraud and conspiracy, offered certain oral testimony, concerning the activities and declarations to her of one Norwood, whom she claimed had, with the aid

of the claims agent of the defendant corporation, fraudulently induced her to settle her claim. The evidence of Norwood's activities and declarations was excluded by the court, upon the ground that there had been no connection shown between said Norwood and the defendant corporation. After having unsuccessfully offered oral testimony on that point, counsel for plaintiff reduced to writing and read into the record a statement embodying the facts and circumstances which plaintiff offered to prove and upon which plaintiff stated that she would rely as showing fraud and conspiracy. The court refused to allow evidence to be introduced in support of said offer, and, on motion of the defendant corporation, directed the jury to return a verdict for the defendants, and said verdict was rendered accordingly.

Plaintiff's complaint was filed on September 27, 1917. Summons was served on the defendant corporation on September 29, 1917.

[1] The following, in substance, are the facts which plaintiff offered in writing to prove: On the afternoon of September 29, 1917, the same day on which the summons in the action was served, plaintiff was called to the telephone at her home in the city of Oakland by some person who, after inquiring if she was Miss Wilson, represented himself to be Mr. Carey, one of plaintiff's attorneys. Plaintiff remarked that it did not sound like Mr. Carey's voice, to which said person replied that he had a dreadful cold and was hoarse. He then asked plaintiff what she had said to Dr. Buteau's nurse, to which plaintiff replied that she had told the nurse that she was feeling better. The person then stated that the nurse had so informed him, and that he was afraid that it was damaging evidence against plaintiff, and that if she wanted to drop the case or settle it with the company he would not charge her anything for his services. He then asked if she would settle for \$100, to which plaintiff replied that she would not. The telephonic communication then ended. As a matter of fact plaintiff had been examined by Dr. Buteau prior to the filing of her complaint. At the time of said telephonic communication plaintiff was attending her sister, who required almost constant attention, and plaintiff herself was extremely nervous, and afterwards became discouraged with reference to her case because of what had been stated to her over the telephone. On October 10, 1917, said C. J. Norwood, who was a total stranger to plaintiff, called at plaintiff's home and inquired for her, but, finding that she was not in, departed and returned the next day, at which time he stated to plaintiff that he had observed that she had brought suit against the San Francisco-Oakland Terminal Railways; that he himself had been in the same accident, but had not yet settled with the company, although he intended to do so. Plaintiff informed him that her attorneys had

told her to settle her case, that she would like to settle, and she asked said Norwood to let her know if he settled his case. Norwood stated that he thought he would see what he could do; that he himself had not done anything, but that he did not want to give his case to the lawyers; that he would rather settle with the company; and that he thought he would go down and see them, and he did not want to wait any longer. Norwood then departed, but afterwards, on the same day, telephoned plaintiff that he had settled with the company, and requested the privilege of again calling on plaintiff, stating that he had something to her advantage to tell her. Later in the afternoon he called at her residence and stated to her that Mr. Mills, the claims agent of the defendant corporation, had told him that the attorneys for the company were going to call plaintiff down the next day and take her deposition, and that, since plaintiff's attorneys had released her, if she wanted to settle with the company, she had better go that afternoon; that if she waited until the next day it would be too late; that Mills had told him that he could not do anything afterwards because it would be in the hands of the lawyers. Norwood then, at the request of plaintiff, telephoned Mills and made an appointment with him for plaintiff, and afterwards accompanied plaintiff to the office of said Mills. After conversing with Mills, plaintiff accepted a check for \$200 in full settlement of her claim. The telephone message purporting to have come from Mr. Carey was not from Mr. Carey, nor was it from any of plaintiff's attorneys, but plaintiff did not know that she had been deceived until the next day, October 12, 1917.

Plaintiff further offered to prove that the statement made by said Norwood at the time he called on plaintiff on October 11, 1917, to the effect that he had not yet settled with said company was false, and that he had in fact settled with said company in August, 1917, and that prior to visiting plaintiff said Norwood had consulted with said Mills with reference to plaintiff's case and with reference to a settlement of plaintiff's case. Plaintiff further offered to prove by said Dr. Buteau that as a result of the injuries received by her she was a profound neurasthenic and had suffered a severe shock to her nervous system. Plaintiff further offered to prove that at the time she called at Mills' office with Norwood she was in an extremely nervous condition and was depressed and discouraged because of the telephone message that she supposed was from Mr. Carey; that in accepting the check for \$200 she did so because of the fact that she believed that she had been abandoned by her attorneys, and because of the statements made to her by said Norwood to the effect that if she did not settle before the following day it would be too late for her to settle, and because of the various matters stated to her by said Nor-

wood with reference to the treatment a Mrs. Marshall had received who had a claim against said company for injuries received in an accident while on a street car of said company, to the effect that Mrs. Marshall had been subjected to X-rays and had been severely examined by the attorneys for the company; that in making the settlement with said Mills plaintiff was ignorant of her rights in the premises and believed that if she did not settle upon that day it would be too late for her to settle, which belief was induced by the statements of said Norwood to her; that upon ascertaining from her attorneys on the following day that they had not withdrawn from her case she authorized them to tender the check back to said Mills and to said defendant corporation; and that said check was, within a few days thereafter, tendered to said Mills and to said corporation defendant, but that said tender was refused.

Plaintiff further offered to prove the main allegations of her complaint with reference to the negligence of said defendant corporation, etc.

The oral proof offered by plaintiff previous to the making of the written offer was, as above stated, excluded by the court, upon the objection of said defendant corporation. Plaintiff was not allowed to testify as to said telephonic communication, nor as to any of the statements made to her by Norwood. Nor was she allowed to give her reasons why she accompanied Norwood to the office of said claims agent, nor the reason for her acceptance of said check of \$200 in full settlement of her claim.

Norwood was called as a witness by plaintiff, but the court would not allow plaintiff to examine him as to any of the statements claimed to have been made by him to plaintiff. One of the important points relied upon by plaintiff to show fraud and conspiracy was the asserted false statements of Norwood on his first visit to plaintiff to the effect that he had not yet settled his case with the company, but that he intended to do so, and that he did not want to give his case to the lawyers, but would go down and see the company without waiting any longer. Norwood, while a witness, admitted that he had settled his case with the company several days prior to his first visit to plaintiff, but the court refused to allow plaintiff to interrogate said Norwood with reference to said asserted false statements. In fact, all evidence offered by plaintiff tending to show the activities of Norwood and the statements made by him to plaintiff was excluded.

We are of the opinion that the rulings of the court in this respect constituted error. We are of the opinion also that, had plaintiff been successful in establishing the truth of the facts asserted by her in her written offer, the question of the fraudulent procurement of said release should have been submitted to the jury together with the main issues of the

case. The trial court, in excluding this evidence, was evidently acting upon the theory that plaintiff was required to show a direct connection between the supposed agent, Norwood, and the recognized agent of the defendant corporation, Mills. By the adoption of such a rule, however, plaintiff was deprived of the right accorded her by the law, of proving fraud and conspiracy by circumstantial evidence. *Maxson v. Llewellyn*, 122 Cal. 195, 54 Pac. 732; *People v. Donnelly*, 143 Cal. 394, 77 Pac. 177; *People v. Kizer*, 22 Cal. App. 10, 183 Pac. 516, 521, 134 Pac. 346; *Butler v. Collins*, 12 Cal. 457; *Levy v. Scott*, 115 Cal. 39, 46 Pac. 892; *Cassel v. Bullard*, 64 U. S. (23 How.) 172, 16 L. Ed. 424; *Brake v. Stewart*, 76 Fed. 140, 22 C. C. A. 104.

[2] In brief, the substance of plaintiff's proffered proof was that she had been led to believe by trickery that her attorneys had abandoned her case; that through falsehood and deception she had been frightened into the belief that if she did not settle her case that day she could not be allowed to settle it afterwards; that, if she did not settle that day, she would on the following day be subjected to the rigors of severe examination by opposing counsel and perhaps be required to submit to X-ray examination as to her physical condition; and that while she was in that condition of mind she was persuaded to go before the claims agent of the company, where, without the aid of counsel or friend, she was induced to settle for an inadequate and trifling sum.

If the release relied upon by the defendant corporation to defeat plaintiff's action was the product of such methods, plaintiff should have been allowed to prove it. Whether or not there was any existing relation between Norwood and Mills was one of the questions for the jury to decide after hearing all of the circumstances surrounding the transaction. Norwood was admittedly a total stranger to plaintiff. He had already settled his claim against the company prior to his visit to plaintiff. Plaintiff's action was not one such as would excite the public interest. The parties thereto were the only ones concerned. Norwood was obviously not acting in behalf of plaintiff. The jury, then, had a right to know what his interest was, and the extent of it, and the reason for his asserted false statements to plaintiff, if he did in fact make any. Plaintiff should have been permitted to present all of these circumstances to the jury in order to prove, if she could, that the unusual activities of Norwood could be accounted for on no other hypothesis than that he was the agent of the defendant corporation. It would make little difference whether it was shown that he was an authorized or a self-constituted agent of the defendant corporation, because, in either event, if an impetuous settlement was brought about through his trickery and falsehood, the defendant corporation should not be allowed to

take advantage of an unfair settlement thus made, accept the benefits thereof, and deprive plaintiff of a trial upon the real merits of the case. *Wilder v. Beede*, 119 Cal. 646, 51 Pac. 1083; *Pope v. J. K. Armsby Co.*, 111 Cal. 159, 43 Pac. 589; *Riser v. Walton*, 78 Cal. 490, 21 Pac. 362; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88.

[3] The courts have frequently held in no uncertain terms that, where a release is tainted with fraud, it should not be sustained, and that the question of whether or not such taint exists is one to be submitted to and decided by the jury. In *Kansas City, M. & B. Ry. Co. v. Chiles*, 86 Miss. 361, 38 South. 498, it was said:

"No release of this nature should be upheld if any element of fraud, deceit, oppression, or unconscionable advantage is connected with the transaction. And in passing on the validity of such release, when assailed, all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown. So that the jury, in the clear light of the whole truth, may rightly decide which story bears the impress of verity."

In *Carr v. Sacramento C. P. Co.*, 85 Cal. App. 439, 170 Pac. 446, in dealing with the question of a release, the court said:

"It is true that the law does not discourage settlements of controversies by agreement, and is disposed as far as possible to uphold them, but it is equally ready to relieve parties from fraud and imposition through which they have been induced to barter away their rights. In cases like this especially, where the opportunity for over-reaching is so great, the law demands good faith on the part of the releasee and a full understanding on the part of the person injured as to his legal rights."

Additional cases to the same effect are *Atchison, T. & S. F. Railway Co. v. Cunningham*, 59 Kan. 722, 54 Pac. 1055; *Smith v. Occidental, etc., Steamship Co.*, 99 Cal. 462, 34 Pac. 84; *Kelley v. Chicago, etc., Ry. Co.*, 138 Iowa, 273, 114 N. W. 536, 128 Am. St. Rep. 195; *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377.

[4] Plaintiff also claims and she offered to prove, that she was a profound neurasthenic at the time of the execution of said release. If that be true, said release should, under the law, be scrutinized with even more care than if she were in a normal condition. *Edmunds v. Southern Pacific Co.*, 18 Cal. App. 532, 123 Pac. 811; 23 Rul. Case Law, 388 et seq.; *Carr v. Sacramento C. P. Co.*, supra.

It is our opinion that the evidence offered by plaintiff was improperly excluded, and that the question of the asserted fraudulent release should have been submitted to the jury.

The judgment is therefore reversed.

We concur: WASTE, P. J.; RICHARDS, J.

(48 Cal. App. 351)

**SIMMONS et al. v. STEPHENS et al.**  
(Civ. 3296.)

(District Court of Appeal, First District, Division 1, California. June 28, 1920.)

1. Municipal corporations §706(5)—Finding of death of pedestrian from negligence of driver of auto authorized.

Evidence held to support finding that death of pedestrian on street from collision of automobile was caused by negligence of driver in excessive speed and operation.

2. Appeal and error §1011(1)—Conclusion on conflicting evidence not reviewable.

Conclusions of the lower court on conflicting evidence as to the facts will not be disturbed.

3. Municipal corporations §705(1)—Collision of auto with pedestrian held not unavoidable accident.

There having been a space of over 15 feet on either side of a pedestrian crossing a street, through which the automobile which struck him could have passed, and he being in view for a considerable distance down the street, it cannot be said the accident was unavoidable.

4. Appeal and error §931(6)—Trial court cannot be presumed influenced by evidence admitted and then stricken.

The trial court cannot be presumed to have been influenced by evidence which after admitting it struck out on motion, especially where it expressed doubts as to admissibility thereof when offered.

5. Appeal and error §1054(3)—Admission of evidence on trial without jury harmless, in view of other evidence and basis of decision.

Admission, in action for collision of automobile with pedestrian, of traffic ordinance of city, if error, was harmless, the machine's rate of speed being also in violation of state law, and the decision being based, not only on excessive speed, but on negligent operation, for which Civ. Code, § 1714, declared the owner of property liable.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Hattie A. Simmons and others against Henry H. Stephens and another, partners as Southern California Stage Company. Judgment for plaintiffs, and defendants appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.  
H. S. Laughlin and Muhleman & Crump, all of Los Angeles, for respondents.

KNIGHT, Judge pro tem. This is an appeal by the defendants from a judgment rendered against them in an action brought by the surviving widow and children of Frank Henry Simmons to recover damages on account of the death of the said Frank Henry Simmons, who was struck and instantly killed.

ed by an automobile driven by one of the employes of the defendants. The court, sitting without a jury, awarded plaintiffs a judgment in the sum of \$3,000.

Appellants contend that the evidence is insufficient to support the findings, and that the court erred in admitting certain evidence. There is no merit in any of appellants' points.

[1] The evidence in many respects is conflicting, but there is ample proof in the record to support the findings of the trial court that the deceased met his death through the negligence of the driver of the automobile. The accident occurred on January 4, 1918, at about the hour of 7 o'clock in the evening, at or near the intersection of Seventh and Ceres streets in the city of Los Angeles. The automobile at the time of the accident was being operated as a stage between San Diego and Los Angeles, and was on the in-bound trip going toward Los Angeles. Seventh street runs east and west, and on it there is constructed the double tracks of the street car company. Ceres street runs north and south and intersects Seventh street. There is a slight jog in Ceres street where it intersects Seventh street, the northerly intersection being a short distance to the east of the southerly intersection. The deceased, Simmons, a carpenter by occupation, lived near said intersection. During the evenings he was employed as doorkeeper at a moving picture theater located on Seventh street near the northwest corner of Seventh and Ceres streets. On the evening of the accident Simmons, who was 64 years of age and in full possession of all of his faculties, started straight across Seventh street, in a direction which, if he had succeeded in crossing the street, would have brought him immediately in front of the theater and only a few feet west of the most westerly line of Ceres street. According to the testimony of disinterested eyewitnesses, Simmons, before starting across the street, stood near the curb, and looked to his left for approaching vehicles which might be traveling down the right side of Seventh street. The street was clear and he started to cross, and when he reached a point between the north-bound and south-bound street car tracks he stopped and looked to the left and then to the right, and, observing the approach of the automobile stage from his right, remained stationary to allow the stage to pass in front of him. The stage at the time was traveling westwardly on the north side of Seventh street, with the left wheels running on or a little to the north of the farthest northerly rail of the street car track. When the stage reached a point about 40 or 50 feet from where Simmons had stopped the driver of the stage changed his course slightly to the left, which brought Simmons directly in front of the rapidly moving stage, and before Simmons could get out of the way he was struck by the stage and killed. The stage proceeded some 40 feet before it was

stopped. The headlights of the stage were lighted at the time, and several witnesses estimated the speed of the machine immediately prior to the impact to be upwards of 25 miles an hour. It was fully shown that, had the stage continued in the straight direction in which it was traveling before the driver deviated its course it would entirely have cleared Simmons. Some of the witnesses testified that the horn was not sounded, and others that it was.

[2] The driver of the stage claims, and it is the theory of appellants on this appeal, that Simmons was proceeding across the street with his head down and his hat drawn down over his eyes, looking neither to the right nor to the left, and that as the driver of the stage endeavored to pass Simmons to the left and behind him, Simmons stepped back in front of the machine, and the impact was inevitable.

At best, this testimony raised a mere conflict, and in that state of the record the well-established rule is that the conclusions of the lower court will not be disturbed. *Holroyd v. Gray Taxi Co.*, 179 Pac. 709; *Covel v. Price*, 179 Pac. 540.

[3] The court found and the evidence shows, that there was a space of over 15 feet of open clear roadway on either side of Simmons, through which the stage could have passed without colliding with him, and Simmons could be seen for a considerable distance down Seventh street. Under such circumstances it cannot be said that the accident was unavoidable. *Irwin v. Golden State Auto Touring Corp.*, 178 Cal. 10, 171 Pac. 1059. The trial court was fully warranted in finding upon the facts presented that the proximate cause of Simmons' death was the excessive speed of the stage and the negligent operation of it by the driver.

[4, 5] The court did not err in admitting certain evidence, as complained of by appellants. The declarations of the stage driver made subsequent to the accident were stricken out by the court on motion of appellants, and it can hardly be presumed, as appellants contend, that the court allowed itself to be influenced by such evidence, particularly in view of the fact that doubts were expressed by the court as to the admissibility of the proof when it was offered. If it was error at all to admit in evidence the traffic ordinance of the city of Los Angeles, it was harmless, for the reason that the rate of speed at which the stage was traveling at the time of the accident was also in violation of the state law, and the decision of the trial court was not based alone upon the evidence of excessive speed, but was also founded upon the negligent operation of the stage by the driver, which was in violation of the law of negligence as declared in the Civil Code. Section 1714.

We are of the opinion that the judgment of the trial court is correct and, finding no error

In the record, the judgment is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(48 Cal. App. 245)

**PEOPLE v. MOORE. (Cr. 500.)**

(District Court of Appeal, Third District, California. June 18, 1920. Hearing Denied by Supreme Court Aug. 18, 1920.)

1. False pretenses §35—Information for misrepresentations that defendant was agent of another held sufficient.

An information alleging that defendant fraudulently misrepresented that he was the agent of others authorized to buy cattle for them, and that, relying on those representations, the prosecuting witness delivered cattle to defendant, and was thereby defrauded of them, sufficiently alleges that the cattle were delivered to defendant as the agent of the others to sustain a conviction.

2. False pretenses §43(2)—Evidence that misrepresentations influenced delivery of property is admissible.

In a prosecution for obtaining cattle by false representations, it was not error to overrule defendant's objection to question whether defendant's statement influenced prosecuting witness in making the trade.

3. Criminal law §419, 420(12)—Public weighmaster's certificate of weight of cattle is hearsay.

In a prosecution for obtaining cattle by false pretenses, the defendant's offer in evidence of the public weighmaster's certificate of the weight of the cattle was properly rejected as hearsay.

4. False pretenses §48—Subsequent efforts of defendant to pay for property fraudulently secured not admissible.

Since the crime of obtaining property by false pretenses is complete when the property is delivered, it was not error to exclude evidence of defendant's offers and attempts to pay for cattle which he had previously obtained by falsely representing himself as the purchasing agent of others.

5. Criminal law §390—Error to exclude denial by defendant of intent to defraud.

In a prosecution for obtaining property by false pretenses, it was error to exclude testimony by defendant that he had no intention to defraud the prosecuting witness when he obtained the property.

6. Criminal law §1186(4)—Exclusion of denial of fraudulent intent held not substantial error warranting reversal.

Error in excluding defendant's denial of fraudulent intent in obtaining cattle from prosecuting witness does not require reversal under Const. art. 6, § 4½, forbidding reversal for improper rejection of evidence unless the error resulted in a miscarriage of justice, where defendant had denied making the alleged false

representations, and his testimony, if believed, completely exonerated him from the charge of fraud.

7. Criminal law §1159(3)—Evidence held not to warrant reversal, notwithstanding defendant's denials.

Where the evidence for the prosecution sufficiently showed that defendant obtained cattle from the prosecuting witness by false pretenses, as alleged in the information, the conviction cannot be set aside for insufficiency of the evidence, though defendant's testimony conflicted with that of the prosecution and established his innocence if the jury had believed it.

8. Criminal law §720(7)—Evidence held to authorize argument of prosecuting attorney.

In a prosecution for obtaining cattle by false representations that defendant was the agent of others, where the prosecuting witness had testified without objection that he had not been paid anything for the cattle delivered to defendant, it was not improper for the prosecuting attorney in his closing argument to call the jury's attention to the fact that prosecuting witness had received nothing for his cattle.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

J. W. Moore was convicted of obtaining property by false pretenses, and he appeals from the judgment of conviction and from the order denying his motion for new trial. Affirmed.

Levey & Lipman, of San Francisco, and Mannon & Mannon, of Ukiah, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NICOL, Presiding Judge pro tem. The defendant, J. W. Moore, was convicted in the superior court of Mendocino county of the crime of obtaining property by false pretenses, and prosecutes this appeal from the judgment and order denying his motion for a new trial.

[1] 1. Appellant claims that the court erred in overruling his demurrer to the information; the objections to the information being that it is not direct and certain as to the offense charged, and that it fails to disclose any natural or causal connection between the alleged false representations and the delivery of the property to the defendant. The charging part of the information is as follows:

"The said defendant, J. W. Moore, on the 30th day of June, A. D. nineteen hundred and nineteen, at the said Mendocino county, state of California, and before the filing of this information, did then and there devising and intending by unlawful ways and means and by false and fraudulent pretenses and representations to obtain and get into his custody and possession the goods and personal property of W. H. Edmonds, with intent to cheat and defraud and thereby then and there willfully and unlawfully, know-



(191 P.)

ingly and designedly, falsely and fraudulently pretend and represent to W. O. Edmonds that he, the said J. W. Moore, was then and there buying cattle for Lewis and McDermott, and that he the said J. W. Moore was then and there authorized by the said Lewis and McDermott to negotiate for the purchase of, and to purchase, cattle for said Lewis and McDermott as their agent, whereas in truth and in fact the said J. W. Moore was not buying cattle for the said Lewis and McDermott, nor any one acting in their behalf, to negotiate for the purchase of, nor to purchase, cattle as their agent, or otherwise, as he the said J. W. Moore, then and there well knew. And the said W. O. Edmonds, then and there believing the said false and fraudulent pretenses and representations so made, as aforesaid by the said J. W. Moore to be true, and being deceived thereby, was induced by reason of the said false and fraudulent pretenses and representations so made as aforesaid to deliver, and did then and there deliver to said J. W. Moore 50 head of beef cattle of the value of about \$5,095 lawful money of the United States of America and of the personal property of said W. H. Edmonds, and the said J. W. Moore then and there, and by means of the said false and fraudulent representations so made as aforesaid, did then and there willfully and unlawfully, knowingly, designedly, and fraudulently receive and obtain from said W. O. Edmonds the said goods and personal property hereinbefore described and set forth, with the intent to cheat and defraud said W. H. Edmonds of the same, and the said J. W. Moore did then and there willfully, unlawfully, and fraudulently take and carry away the same. Whereas in truth and in fact the said pretenses and representations so made as aforesaid was and were then and there in all respects utterly false and untrue and fraudulent, and whereas in truth and in fact the said defendant, J. W. Moore, well knew the said pretenses and representations so made by himself as aforesaid to be utterly false and untrue and fraudulent at the time of making the same. And the said defendant, J. W. Moore, then and there in the manner and by the means aforesaid did then and there and thereby willfully and unlawfully, fraudulently, knowingly, and designedly cheat and defraud the said W. H. Edmonds of the said goods and personal property hereinbefore described and set forth. All to the damage of said W. H. Edmonds. \* \* \*

In our opinion the demurrer was properly overruled. It is clear from the allegations of the information that the defendant falsely represented that in all his negotiations concerning the cattle mentioned in the information he was acting as the agent of Lewis and McDermott, and the fact that it is alleged that the cattle were delivered to the defendant does not render the information void in any respect whatever; for, if it were true that the defendant in all his negotiations concerning the purchase of the cattle was the agent of Lewis and McDermott, then it was proper that he should receive the cattle.

In the case of *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521, the defendant was convicted of the crime of obtaining money by

false pretenses under section 532 of the Penal Code, and it was claimed by the defendant that the information did not show the causal connection between the false pretenses and the parting with the property by the prosecuting witness. The court, in passing upon this objection, uses the following language:

"We are of the opinion that as against the defendant's general demurrer the information should be held sufficient on appeal. While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the 'Fatherland Magazine,' a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby. Section 4½, art. 6, of the Constitution provides that 'no judgment shall be set aside, or new trial granted, in any case, \* \* \* for any error as to any matter of pleading, \* \* \* unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' We are satisfied that to reverse the judgment on this ground would be to entirely ignore this provision of our Constitution."

Applying this language of the Supreme Court to the information in the case at bar it is equally clear that no person of common understanding could fail to understand from reading the information that the defendant, in negotiating for the purchase of the cattle, falsely represented and pretended to W. O. Edmonds that everything he was doing he was doing as the agent of Lewis and McDermott, and that by these false and fraudulent representations and pretenses he obtained the cattle, and that the prosecuting witness was thereby defrauded out of his property.

In *People v. Haas*, 28 Cal. App. 182, 151 Pac. 672, the court, in passing upon the sufficiency of an information for obtaining money or property by false pretenses, said that—

"An indictment or information charging the crime of obtaining money or property by false representations and pretenses must show the facts as to what the pretenses were; that there was an intent to defraud, the name of the person defrauded, with a description of the property and a statement of its value, together with an allegation that the false and fraudulent pretenses charged were relied upon by the party who claims to have been defrauded, and that he was induced thereby to part with his property."

In the case at bar all these necessary averments are fully alleged, and the information in this case is as full and complete as the

information that the court in *People v. Haas* held to be sufficient. See, also, *People v. Hines*, 5 Cal. App. 122, 89 Pac. 858; *People v. Donaldson*, 70 Cal. 116, 11 Pac. 681. Tested by the principles announced in the foregoing cases, the information before us in this case is ample and sufficient. "It contains every essential allegation necessary to charge the defendant with the commission of the offense, and is calculated to fully acquaint him with the nature of the charge." *People v. Hines*, *supra*.

[2] 2. Complaint is made that the court erred in overruling defendant's objection to the following question propounded by counsel for the people: "Did the statements he was representing Lewis and McDermott have any influence with you in bringing about this trade?" We see no error in the court's ruling. Rightly understood, the question had the effect of simply asking the witness if he relied upon the false representations that defendant was the agent of Lewis and McDermott in the purchase of the cattle.

[3] Defendant offered in evidence what is termed the "public weighmaster's certificate of weight and measure" for these cattle. The court sustained an objection to the same, and in this ruling we think the court was correct, as the certificate was clearly hearsay and inadmissible.

[4] Appellant also contends that the court erred in sustaining an objection to the following question: "Did you or not on or about the 2d day of July, 1919, send your wife, Rosa Moore, to the Bank of California in San Francisco to arrange for the payment of this note?" We do not consider that this alleged act of the defendant was relevant or material to the issue involved in the case. To have allowed this question to be answered would have been to allow evidence of the act of a third party performed after the crime had been fully completed and consummated. Furthermore, the matter sought to be elicited by this question would be self-serving in character and would be irrelevant to any issue in the case, and we also find no error in the refusal of the court to allow the witness Friedman to testify in regard to a letter claimed to have been written by him to the prosecuting witness after the crime had been fully completed, and which had reference to an offer by defendant to pay to the prosecuting witness a certain amount of money which was claimed to have been received as part of the proceeds of the cattle.

[5] An objection was sustained to the following question asked the defendant: "Did you intend, Mr. Moore, at the time when you got these cattle from Mr. Edmands to cheat or defraud Mr. W. O. Edmands or W. H. Edmands out of those cattle or any of them?" We think this question was proper, and that the defendant should have been allowed to answer it. "The general rule is well settled

that, under our system, a witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action." *Fleet v. Tichenor*, 156 Cal. 343, 104 Pac. 458, 34 L. R. A. (N. S.) 323; *Wohlford v. People*, 148 Ill. 296, 36 N. E. 107; *Cummings v. State*, 50 Neb. 274, 69 N. W. 756; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *People v. Farrell*, 31 Cal. 576; 1 Jones' Law of Evidence, §§ 170, 170a; 12 Cyc. 403.

[6] But, while we think the defendant had the right to state to the jury his intent at the time he procured the cattle, still we do not consider that the ruling of the court on this question resulted in any serious error to the defendant. We are satisfied from an examination of the record that this error was not prejudicial to the defendant's case. He testified very fully as to the transaction; denied repeatedly of ever having told Edmands that he was acting for Lewis and McDermott; said that he told him that he was in business for himself and buying for himself. His testimony was utterly irreconcilable with the theory of the presence of any intent to cheat or defraud Edmands out of his cattle. It is perfectly plain from a full examination of the evidence given by the defendant that a further statement by him to the effect that at the time he got the cattle from Mr. Edmands he did not intend to cheat or defraud him out of the cattle could not have changed the views of the jury or affected the result. *Fleet v. Tichenor*, 156 Cal. 343, 104 Pac. 458, 34 L. R. A. (N. S.) 323. To reverse the judgment for this error would be to ignore section 4½ of article 6 of the Constitution, which provides that—

"No judgment shall be set aside, or new trial granted, in any criminal case, on the ground of \* \* \* the improper admission or rejection of evidence, \* \* \* unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The objections to the questions asked W. O. Edmands as to offers of payment made at the meetings with defendant after the transaction at the police station in Berkeley and before his arrest were properly sustained by the court. The crime was complete at the time the defendant perpetrated the fraud upon Edmands and thereby procured his cattle.

[7] 3. It is next claimed that the verdict is contrary to the evidence. The evidence sufficiently shows that the defendant falsely represented to Edmands that he was acting for Lewis and McDermott, and, after so deceiving him, the cattle were taken over by the defendant, or, as the information alleges, were "delivered" to him. It appears that Edmands relied upon these false representations, that he was the agent of Lewis and

McDermott, and was thereby defrauded out of his property. The gist of the offense lies in the making of the false pretenses which were made by the defendant for the purpose of defrauding Edmands and upon which Edmands relied and was thereby deceived and defrauded out of his cattle. Defendant on the trial claimed that the cattle had been actually sold to him, and that he did not receive their "delivery" to himself by reason of any false representations that he was the agent of Lewis and McDermott.

This defense of the defendant was by the verdict of the jury rejected, and this verdict is final and conclusive.

"Undoubtedly the defendant's own story exculpates him, but it was for the jury to say whether or not that story should be believed. The evidence was therefore sufficient to justify the verdict." *People v. Rongo*, 169 Cal. 71, 145 Pac. 1017.

In *People v. Emerson*, 130 Cal. 562, 62 Pac. 1009, it is said:

"For, if the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, is sufficient to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact upon which the decision of the jury and the trial court is final and conclusive."

[8] 4. Finally the appellant contends that the assistant prosecuting attorney was guilty of misconduct in his closing argument to the jury. But there is no merit in this contention. There was a proper basis in the evidence in the case upon which the attorney had the right to call the jury's attention to the fact that Edmands had received nothing from the defendant for his cattle. The prosecuting witness, W. O. Edmands, answered without objection to questions propounded by counsel for defendant as follows:

"Q. You also testified that this amount set out in that paper \$5.095 was not paid, did you not? A. No; nothing, none of it has been paid. \* \* \*

"Q. Mr. Edmands, in that conversation that you had with Mr. Moore on the 14th day of July, 1919, at Berkeley, Cal., and on the 15th day of July, did or did not Mr. Moore offer to pay you in full? \* \* \* A. No. \* \* \*

"Q. I will ask you if at that time an offer was not made to you for payment in full of this note by Mr. Terrill representing Mr. Moore, the defendant in this case. A. No."

This evidence, as above stated, was received without objection, and it furnishes a proper basis for all the argument of the assistant prosecuting attorney which was objected to by the defendant.

The judgment and the order are affirmed.

We concur: HART, J.; BURNETT, J.

(48 Cal. App. 228)

COOPER et al. v. SELIG et al. (Civ. 2113.)

(District Court of Appeal, Third District, California. June 18, 1920. Hearing Denied by Supreme Court Aug. 16, 1920.)

1. Deeds  $\Leftrightarrow$  155 — Granting clause considered in determining whether habendum creates condition subsequent.

Where a deed to a city of a strip of land contained an unconditional grant of the strip "and the reversion," followed by a habendum clause, stating the grant was "for the purposes of a public road of said city," the inclusion of the reversion in the granting clause was important in determining whether a condition subsequent was created.

2. Deeds  $\Leftrightarrow$  145—In view of granting clause, matter in habendum held to create a covenant and not condition.

Where a deed to a city granted the reversion, the habendum clause provision, "for the purposes of a public road of said city," has no greater force than if the grantee, in consideration of the conveyance, had promised to use the land for a highway, and must be construed as a covenant and not a condition, and the fee would not thereby be affected in the absence of a stipulation for forfeiture and re-entry, and upon abandonment of the road the property would not revert to grantor or his assigns.

3. Easements  $\Leftrightarrow$  1—Granting clause not cut down by habendum clause of doubtful import.

If grantor intended to convey to city only an easement for a roadway, he could easily have expressed that purpose; and his failure to do so, together with the application of the principle that where the asserted modifying or limiting clause, in this case a habendum clause stating "for purposes of a public road of said city," is of doubtful import, the fee contemplated by the granting clause, in this case containing a reversion, will not be cut down, show he did not convey a mere easement.

4. Deeds  $\Leftrightarrow$  90—Construed in favor of grantee.

A grant in a deed is to be interpreted in favor of the grantee under Civ. Code, § 1069.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Mary Cooper and another against William N. Selig and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Charles Lantz, Howard F. Shepherd, and Samuel M. Garroway, all of Los Angeles, for appellants.

Loewenthal, Loeb & Walker, of Los Angeles, for respondents.

BURNETT, J. The action is in ejectment to recover possession, together with the damages for use of a strip of land which was formerly a part of a public street in the city of Los Angeles. The evidence falls to show any interest in the property on the part of

T. A. Davis, and we shall, therefore, in the opinion refer to Mary Cooper as the only plaintiff and appellant. According to the statement of her counsel she claims relief "under the principle of law that the adjoining owner of realty owns the fee to the center of a street, subject only to the easement for street purposes, and upon the abandonment or vacation of the street, takes the fee freed of the easement." On March 11, 1882, John S. Griffin conveyed to the city of Los Angeles, by a grant, bargain, and sale deed in the usual form, but providing, however in the habendum clause that it was "for the purposes of a public road of said city" a strip of land sixty feet in width, being thirty feet on each side of a line which was described in the deed. At the date of this deed, the grantor was the owner of the land on the westerly and also on the easterly side of this 60-foot strip. This public road was called "Mission Road," and ran in a general north and south direction, and it will be referred to hereafter as "Old Mission Road."

In September, 1883, John S. Griffin conveyed to Louisa H. Griffin, his wife, certain land which lay on the westerly side of Old Mission Road and adjoined it along the portion of the former street here in controversy. Louisa H. Griffin recorded a plat of the property conveyed to her, calling it the "Park Tract," and showed her tract as adjoining Old Mission Road on the west. The lot which adjoined said road along the land here involved was designated on her plat as lot 17, block C. Thereafter, the title of Louisa H. Griffin in the Park tract (including said lot 17, block C) was, by decree of distribution made upon the settlement of the estate distributed to John S. Griffin; and this lot, by conveyance from said John S. Griffin, became the property of plaintiff Mary Cooper prior to the commencement of this action.

Shortly prior to the year 1915, the city of Los Angeles widened Old Mission Road to 100 feet, and moved it at the point here involved some 40 feet westerly from its former course. This, wider street, referred to to herein as New Mission Road, being situated some 40 feet westerly and toward lot 17, block C, left a portion of the westerly half of Old Mission Road lying easterly from New Mission Road, which portion prior to the street being moved adjoined the said lot 17, block C. This abandoned portion of Old Mission Road was vacated by the city of Los Angeles under an ordinance, which was duly passed.

The defendant owned the land on the easterly side of the old road and bordering thereon, and after the new road was laid out he moved his fence up to the easterly line of said new road. It is conceded by appellant that respondent had a right to take possession of the portion of the old road which lay to the east of the center line thereof. The

controversy, however, is over the strip which was bounded on the east by the center line of the old road and on the west by the new road, which strip is a part of the westerly half of the old road which formerly adjoined said lot 17, block C, of the Park tract.

Respondent characterizes the action of appellants as an attempt "to jump across the full breadth of New Mission Road, alight on the easterly line thereof, and interpose themselves between respondent and the present highway, depriving him of access to the road throughout the length of the strip of land described in his pleadings."

However, regardless of either party's animus or convenience, the question here is simply one as to the proper interpretation of certain instruments, and particularly of said deed from Griffin to the city of Los Angeles. For, if that deed conveyed to said city the entire estate in said strip of land, then it is conceded that the judgment of the lower court must be upheld. But, if thereby an easement only was granted, then it would be necessary to inquire whether any merit exists in the contention of respondent that appellant has not succeeded to the fee in said strip.

At the outset it may be stated that there is really no dispute that if the fee was conveyed to the city, no change in the title was effected by the abandonment of the street, but if the fee to said strip was in the owner of the abutting property, then upon said abandonment, the complete title became vested in said owner. *San Francisco v. Center*, 133 Cal. 673, 66 Pac. 83; *Elliott, Roads and Streets*, §§ 1190, 1191.

Various circumstances are suggested by both parties as lending support to their respective interpretations of said deed, but they seem to furnish little, if any, aid to the proper solution of the question. To ascertain the intention of the parties, we must rely upon the language which they used in the instrument, viewing it in the light of the recognized rules of interpretation for such cases.

[1] The granting part of said deed is as follows:

"The said party of the first part, for and in consideration of the sum of five hundred dollars \* \* \* does by these presents, grant, bargain and sell and convey and confirm unto the said party of the second part forever, all that certain tract and parcel of land situated in the city and county of Los Angeles, state of California, bounded and described as follows [describing it]. Together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof."

Then follows the habendum clause:

"To have and to hold all and singular, the said premises, for the purposes of a public road of

said city, unto the said party of the second part forever."

It is properly stated by respondent that except for the expression, "for the purposes of a public road of said city" in the habendum clause, there is not a word to indicate any intention than that the grant was of an unconditional fee. The question is whether this expression operates to limit the grant to that of an easement.

In urging their respective claims, both parties attach much importance to certain cases as precedents, which it may be well to notice briefly.

One view suggested by respondent is that any possible effect of said expression to limit the conveyance to an easement is obviated by the grant of the reversion, and it is said:

"The grant of the reversion is on its face a complete contradiction of the claim that it was intended by the parties that the reversion should not be granted."

In support of this particular contention is cited *Vaughn v. Stuzaker*, 16 Ind. 338, wherein one Bassenger had conveyed to Jenks certain property for the purpose of a street, together with the reversion and reversions. The court held that the effect of the reversionary clause was to vest in Jenks "the reversionary right, if any, that might have arisen out of the failure to apply the property to the purpose for which it was conveyed." Appellant claims that in holding that a reversion was created by the use of the words, "to have and to hold for the purposes of a public road," said decision is contrary to all other cases cited by respondent. Attention is also called to the fact that it is somewhat ancient, having been rendered in 1861. However, no doubt many important legal principles were promulgated by the courts long prior to that date. As to a reversion there is this to be said: If the deed herein conveyed an unlimited fee, or simply an easement for highway purposes, no estate would be created by operation of law, but if thereby was granted a fee upon condition subsequent, then, manifestly, upon the failure of said condition a reversionary interest would be involved. We may add that it is quite possible to construe said deed so as to fall within any of these designations. In other words, it would not be altogether unreasonable to say that it conveyed an unconditional fee, or simply an easement, or the fee upon condition subsequent. If we have the last of these, then, of course the grant of the reversion would be quite important. At any rate, the use of said expression seems to be some evidence of the intention of the grantor to convey to the grantee the entire estate in the property.

[2] In *Greene v. O'Connor*, 18 R. I. 56, 25 Atl. 692, 19 L. R. A. 262, the Supreme Court of Rhode Island held that the words, "this

conveyance is made upon the condition that the said strip of land shall be forever kept open and used as a public highway, and for no other purpose," inserted between the description of the property and the habendum clause, did not create a condition subsequent, that it was merely a declaration of the purpose for which the land conveyed was to be used and improved, and that "such a declaration does not create an estate on condition, but merely imposes a confidence or trust in the land, or raises an implied agreement on the part of the grantee to use the land for the purpose specified."

In *Kilpatrick v. Mayor of Baltimore*, 81 Md. 179, 31 Atl. 805, 27 L. R. A. 643, 48 Am. St. Rep. 509, it was said that conditions subsequent are not favored in law, that they will not be raised by implication, and that a deed of land to a municipality which in the habendum clause adds the words, "as and for a street to be kept as a public highway," does not create a condition subsequent, and "the property does not revert to the grantor because of the failure to use it as a street."

In *Rawson v. School District*, 7 Allen (Mass.) 125, 83 Am. Dec. 670, the grant was to the public for a burying place, and the Supreme Court of Massachusetts held that the deed was not to be construed as a grant on condition subsequent, solely for the reason that it contained a clause declaring the purpose for which the premises were to be used, particularly since such purpose did not inure specially to the benefit of the grantor and his assigns, but was in its nature general and public, and there were no words indicating an intent that the grant was to be void if the declared purpose was not fulfilled. The court said:

"Language so equivocal cannot be construed as a condition subsequent without disregarding that cardinal principle of real property already referred to, that conditions subsequent which defeat an estate are not to be favored or raised by inference or implication."

A similar view is expressed in *Devlin on Deeds* (3d Ed.) §§ 838b, 970.

In *Eldridge v. See Yup Co.*, 17 Cal. 49, a lot had been conveyed to Athale by deed of bargain and sale in usual form, except that in the habendum clause these words appeared:

"For the use of a Chinese Church, or place of religious worship or moral instruction, under his direction and in conformity to the rules of the See Yup Company."

The Supreme Court cited with approval cases holding that, after the words of grant in the usual form, any restriction upon the use of the land by the grantee is void, and "where the habendum clause is irreconcilable with the premises, the premises must prevail," and concluded that the mere direction in the deed as to how the property was to be

used did not qualify the title nor raise a use or trust.

In *Taylor v. Danbury Public Hall Co.*, 35 Conn. 430, the deed conveyed to the town a piece of land "for the sole use and purpose of a public highway." The court said:

"This deed conveys something more than an easement. Whatever effect ought to be given to the limitation under other circumstances, so long as the premises continue to be used for a highway the town has a complete title, in the enjoyment of which it cannot be disturbed, not only to a right of way, but to the fee of the land."

It was further declared that the grantors parted with their title to the original highway, and they had nothing left to convey.

There are other cases to the same effect, holding that such expressions as "for the purposes of a public road" are directory only, that they do not qualify or limit a grant which is in absolute form, or operate to reduce the conveyance to that of an easement only. Appellant attempts to distinguish those cases from this by urging the view that therein no contention was made that only an easement was conveyed, but that the controversy was whether an unconditional or a defeasible fee was granted. But the character of the estate was certainly involved, and the courts held that the fee was not qualified by the expression of the purpose to which the property was to be devoted.

Appellant has not cited any case to the contrary directly in point, but she claims that by somewhat analogous decisions her theory is supported.

Among these is *Montgomery v. Sturdivant*, 41 Cal. 290. Therein, though, the habendum clause plainly provided that the grantees were to hold the property for life and the court properly held that this was to be considered in determining the intention of the grantor. The Supreme Court said that without the habendum clause the deed would have conveyed an estate in fee simple, but that said clause could not be disregarded without ignoring the clear intention of the parties. The case was substantially the same as though the deed had provided that the party of the first part grants to the party of the second part certain real estate to have and to hold for the natural life of the grantee.

In *Anderson v. Yoakum*, 94 Cal. 227, 29 Pac. 500, 28 Am. St. Rep. 121, the controlling question was as to the effect of a quitclaim deed upon an after-acquired title, although the court said that an habendum clause may limit and qualify the interest conveyed. The case has no bearing upon the interpretation of the deed before us.

A case more nearly in point is *Pellissier v. Corker*, 103 Cal. 516, 37 Pac. 465. The deed therein provided:

"I, David Winbigler, for value received, do hereby grant to W. V. Rhinehart, his heirs and assigns, for the sole purpose of an alleyway, to be used in common with the owners of other property adjoining said alleyway, all that tract of land," etc.

The Supreme Court said:

"We think this deed is an express grant of an easement—a right to the use and nothing more."

It is to be observed, though, that the qualifying words are in the granting part of the deed and so clearly connected with the word "grant" as naturally to suggest that what was intended was simply to convey the right to the use of the property for an alley.

Moreover, said statement was entirely unnecessary to the decision, since there was, as the Supreme Court held, a dedication of the strip of land "for use as an alleyway by the owners of the adjacent lots," and as the use had not been abandoned such owners were entitled to continue it without interference, regardless of the question whether the fee or only an easement was conveyed by the deed to Rhinehart. The case did not involve, as does this, an action by one asserting title after the use has been discontinued, but it was brought by one of the owners of adjoining property for whose benefit the conveyance had been made for an injunction to restrain interference with the use of the property for an alleyway. Applying the principle to the case herein, it would, of course, not be contended that, if Dr. Griffin had conveyed said strip to a third party while the city was actually using it, the municipality could thereby be precluded from the further use of the land as a street regardless of the question whether the city owned the fee or simply an easement. It is to be further observed that in the *Pellissier* Case the court finally reached the conclusion that the legal title was held by Rhinehart, his heirs and assigns, in trust for the benefit of the other property owners and subject to an easement created by the dedication of the land as an alleyway. Probably there is not much difference in the legal effect of the two statements. At least, as far as the merits of that action were concerned, it was unimportant whether the deed to Rhinehart conveyed merely an easement or the fee in trust subject to the easement. But herein, if the deed to the city of Los Angeles conveyed the legal title in trust for the purpose of a highway, then significance should be attached to the grant of the reversion.

In *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049, the habendum clause clearly limited the interest conveyed to a life estate. It is true that the court said:

"The intention of the parties to the grant is to be gathered from the instrument itself and determined by a proper construction of the language used therein, but for the purpose of as-

certaining this intention the entire instrument, the habendum as well as the premises, are to be considered, and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause the habendum will prevail over the granting clause."

In *Burnett v. Piercy*, 149 Cal. 178, 86 Pac. 603, it appeared from an examination of the deed and a contemporaneous instrument constituting a part of the same transaction that it was clearly the intention of the parties to convey a life estate, and the Supreme Court very properly said:

"When, upon a fair consideration of all the parts of a deed, and of the contemporaneous instruments constituting parts of the same transaction, it appears that it was the intention, by other expressions in the deed, to limit and qualify the effect and meaning of the granting clause, so that it should not operate to transfer the entire estate, but only a limited estate, the rule that repugnant conditions restraining alienation are void does not apply, unless the conditions refer to the limited estate actually granted. In such cases the other provisions in the deed operate on and affect its true meaning, the granting clause is to be taken in the limited sense which the entire instrument shows it was intended to have, and the limitations and conditions relating to the fee are not to be considered as repugnant to the grant, but as descriptive of the estate conveyed, and in harmony with the grant when truly interpreted."

The decision follows well-established principles, but it is controlling here only upon the assumption that the habendum clause shows an intention to limit the estate to an easement.

The principal question in *Gordon v. Cadwalader*, 164 Cal. 509, 130 Pac. 18, was as to the meaning of the term "heirs" used in the deed in controversy. From a consideration of the whole instrument it was held that the rule in *Shelley's Case* did not apply, and that the word "heirs" was not used in the technical sense. The situation there was so different from this that the decision cannot afford us much assistance.

Some cases from other jurisdictions are cited by appellant, but further than stating general principles that apply to the interpretation of deeds they are not in point.

While the case is not free from difficulty, yet, we think, the recital of the purpose for which the land was to be used should have no greater force than if the grantee in consideration of the conveyance had promised to use the land for the purposes of a highway. If such had been the case, it would not be disputed, in view of the decisions, that the promise to so use the land would be construed as a covenant and not a condition, and the fee would not thereby be affected, in the

absence of a stipulation for forfeiture and re-entry.

[3, 4] In construing this instrument, it is difficult to overlook the fact that if Dr. Griffin really intended to convey only an easement, he could easily have so expressed his purpose. His failure to do so, together with the application of the principle that where the asserted modifying or limiting clause is of doubtful import the fee contemplated by the granting clause of the deed will not be cut down, and the rule that a grant is to be interpreted in favor of the grantee (section 1069, Civ. Code), in connection with the other considerations to which we have directed attention, lead us to the conclusion that the trial court should be upheld.

The judgment is affirmed.

We concur: NICOL, Presiding Judge pro tem.; HART, J.

(48 Cal. App. 57)

**BUTTERS et al. v. BRAWLEY STAR et al.**  
(Civ. 2484.)

(District Court of Appeal, Second District, Division 2, California. June 3, 1920.)

**1. Appeal and error**  $\S$  193(3)—Misjoinder of causes of action not considered for first time on appeal.

Under Kerr's Cyc. Code Civ. Proc.  $\S$  434, objection that plaintiff stated two causes of action in one statement cannot be raised for the first time on appeal.

**2. Witnesses**  $\S$  275(7)—Cross-examination of defendant held proper in view of direct examination.

In an action against newspaper publishers for subscription contest prize, where one of the publishers had been examined on direct examination as to the rules of the contest, it was proper for plaintiff on cross-examination to produce copies of the newspaper containing the rules and question the witness in regard thereto.

**3. Principal and agent**  $\S$  177(3)—Principal chargeable with knowledge of agent.

Newspaper publishers were chargeable with knowledge of their agent that contestant for subscription contest prize had sold her votes to such agent and withdrawn from the contest, though she remained listed as an active contestant and received the votes secured by the agent.

**4. Contracts**  $\S$  189—Contestant for newspaper prize held not a legal contestant.

Where rules of newspaper subscription contest prohibited newspaper employes or members of their families from participating in the contest, a contestant, who sold her votes to an employe, but remained listed as an active contestant, receiving credit for votes procured by such employe, was not legally a contestant, and though she received the largest number

of votes, the contestant receiving the next highest number was entitled to the prize, though the publishers had paid the employé a cash sum in lieu of prize, according to the rules of the contest.

**5. Contracts ¶189—Consideration for assignment of right in prize contest held immaterial in action against offerer of prize.**

Where contestant who received highest number of votes in subscription contest was not legally a contestant, having withdrawn from the contest and having sold her votes to an employé of newspaper, who thereafter secured votes in her name in violation of the rules of the contest, and where such contestant, after being declared winner, assigned her right to the prize to contestant who received the next highest number of votes, the latter contestant was entitled to the prize, in action therefor against publisher, regardless of the question whether there was a consideration for such assignment, since the assignor, not having been legally a contestant, had nothing to assign, and since no one except the assignor could raise the question of form or want of consideration.

**6. Trial ¶418—Denial of nonsuit cured where defendant introduces evidence supplying defect.**

Action of court in overruling motion for nonsuit because of insufficiency of evidence was cured, where defendant himself introduced evidence supplying the defect.

**7. Estoppel ¶72—He who trusted most must suffer as between two innocent persons.**

Where one of two innocent persons must suffer by the fraudulent act of a third, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Anna D. Butters and husband against the Brawley Star, a corporation, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Galen Nichols, of El Centro, for appellants.

Frank Birkhauser, of El Centro, for respondents.

THOMAS, J. By this action plaintiff seeks specific performance of an agreement to deliver a certain Overland automobile, or the payment of the sum of \$795, the value thereof, if delivery cannot be made, and general relief.

From the record we gather that defendants were the publishers of a newspaper called the Brawley Star, at Brawley, Imperial county; that during a certain period—from May 13, 1916, to June 24, 1916, both dates inclusive—they conducted what is commonly known as a newspaper subscription contest, for the purpose of securing paid subscriptions for said newspaper; that as an

inducement for candidates to obtain such subscriptions they offered as "first prize" a certain Overland automobile, the value of which, it is alleged, was \$795, and for which plaintiff Anna D. Butters was one of the contestants; that for each paid subscription secured by any of the candidates a certain number of votes was credited to the contestant securing the same, or to whose credit a subscriber making a voluntary subscription might direct; and that at the end of such contest one Frances Blake, also a contestant, was declared to have received the largest number of votes, and was therefore claimed to be entitled to said automobile. It appears that thereafter said Frances Blake informed plaintiff that she—Miss Blake—was not entitled to the automobile in question, for the reason that she had not received 2,700,020 votes, as credited but, on the contrary, that her total vote was not in excess of 150,000; while the plaintiff, in the same count, had received 1,497,000 votes. According to Miss Blake, one Keane, the manager of said contest and an employé of said defendants, had used her name, as hereinafter set forth, and that by right the auto should have been awarded to plaintiff. Miss Blake thereupon made, executed, and delivered to said plaintiff Anna D. Butters a "writing," which, in words and figures, is as follows:

"Mr. De Rackin and Mr. Kintz: Please give the Overland automobile which I won through your contest to Mrs. Ralph Butters, as she is the one who is entitled to it. Frances Blake." (Mrs. Ralph Butters and Anna D. Butters, one of the plaintiffs, appear to have been understood to be one and the same person.)

In the complaint this instrument is referred to as an "assignment," and it is alleged that by it Frances Blake "assigned and transferred all her right, title, claim, and interest and any and all right she might or could have in and to said automobile to said plaintiff Anna D. Butters, for a valuable consideration." On the trial, however, the evidence shows that no consideration was given therefor. Thereafter plaintiff made demand on defendants for the delivery of the automobile, both by reason of the fact that she had actually received the highest number of votes in the contest and by virtue of the said "assignment," as the successor in interest of the rights, etc., of the aforesaid Frances Blake, which demand was not complied with by defendants, or any of them.

A general demurrer to the complaint was interposed. This was overruled by the trial court, which ruling is assigned as error.

Defendants answered, denying, except for certain formal portions of the complaint, all the material allegations thereof, and set up certain affirmative defenses, which, how-



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ever, in view of the record, it is unnecessary here to set forth. After trial the court found for the plaintiff, and in due time judgment was entered accordingly, from which judgment this appeal is taken.

[1] It is urged by appellants that the complaint does not state a cause of action. In this connection appellants say:

" \* \* \* It is apparent that plaintiff intends to state two causes of action therein, which are commingled in one statement. One of these is (a) that plaintiff received the highest number of legal votes cast in the contest, and therefore won the first prize; and the other is: (b) that plaintiff purchased, by assignment from Frances Blake, the latter's interest in the first prize."

Although the complaint is far from what might be termed a model in pleading, we think it invulnerable to the general demurrer. Conceding specifications (a) and (b) of the argument above referred to to be well taken, and that if pressed in the trial court that the court would not have hesitated in sustaining them, still it is beyond the power of this court to act thereon, under the condition of the record before us. Section 434, Kerr's Cyc. Code of Civ. Proc. and cases cited thereunder.

The seventh finding of fact, as shown by the record, is as follows:

"That Frances Blake quit and withdrew from said contest on about June 10, 1916, at a time when she had not to exceed 100,000 votes, and was out of the said contest from that time on. That the person or persons in the employ of said defendants, to wit: H. A. Keane and Paul Du Pron, who took up the list of said Frances Blake and concluded it of their own accord did not do so according to the rules of said contest, and their taking up the same was not according to the said rules of said contest; that by reason of the fact that the highest number of subscriptions credited to the contestant who was regularly in the contest according to the rules thereof, is to the plaintiff herein, Anna D. Butters, and she therefore had the highest number of votes to her account."

From this it appears that whatever was done by Keane and Du Pron in connection with the contest was in violation of the rules thereof. The evidence upon which that finding is based was elicited on cross-examination of the defendant De Rackin, after plaintiff's case in chief had been closed, and while the defendants were putting on their case, and was received over the objection of defendants' counsel. The witness was asked if he had the newspaper's issues between the dates of May 13, 1916, and June 24, 1916, and as to whether they contained the rules under which the contest was to be conducted. Upon his giving an affirmative answer to these questions, the witness was asked to produce them. This was objected to by defendant "on the ground that it is improper

cross-examination, and if they were competent at all it is part of plaintiffs' case in chief; they are incompetent, irrelevant, and immaterial." This objection was by the court overruled. Counsel for defendants then made the following objection:

"I want to object before you begin to read relative to the introduction of the papers; it is incompetent, irrelevant, and immaterial, and not proper cross-examination, and if competent at all should have been introduced in the plaintiffs' case in chief."

This objection was also overruled by the court.

[2] We have read the entire record. No doubt rests in our minds that the rulings made were correct. During the examination in chief of the defendant De Rackin, he was asked the following questions relative to the rules of the contest, and gave the following answers thereto:

"Q. Now, in regard to the rules of the contest; I will ask you whether or not a contestant could get credit for a slip mailed in with a subscription? A. Sure. Q. To be more definite, if I wanted to vote for Miss Blake, or one of those other ladies, I could have mailed to this office a check or money order, or anything else of that character that covered a certain amount of money, and then I would receive the paper, and the votes would be put in the ballot box? A. Yes, sir. Q. And would they or would they not go through the hands of the contestant in that case? A. Not necessarily."

This was on direct examination of the defendants' said witness, in reference to a part of the rules of the contest, and opened the door for the cross-examination permitted by the court. We think, therefore, that the ruling on the objection was proper. By this line of examination defendants supplied evidence without which plaintiff might have failed.

It is next urged that the evidence is insufficient to support the judgment, for the reasons: (a) That the so-called assignment executed by Frances Blake as aforesaid "is not an assignment at all, but a mere expression of opinion"; (b) that said assignment was given without consideration; and (c) was so executed and delivered "long after the said Frances Blake had sold whatever interest she had in the votes in said contest mentioned in said complaint, or the prizes to be won thereby, to another person." From the evidence it appears that plaintiff paid nothing for said "assignment." It also affirmatively appears that Frances Blake had, "about two weeks" before the contest closed, sold her votes to one Keane for \$25, and thereafter took no further part in the contest, although her name continued to be carried in the Brawley Star as a contestant. The \$25, however, were never paid to Frances Blake. It is further shown that one Du

Pron, an employé of defendants, carried on the contest on behalf of said Frances Blake from the time of such sale and actual withdrawal by her from the contest to the close thereof, and solicited and secured subscriptions on his own behalf and that of one E. A. Keane, a coemployé of defendants, but in the name of said Frances Blake, and without her knowledge or consent. Because of this fact, we entertain serious doubt, even although we were to hold said "assignment" good, as to whether Frances Blake had any interest that she could assign or transfer. But with the record before us we think this point immaterial.

The rules of the contest provided, among other things, as follows:

"No employé or members of an employé's family will be allowed to enter the contest."

[3] Keane was the agent of the defendants Kintz and De Rackin. Keane employed one Du Pron and others to represent Frances Blake, but without her knowledge, in gathering subscriptions to said paper, and ostensibly on account of the contest in question. At the close of the contest, as shown by the record, the standing of the contestants was as follows: Miss Frances Blake, 2,700,020; Mrs. Ralph Butters, 1,497,940; Mrs. J. E. Ramsdell, 577,740; Miss Naomi Campbell, 415,515; Mrs. Earl McReynolds, 322,555; Mrs. Joe Winters, 149,590. According to the testimony of Frances Blake, she had not to exceed 100,000 votes to her credit at the time of her transaction with Keane as aforesaid. There is no contradiction of this testimony, except the showing made by the defendants themselves, as above set forth, as to the standing and showing of the respective contestants. From the date of the transaction last referred to Miss Blake was in fact out of the contest. The activities of Keane and those working under him were in fraud of both the newspaper proprietors, whose agents they were, the other contestants, and those who subscribed under the false impression that they were doing so to help Miss Blake, because of a violation of the "rules of the contest" which we have already pointed out. We find no evidence that either Mr. Kintz or Mr. De Rackin, the proprietors of the Brawley Star, had any personal knowledge of this violation of the rules mentioned. The evidence is conclusive that the name of Miss Blake was actually carried out as an active contestant to the end of the contest. This advertised fact, as we have already seen, was false. This was known to Keane, who was the agent of the defendants Kintz and De Rackin, and as such his knowledge, as a matter of law, was theirs.

[4] Under these conditions Miss Blake was not legally a contestant, and hence it naturally would follow that plaintiff, being the contestant, legally in the contest, receiving the highest number of votes cast, was

entitled to the highest award offered. If this conclusion be correct, then the point which we are now discussing must be decided in favor of the plaintiffs. This is the point which has given us much trouble. In its consideration many questions have come up. Is the person, under conditions such as here exist, receiving the second highest number of votes so cast, but actually the highest number of votes cast for a legal contestant, entitled to the highest award? If so, is the principle involved in such a case as this different from that which prevails in an ordinary election contest? If a different principle prevails, what is the difference? Is it not possible that had Keane withdrawn Miss Blake's name from the contest and from the paper that the result might have been otherwise? These and many other questions have occurred to us.

[5] In the case of *Bush v. Head*, 154 Cal. 277, 97 Pac. 512, the Supreme Court held that—

"An unworthy motive could not convert the exercise of this right [the right to vote] into an illegal vote, within the meaning of the Code provisions under discussion."

In this case a candidate for judgeship had made promises that if elected he would not qualify for the office, but, after election, failed and refused to carry out the promises so made. From this appellants argue that—

"The party getting the second highest number of votes, even though the motive of the one receiving the highest number is bad, does not obtain the office, the votes being legal, even though the motive is bad."

In the case of *Henry v. Jordan*, 179 Cal. 24, 175 Pac. 402, the Supreme Court held that "a candidate who received next to the highest vote, the highest vote being obtained by the candidate for the nomination of another political party, which he did not receive, cannot be held to be the party candidate." The principle underlying the foregoing decisions does not, we think, maintain in the case at bar. In the foregoing cases there were the question of construction of both our Constitution and statutes, and there was also one of public policy. There was no question of fraud, either actual or constructive, involved. In the case at bar, the decision hangs almost, if not quite entirely, on the fraud practiced by the agents of defendants—the arrangement by them with one of the contestants legally in the contest by which the latter was to and actually did withdraw from the contest in favor of said Keane, which fact was kept from the public and the other contestants, as well as from the defendants Kintz and De Rackin. The name of the withdrawing contestant, Frances Blake, was carried in the paper as an actual contestant. By this arrangement it was made possible for Keane and his subordi-

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nates to ascertain from time to time the relative standing of the various contestants in the contest, and what it would be necessary for them to do, or the number of subscriptions which it would be necessary for them to procure in order to lead in the contest. This arrangement, too, was an absolute violation of the "rules of contest," as we have already seen. Under these conditions we do not think the cases just referred to apply. We hold, therefore, that the point which we are now considering must be decided against appellants, for the reason: (1) That we think that no one, save Frances Blake, can raise any question as to the validity of the "assignment" involved, either as to its form or want of consideration—and, so far as she is concerned, according to her own testimony it was given as an assignment of whatever right she may have had to the plaintiff herein—and (2) because it is immaterial, for the reason that at the time Frances Blake executed such purported assignment to plaintiff she had nothing to assign.

[8] At the close of plaintiffs' case defendants moved for nonsuit. The grounds of the motion for nonsuit did not include the fact that there was no evidence to show what the position of the plaintiff was in the contest. The only evidence of the number of votes polled for any one was that of the testimony of Miss Blake, which was that she had "not to exceed 100,000 votes." These, as we have seen, she had sold. The motion for nonsuit was denied. We think properly so. Christenson Lbr. Co. v. Buckley, 17 Cal. App. 37, 118 Pac. 466; De Leonis v. Hammel, 1 Cal. App. 390, 82 Pac. 349. Especially is this true when, even although granting that such ruling in certain cases were error, that error is cured where the defendant, as in this case, supplies the defect by evidence which he himself introduces. Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458; Higgins v. Ragsdale, 83 Cal. 219, 23 Pac. 316; Abbey, etc., Ass'n v. Willard, 48 Cal. 614; Winans v. Hardenbergh, 8 Cal. 291; Smith v. Compton, 6 Cal. 24. If there was any uncertainty as to the number of votes polled for plaintiff, irrespective of any rights which the said Frances Blake may have assigned to plaintiff, that was cleared away absolutely by a showing as to the number of votes polled for each purported contestant, and this included plaintiff. We think the evidence supports the judgment.

The next point urged is that "such decision and judgment is against law." We do not think it would serve any good purpose to quote the specifications urged in support of this contention. Suffice it to say that all have been considered, and we do not think the point well taken.

It is quite obvious now, we think, that the

defendants Kintz and De Rackin, the owners, etc., of the Brawley Star, are free from actual fraud. The fact is, too, that they have paid the sum of \$700, which was made possible by the "rules of the contest" to be accepted in lieu of the automobile, to said Keane. But Keane, being, by the rules of the contest, ineligible as a contestant for the reasons already stated, was not entitled to the same. His fraud was, as a matter of law, chargeable to the defendants Kintz and De Rackin. The plaintiff is also entirely free from any taint of such fraud, practiced as stated by said persons.

[7] We hold, therefore, that the plaintiff was the contestant legally in the contest receiving the highest number of votes so polled, and was entitled to the highest award. The rule applies that where one of two innocent persons must suffer by the fraudulent act of a third, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed. Ruiz v. Norton, 4 Cal. 355, 60 Am. Dec. 618; Poorman v. Mills & Co., 39 Cal. 345, 2 Am. Rep. 451; Bedell v. Herring, 77 Cal. 572, 20 Pac. 129, 11 Am. St. Rep. 307; Tafft v. Presidio, etc., R. Co., 84 Cal. 131, 24 Pac. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166; Blaisdell v. Leach, 101 Cal. 405, 35 Pac. 1019, 40 Am. St. Rep. 65.

No other point urged needs consideration. Judgment affirmed.

We concur: FINLAYSON, P. J.; WEBSTER, J.

(48 Cal. App. 314)  
MOHN v. SUMNER. (Civ. 3128.)

(District Court of Appeal, Second District, Division 1, California. June 26, 1920. Hearing Denied by Supreme Court Aug. 23, 1920.)

1. Trespass  $\S$  46(1)—Evidence held not to sustain finding for defendant.

Where the uncontradicted testimony showed that defendant, acting as attorney for plaintiff's wife, procured the dray and was present when all of plaintiff's personal property in the house was removed therefrom to another house selected by the wife during plaintiff's absence, a finding that defendant did not remove plaintiff's property from the house is not sustained by the evidence.

2. Evidence  $\S$  317(2)—Declarations of plaintiff's wife to her attorney concerning difficulties with husband held hearsay.

In an action for damages caused by the removal of plaintiff's goods from his house during his absence, where defendant claimed to have been acting as the attorney of the wife, declarations by the wife to defendant concerning her difficulties with her husband, made out of the presence of plaintiff, are hearsay and incompetent.

**3. Husband and wife §22—Wife had no authority to remove or authorize removal of husband's property.**

Under Civ. Code, § 103, authorizing the husband to choose any reasonable place or mode of living, and section 104, making it desertion by the husband to choose an unreasonable place or mode of living, in the absence of competent evidence that the residence and mode of living established by the husband were unreasonable, a wife had no authority as agent for her husband which justified the removal by the wife's attorney of the husband's property during the husband's absence from his residence.

**4. Trespass §30—Wife's attorney liable for removal of property from husband's home.**

An attorney for a wife who has had disagreement with her husband cannot justify the removal of the husband's property from the home selected by him during the husband's absence on the ground of instructions by the wife.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by George F. Mohn against Charles E. Sumner for damages for trespass. Judgment for defendant, and plaintiff appeals. Reversed.

W. R. Andrews, of San Diego, and Iverson L. Harris, for appellant.

Wright & McKee, of San Diego, for respondent.

CONREY, P. J. Action to recover damages for a trespass alleged to have been committed by the defendant by wrongfully taking and removing from plaintiff's house the furniture of the plaintiff and all of his personal property therein. From the judgment entered in favor of the defendant, the plaintiff appeals.

[1] The court found that it was not true that the defendant wrongfully or at all removed from the plaintiff's house and domicile plaintiff's goods and chattels contained therein. It is shown by undisputed evidence that on the 4th day of February, 1918, and for several years prior thereto, the plaintiff had resided with his wife in a house rented by him and known as "North House" on the "Point Loma Homestead Grounds," in the city of San Diego; that in the latter part of the year 1917, and thereafter, there were domestic difficulties between the plaintiff and Mrs. Mohn, and that the defendant as an attorney at law was from time to time consulted by Mrs. Mohn concerning her troubles with her husband; that on the 4th day of February, 1918, the plaintiff on going away from home, told his wife that he would be absent four or five days; that within the following week she received from him a letter mailed from Ash Fork, Ariz., through which place he was passing, in which plaintiff stated that he would return and be at home about the 1st of April, and gave her

no address at which she might communicate with him; that Mrs. Mohn consulted further with the defendant, Sumner, and in conformity with advice given by him, she determined to remove from North House to a house which she rented on Front street in San Diego, and took with her out of North House all the personal property of the plaintiff therein, as well as her own personal belongings; that the defendant not only gave this advice as Mrs. Mohn's attorney at law, but rendered her some personal assistance in executing her plans; that the defendant employed drays for the purpose, and accompanied them to North House, where he remained throughout the day while the packing and moving was being completed. Without more ample statement of the testimony, we may say that we are satisfied that the evidence is not sufficient to sustain the finding that the defendant did not at all remove any of the plaintiff's goods and chattels from North House. He was a participant in that removal, and may be held responsible therefore if the act was wrongful.

We are further of opinion that the evidence is insufficient to sustain the court's finding that the defendant "did not wrongfully and by force" remove said property. The plaintiff having proved that the property was his separate personal property left by him at his place of residence, and that during his absence it was taken away without his consent or knowledge, defendant having actively participated in the act of removal of the goods as above stated, plaintiff was entitled to recover the damages resulting therefrom, unless by other evidence the defendant was able to prove that his acts in the premises were not wrongful.

[2] Notwithstanding objections by the plaintiff, the court permitted the defendant and another witness in their testimony to repeat numerous statements made by Mrs. Mohn to the defendant concerning her difficulties with the plaintiff and the circumstances of his absence from home, upon which statements of fact the defendant based his advice to Mrs. Mohn. This testimony should have been excluded. The defendant was not charged with having committed any wrong as an attorney at law in giving advice to his client upon any statement of facts which she had made to him. Defendant's liability, if any, to plaintiff in this action arises from defendant's acts wherein he took part in the removal of the property, and not from anything done by him as a counselor or attorney at law. His acts in connection with the taking away of plaintiff's property might be justified by establishing the right of Mrs. Mohn to remove the property, and that he was merely an agent acting for her and at her request; but the facts offered to establish her right should not have been per-

mitted to be proved by the repetition of statements made by her without the presence or knowledge of the plaintiff. If we leave out of consideration the evidence thus erroneously admitted, there remains very little in the case except the undisputed facts first above stated. On these facts it must be determined whether or not Mrs. Mohn, in the exercise of her right to separate herself from the family domicile, was further entitled to remove therefrom the personal property of her husband which he had placed there for the purpose of establishing a home in that place.

[3] "The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion." Civ. Code, § 103. "If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him." Civ. Code, § 104. Since in this case there is no competent evidence that the place and mode of living established by the plaintiff at North House were either unreasonable or grossly unfit, we must, for the purposes of the present action, assume that Mrs. Mohn was under obligation to remain in the home so established; or to leave her husband's property there if she chose to go away. Circumstance no doubt might have existed which would have justified her in vacating the house and taking away all its contents, and which would have raised the presumption of agency on her part to act for him and would have further raised the presumption of his consent thereto. But under the only admissible evidence produced at the trial the plaintiff's property was taken away, and his residence placed in an uninhabitable condition upon the mere willful desire of his wife; and the defendant, with complete knowledge of the circumstances, aided her in carrying out that design. The precise question of liability here presented seems to be without precedent in this state, and very few similar cases have been found elsewhere. In *Schindel v. Schindel*, 12 Md. 108, the plaintiff and defendant were brothers who had married sisters. A separation having occurred between the plaintiff and his wife, the husband went to his father's house and the wife went to her mother's house. A few days later the defendant entered the plaintiff's house and

took away certain furniture, claiming that he did so by the direction and in the presence of the plaintiff's wife. The court based its decision upon the fact that the husband and wife were living separate from each other, and held that under those circumstances the wife was not her husband's agent. "The acts, therefore, of the defendant cannot derive a justification from any license or authority conferred by the wife of the plaintiff while she was living apart from him." In *Heyert v. Reubman* (Sup.) 88 N. Y. Supp. 797, the defendant was the father of the plaintiff's wife, and the action was for conversion of a quantity of household furniture belonging to the plaintiff. During the plaintiff's absence from home the defendant took away all of plaintiff's furniture therein, and sought to justify upon the ground that plaintiff's wife had come to his house and said that she had trouble with her husband, and asked that the defendant take the furniture. The court, in affirming judgment in favor of the plaintiff, said:

"We may infer that plaintiff and his wife had trouble. The plaintiff's ownership of the property, however, and the defendant's exercise of dominion and control over it, is undisputed, as is its value. Clearly, the wife had no authority, express or implied, to authorize the defendant to enter plaintiff's home and take possession of the property and remove it. \* \* \*

[4] The provisions of the Civil Code, to which we have referred, would have very little force or effect, and the right of a man (even though married) to retain possession of his personal property, placed by him in his own house, would be a right of no substance or value, if it were held that the wife, whenever a shadow of discord falls upon them, may, without just cause, change the domicile and remove her husband's property to some distant place without his consent. Since she has not that right, any person who, at her mere request, and with knowledge of the circumstances as they were known to this defendant, takes part in the seizure and removal of the husband's goods, should be held liable for the resulting damage if he is unable to prove facts establishing her special authority and justifying his conduct under the circumstances.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

(48 Cal. App. 257)

**PEOPLE v. BAY SIDE LAND CO. et al.**  
(Civ. 3088.)

(District Court of Appeal, Second District, Division 2, California. June 21, 1920. Rehearing Denied July 21, 1920; Hearing Denied by Supreme Court Aug. 19, 1920.)

**1. Nuisance §84—Complaint under Redlight Abatement Act held sufficient.**

A complaint for the abatement of a nuisance under the Redlight Abatement Act, which alleged that the building was used for purposes of lewdness, prostitution, and assignation, and that certain named lewd persons occupied the premises and then and there solicited sexual intercourse, is sufficient, though it does not allege that sexual intercourse was committed on the premises.

**2. Nuisance §84—Testimony of detective held proper.**

In an action to abate a nuisance under the Redlight Abatement Act, a judgment of abatement will not be reversed because of the evidence given by stool pigeons employed by the district attorney, where those witnesses had not solicited any of the acts testified to, but merely related to acts they observed by others.

**3. Nuisance §65—Place used for "lewdness" may be abated, though no prostitution is there committed.**

A place used for acts of lewdness may be abated as a nuisance under the Redlight Abatement Act, though no prostitution committed therein; "lewdness" including prostitution and assignation and other immoral or degenerate conduct or conversation between persons of opposite sexes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lewdness.]

**4. Nuisance §65—Ignorance of owner no defense to abatement of disorderly house.**

Premises may be ordered closed under the Redlight Abatement Act, though the owner had no knowledge of the improper use thereof, since the object of the act is not to punish, but to reform the property.

**5. Nuisance §65—Knowledge by employees of café of immoral acts imputable to proprietor.**

The knowledge or gross negligence of the employees of a café where immoral acts were openly committed is imputed to the proprietor, so that his ignorance thereof is no defense to abatement of the café as a nuisance.

**6. Appeal and error §1050(1)—Admission of evidence held not prejudicial in view of other evidence.**

In an action to abate a disorderly house, the admission in evidence of acts committed at another place by parties who had met at the place in question and there agreed to go to the other place for the purpose of committing those acts does not require reversal, where there was other competent testimony as to immoral acts in the place in question sufficient to sustain a judgment of abatement.

**7. Nuisance §84—Evidence of reputation of disorderly resort held competent.**

In an action under the Redlight Abatement Act, the admission of evidence of the reputation of the place in surrounding localities, all situated within 20 miles of the place in question, and from which the visitors frequently went to the place where defendant's premises were located, is competent.

**8. Nuisance §84—Evidence held to show that disorderly house had not been abated.**

Where there was evidence that defendant's premises had been conducted as a disorderly house, and there was no evidence of any change in its conduct, but the proprietor himself testified that it was managed at the time of the trial as it always had been, there was sufficient evidence to justify a finding that the nuisance was not abated on a stated date before the trial.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the People of the State of California against the Bay Side Land Company and others to abate a nuisance under the Redlight Abatement Act. Judgment for the plaintiff, and defendants appeal. Affirmed.

Bordwell & Mathews, of Los Angeles, for appellant Bayside Land Co.

G. M. Spicer, of Long Beach, for appellant White.

L. A. West, Dist. Atty., and W. F. Menton, both of Santa Ana, and Alex P. Nelson, of Los Angeles, for the People.

WELLER, J. Action to abate a nuisance under the provisions of the Redlight Abatement Act (St. 1913, p. 20). The court rendered judgment in favor of plaintiff, ordered the building closed for the period of one year, and directed the personal property located therein to be sold and applied as provided in the act.

Separate appeals were taken by Louie White, the proprietor of the place and owner of the furniture, and by Bayside Land Company, the owner of the real property and building. For convenience, these appeals will be considered together.

The complaint alleges that defendants "have used said premises, said building, the furniture, fixtures, and musical instruments in their possession, for the purpose of lewdness, assignation, and prostitution, \* \* \* and during all of said times said premises and said café in said building has borne the reputation in the community in which it is situated as a house of lewdness, assignation, and ill fame, and a place where lewdness, prostitution, and assignation are encouraged and allowed; that on the 30th day of November, 1918, said building and premises were occupied by Beatrice Swanner, Viola Johnson, and Irene Fucha as lewd and disso-

(191 P.)

lute persons, and then and there solicited acts of sexual intercourse."

[1] It is claimed that there is "an utter absence of any allegation that any acts of lewdness, prostitution, and assignation occurred on the premises." It was held in *People v. Arcega*, 28 Cal. App. Dec. 1188,<sup>1</sup> that the allegation that the building was used for the purpose of prostitution was sufficient. Here we have an additional averment that certain named lewd and dissolute persons occupied the premises and then and there solicited acts of sexual intercourse. We think these allegations sufficiently clear and explicit to inform the defendants of the character of the charge against the property, and to tender an issue.

[2] Counsel indulge in considerable vituperative criticism of the action of the district attorney in employing "stool pigeons" to obtain evidence in regard to the conduct of the café, and cite cases in which the use of such methods has been condemned by the courts. Suffice it to say that in no instance was any of the "solled doves" decoyed by the "stool pigeons" into committing any of the many acts of lewdness testified to by the latter on the witness stand. The investigators related what they saw with reference to the actions of other guests, and only once did any of them participate in the dissolute practices which were indulged in by the guests of the place, and then only by acquiescence in the proposal of one of the alleged occupants of the building.

[3] The principal contention of appellants appears to be that the decision is not justified by the evidence for the reason that no acts of prostitution or assignation were actually committed on the premises. The finding on this issue is as follows:

"That at all times mentioned in the plaintiff's complaint the defendant Louis White, whose true name is Louie White, has used the premises and the building thereon located, commonly known as the Tower Café, and the furniture, fixtures, and musical instruments therein and in his possession and under his control, for the purpose of lewdness, and in conducting a place where lewdness, assignation, and prostitution were and are encouraged; that the evidence shows, and the court finds, that no acts of prostitution or assignation were actually committed on said premises; that the building located on the premises hereinbefore described, commonly known as the Tower Café, and said premises occupied by him as aforesaid, and the said furniture, fixtures, musical instruments therein were, and now are, by reason of such use, a public nuisance under the statutes of the state of California known as the Redlight Abatement Act."

While the court finds that no acts of prostitution or assignation were actually committed on the premises, it does find that the premises were used for the purpose of lewd-

ness, which was permitted and encouraged thereon.

This finding is challenged as being inconsistent and unjustified. It is insisted that the words "lewdness," "assignation," and "prostitution" are synonymous. With this we cannot agree. "Lewdness" is of much broader significance than the other two words, and includes their meaning as well as all other immoral or degenerate conduct or conversation between persons of opposite sexes, such as were practiced by the frequenters of the café, as related by the witnesses. The lewdness and licentiousness disclosed by the record here as having occurred on the premises is not only disgusting and revolting in itself, but leads inevitably to illicit intercourse, and, undoubtedly, was in the contemplation of the Legislature when it adopted the statute, and was intended to be included within the terms of the act.

[4, 5] Counsel for both the owner of the premises and the proprietor of the business complain that knowledge of the vicious propensities of the guests was not brought home to either of them, and that therefore neither should be made to suffer because of some unknown and unauthorized acts of others. It is unfortunate that such drastic punishment must be inflicted on the innocent to prevent similar occurrences; but the evil sought to be remedied demands harsh treatment, and the owner whose premises are used for immoral purposes must suffer the consequences. As was said in *People v. Casa Co.*, 35 Cal. App. 194, 169 Pac. 454, the object of the act is not to punish; its purpose is to effect a reformation in the property itself. Much of the lewd conduct of visitors was committed openly and brazenly, without any attempt at concealment; and it is inconceivable that it should have escaped the eyes of some of the employés of the management. It is in evidence that one of the waiters, when asked if it was permissible to accost an unattended girl, informed his interrogator that he "might go as far as he liked, so he didn't tip the tables over." The knowledge or gross negligence of his employés must be imputed to the proprietor.

[6] The action of the court in admitting testimony of acts of prostitution at a neighboring hotel is assigned as error. It appears from the record that a party of some nine persons, among whom were the investigators from the office of the district attorney, were at the Tower Café (the premises involved in this suit), and while there made an assignation to repair to the other place where rooms might be obtained, and where, as stated by one of the women, "they could have a real party." Pursuant to the assignation made on the premises, they did go to the Seal Inn, and there rented rooms, and some of them indulged in lewd acts. Probably the court admitted this testimony for the purpose of ascertaining whether or not the purpose of

<sup>1</sup> Rehearing granted.

the assignation so made was consummated. It was error to receive testimony of conduct elsewhere, but, as there was ample evidence aside from that erroneously admitted to sustain the findings, we do not consider that the ruling prejudicially affected the defense.

[7] The act provides that "evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance." One witness testified on cross-examination to conversations regarding the reputation of the Tower Café had with persons residing in Santa Ana, Anaheim, Long Beach, and in the southwest part of Orange county. These places are all within a radius of 20 miles from Seal Beach, and consequently may be said to be in the vicinity of the premises in question. Many of the visitors to this resort came from the places mentioned and would be in a position, from their experiences, to form an opinion as to its character, and from their statements, based on observation, would result the foundation for the reputation of the premises. There were other witnesses who testified to the bad reputation of the place in the city of Seal Beach, where the café is situated, which would justify the court in finding that its general reputation was unsavory. As above mentioned, the statements regarding conversations with persons in the other cities mentioned were elicited on cross-examination, and at most would go only to the weight of the testimony of the witness, and not to its admissibility.

[8] Appellants attack the finding that the nuisance was not abated on the 1st of December, 1918, as not justified by the evidence. There is nothing in the record to show that it was managed in any different manner after that date, and the proprietor testified that at the time of the trial it was still being conducted in the same way as before. This was ample justification for the finding.

We have considered all the points urged by appellants, and find no error in the record. Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(48 Cal. App. 263)

PEOPLE v. SMITH et al. (Civ. 3689.)

(District Court of Appeal, Second District, Division 2, California. June 21, 1920. Rehearing Denied July 21, 1920; Hearing Denied by Supreme Court Aug. 19, 1920.)

I. Appeal and error §1011(1)—Court's finding on conflicting evidence cannot be reviewed.

On appeal from a judgment abating a nuisance under the Redlight Abatement Act, where there was sufficient evidence by the plaintiff to sustain the findings by the trial court, though there was a sharp conflict between that evi-

dence and that of defendant, the appellate court cannot pass on the credibility of the witnesses.

2. Nuisance §84—Evidence held to show a nuisance within Redlight Abatement Act.

In an action to abate a nuisance under the Redlight Abatement Act, evidence of conduct by eight persons assigned to two rooms therein held sufficient to sustain the finding that the house was a nuisance, notwithstanding the proprietor's claim that he believed them all to be married.

3. Nuisance §85 — Entire building may be closed under Redlight Abatement Act.

Where building was operated as a café and hotel under one management, the whole building may be closed under the Redlight Abatement Act, though certain parts of it, such as the kitchen and restaurant, were not shown to have been used for immoral purposes.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the People of the State of California against Doc Smith and others to abate a nuisance under the Redlight Abatement Act. Judgment for the plaintiff, and defendants appeal. Affirmed.

G. M. Spicer, of Long Beach, for appellants Smith and Blankenship.

Bordwell & Mathews, of Los Angeles, for appellant Stanton.

L. A. West, Dist. Atty., and W. F. Menton, both of Santa Ana, and Alex P. Nelson, of Los Angeles, for the People.

WELLER J. This action was commenced under the Redlight Abatement Act (St. 1913, p. 20) against the owners and proprietors of a place in Seal Beach known as the Seal Café and Seal Inn.

The complaint alleges, and the court finds, that the premises were used for the purpose of lewdness, assignation, and prostitution, judgment was entered in favor of the plaintiff, and from that judgment this appeal is prosecuted.

Much of the argument advanced by appellants is disposed of in the opinion this day filed in the case of People v. Bay Side Land Co. et al., 191 Pac. 994, and need not receive further notice here.

The main point urged by appellants as ground for reversal is that the evidence is insufficient to justify the findings regarding the use of the property. The building in question was a two-story structure, the lower floor of which was used as a café where meals and drinks were served, and music furnished that the patrons might dance. In a separate portion of the lower floor was a grillroom, from which a stairway led to the floor above. The second story was divided into sixteen bedrooms, for the accommodation of guests. At the times to which the



testimony refers several of the rooms were occupied by permanent roomers and a few were reserved for transients.

Witnesses for the prosecution related that nine persons, four of them employed by the district attorney, met at the Tower Café, a short distance from the premises in controversy. At the suggestion of one of the women they agreed to visit the Seal Inn for the purpose of obtaining rooms, and, as she put it, "have a real party." Agreeably to this appointment, they repaired to the Seal Café and there partook of liquid refreshments, and some of them danced together. Arrangements were made by this woman for two rooms for the party, and, on ascending the stairs, they were met by defendant Smith, one of the proprietors who asked them to register. One of the men inquired how that was to be done, and another replied: "Oh, just pair off any old way; it doesn't make any difference; we will sign up." This was done, each man registering a woman and himself as man and wife, under assumed names. Eight persons were assigned to the two rooms, but shortly afterward Smith notified them that he had procured another room, which was accepted. Two of the couples then paired off, one pair going to each of two rooms, where they divested themselves of their clothing and went to bed together. The four others, three of whom were the investigators, remained in the third room. Thereupon the woman who had suggested the "party" proposed that she would undress for \$2, and, apparently without waiting for an acceptance of her proposal, did so, with the exception of her undergarments. In this condition she proceeded to indulge in what may be termed her idea of a "real party," and raised such a commotion that the housemaid came into the room and told her she should be more quiet. This was the conditions of affairs when the district attorney arrived on the scene and arrested the participants in the revelry.

The maid testified that frequently the rooms were occupied by more than one couple during the night, usually Saturday and Sunday, and that she was sometimes called on to make up rooms which had been used, not infrequently as late as 1 o'clock in the morning, and that they were thereafter occupied by others. Several witnesses stated that the reputation of the place was bad in the immediate vicinity of its location and over a considerable area in addition.

The defendant Smith said that when the nine persons presented themselves for assignment to rooms he inquired if they were all married, and was informed that they were, and upon such assurance he assigned them

to the rooms. The defense introduced testimony to the good reputation of the place and the orderly conduct of its patrons.

[1] This sharp conflict of the evidence was resolved in favor of the plaintiff by the trial court. There was sufficient testimony, if believed by it, to justify the conclusion, and we cannot pass upon the credibility of witnesses.

[2] It is asserted by appellants that one act of assignation or prostitution does not constitute a nuisance under the provisions of the act. Conceding this to be the law, nevertheless the deductions to be drawn from a single act, when considered in connection with all the attendant circumstances, may properly form the basis for finding that the practice is habitual. We must assume, in support of the judgment, that the court below believed the statements of the witnesses that it made no difference how they were registered, and that the defendant acquiesced in that assertion. Moreover, he admits that he put eight people in two rooms; and, even though they were all married, it is considered somewhat unconventional, at least, for two married couples to occupy the same bed at the same time. The fact that these people showed a willingness to share the privacy of their sleeping quarters should have aroused his suspicion as to the purity of their intentions. Such laxness of management and disregard of the moral code instanced on one occasion might reasonably lead to the inference that such occurrences were common.

[3] Objection is made to the inclusion in the decree of the Seal Café, or the lower portion of the building, as no acts of lewdness are shown to have taken place there. Entrance to the upper floor was gained through the grill, which was separated from the main dining room by the kitchen, and was accessible to the street through an outside entrance. As we understand the situation, the dining room and grill and the Inn above were covered by one roof, under one management and conducted as one business, and we do not believe that the court is required to designate or segregate with particularity the portions of an entire establishment which constitute the nuisance. The kitchen might be innocuous in itself, but is a part of the premises, and accessory to them, and may properly be included in the decree.

After carefully reviewing the record, we are of the opinion that no error was committed by the trial court.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(48 Cal. App. 405)

**KING v. HARFORD. (Civ. 3223.)**

(District Court of Appeal, First District, Division 2, California. July 1, 1920.)

**1. Railroads §152—Bonds secured by mortgage not "negotiable instrument" before amendment of Code.**

Under Civ. Code, §§ 3088 and 3093, defining negotiability as they existed prior to the amendments in 1915 and 1917 (St. 1915, p. 99; St. 1917, p. 1535), a railroad bond payable to bearer and reciting that it was secured by mortgage to trustees was not negotiable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

**2. Principal and agent §160½ — Purchaser from agent selling property as his own cannot rely on power of sale.**

Where an attorney for administratrix and sole legatee sold as his own a bond delivered to him to be listed as property of the estate, a remote buyer of the bond cannot rely on a general power given the attorney to sell property as a defense to recovery of the bond by the legatee.

**3. Executors and administrators §158—Sole legatee administering estate cannot sell personally without order.**

Under Code Civ. Proc. § 1517, before its amendment in 1919 (St. 1919, p. 1178), making invalid sale of any property of a decedent unless under order of the superior court, an administratrix who was sole legatee could not sell without a court order a bond belonging to the estate, and therefore a buyer of such bond from the attorney of the estate could not rely on the legatee's power of sale to the attorney.

**4. Principal and agent §183(1) — Owner of bond sold by agent held not guilty of laches.**

Where an attorney, who sold as his own a bond delivered to him by the administratrix and sole legatee of an estate, paid the interest on the bond to the legatee, who did not discover the sale until 4 months before her death, an action by the executor of the legatee begun within 3½ months after her death was not barred by laches.

**5. Estoppel §54—Reliance by buyer on settlement with agent wrongfully selling bond necessary to estop owner.**

The remote buyer of a bond wrongfully sold by an attorney cannot defeat recovery of the bond by the former owner on the ground of estoppel based on transactions between the owner and the attorney of which the buyer had no knowledge, and on which, therefore, she did not rely.

**6. Mortgages §38(1)—Evidence held to sustain finding that deed was taken as security, not as settlement.**

In an action to recover a corporate bond wrongfully sold by the attorney for the owner, evidence that deeds given by the attorney to the owner contained a clause that they were executed as security is sufficient to sustain a

finding that the owner accepted the deeds as security, and not as settlement of her claim to the bonds.

**7. Principal and agent §183(1)—Restriction of remedies to foreclosure not applicable in suits against strangers.**

Code Civ. Proc. § 726, making action for foreclosure the only remedy to enforce an obligation secured by mortgage, is not available as a defense to an action to recover a bond wrongfully sold by an agent who had given a mortgage to secure the owner, where the action was against a buyer of the bond not a party to the mortgage, and especially where it appeared that all value of the equity conveyed by the mortgage had been lost through no fault of the owner.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by George L. King, as executor of the last will and testament of Elizabeth Maguire, deceased, against Mary I. Harford. Judgment for plaintiff, and defendant appeals. Affirmed.

Nathan Moran, of San Francisco (Chas. S. Wheeler, John F. Bowie, and A. A. Heer, all of San Francisco, of counsel), for appellant.

Frank D. Stringham and Beverly L. Hodghead, both of San Francisco, for respondent.

**NOURSE, J.** This is an action based upon a bond and interest coupons of the Southern Pacific Railway Company. Judgment was rendered in favor of plaintiff and against defendant for the return of the bond and coupons, or their value in case delivery thereof could not be had. Defendant appeals from the judgment under the alternative method.

[1] The bond in suit is one issued by the Southern Pacific Railroad Company, having semiannual coupons attached, known as a first refunding mortgage gold \$1,000 bond. It is made payable to bearer and secured by a mortgage on certain real and personal property of the Southern Pacific Company, as set forth upon the face of the bonds. As the transactions involved herein occurred in 1914, prior to the amendments in 1915 and 1917 (St. 1915, p. 99, St. 1917, p. 1535) of sections 3088 and 3093, Civil Code, the bond was nonnegotiable. *Kohn v. Sacramento Elec. Gas & Ry. Co.*, 168 Cal. 1, 141 Pac. 626; *Crocker Natl. Bank v. Byrne & McDonnell*, 178 Cal. 329, 173 Pac. 752. Defendant thus took the bond subject to all legal or equitable defenses.

The bond came into the possession of defendant in the following manner: It was part of the assets of the estate of Patrick Maguire, of which estate Elizabeth Maguire, plaintiff's testatrix, was the administratrix

with the will annexed. She was the widow of Patrick Maguire and the sole legatee under his will. She delivered the bond in suit (together with other bonds of like character) to one Shay, her attorney in the administration of the estate, as the court found, for safe-keeping and convenience in preparing the inventory and appraisal. He also collected the amount due on the coupons. Shay included this bond in the inventory which he filed in the estate. But before distribution was had, and on June 29, 1914, without any order or authority of court therefor, and without the knowledge of Elizabeth Maguire, he delivered possession of the bond to stockbrokers, who sold the same, under his instructions, for his account and as his personal property, he retaining the proceeds thereof, amounting to \$941. After several successive transfers, and on July 30, 1914, defendant purchased this bond in the open market without knowledge of any equities or claims of the Patrick Maguire estate, or any one else, in respect thereto. She paid \$890 therefor, the full market price at that time. Thereafter, and on October 5, 1914, all the estate of Patrick Maguire, including the bond in controversy, was distributed to Elizabeth Maguire in her individual capacity. Elizabeth Maguire first became aware that Shay had parted with possession of the bond about January, 1916, more than a year after distribution of the estate. At that time Shay offered by way of adjustment to have conveyed to Mrs. Maguire, subject to incumbrances thereon, three pieces of property located in Alameda and Santa Cruz counties. In March, 1916, Shay and his wife, in accordance with this offer, executed two deeds covering that property. These deeds were recorded May 20, 1916. Shay and his wife thereafter signed a statement also dated May 20, 1916, reciting that the deeds "were executed for and intended as security for an obligation, and not otherwise." Elizabeth Maguire died testate in the city and county of San Francisco on the 24th day of May, 1916; and plaintiff brought this action as executor of her will on September 11, 1916.

Appellant relies upon four defenses on appeal:

(1) That there was no conversion. The answer sets up the defense, among others, that at the time of the sale of the bond Shay was attorney in fact for Elizabeth Maguire individually, as well as attorney for her as administratrix of the Patrick Maguire estate, and that she had given him, as such attorney in fact, full power to sell or dispose of the bond. Appellant contends that there was no conversion because Shay sold under this power of attorney. With respect to this matter Shay testified that Elizabeth Maguire gave him a general power of attorney to act for her individually shortly after she was

appointed administratrix of the Patrick Maguire estate; that it had never been revoked; that it was not recorded, and he could not locate it to produce upon the trial. Appellant thereupon attempted to prove by oral evidence Shay's authority from Elizabeth Maguire under the power of attorney to sell personal property. The court sustained respondent's objection on the ground that evidence of the contents of the instrument was inadmissible because a power of attorney from Elizabeth Maguire to sell property of the estate would be void. Appellant urges, however, that respondent bases his right to maintain this action upon the ownership of the bond by Elizabeth Maguire as a legatee under the will of Patrick Maguire, and not upon her right as administratrix to possession of the bond during the period of administration of the estate of Patrick Maguire; that Elizabeth Maguire, as sole legatee under the will of Patrick Maguire, was the owner and could convey title subject to administration; that, if Elizabeth Maguire, as such legatee, did in fact authorize the sale of this bond by the power of attorney given to Shay, her after-acquired right to possession inured to the benefit of appellant, and there was no conversion; that evidence to show such authorization was competent, and its exclusion constituted prejudicial error.

[2, 3] The difficulty with appellant's argument is that Shay did not sell under any power of attorney. Neither did he attempt to sell Elizabeth Maguire's interest as a legatee in the undistributed estate. He sold the bond as his own property and delivered possession to the purchaser. Moreover, Elizabeth Maguire herself had no authority, either as legatee under the will or administratrix of the estate, to sell its assets (*Wickersham v. Johnston*, 104 Cal. 407, 412, 38 Pac. 89, 43 Am. St. Rep. 118; *Bovard v. Dickenson*, 131 Cal. 162, 164, 63 Pac. 162), and therefore could not delegate such authority to another. Her right to convey her share of the estate did not include the right to deliver possession of the property prior to decree of the court. Section 1517, Code of Civil Procedure before its amendment in 1919 (St. 1919, p. 1178), provided that "no sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter"; the property herein involved not being one of the exceptions. A valid sale of the bond in suit could have been made only in accordance with the provisions of this section. It is apparent that the alleged power of attorney was not pertinent to the issues herein involved, and that evidence as to its contents was properly excluded.

[4, 5] (2) That respondent is estopped by the conduct of Elizabeth Maguire from asserting title to the bond as against appel-

lant. The estoppel relied upon by appellant is based upon the alleged laches of respondent and his testatrix, during which time appellant contends a cause of action existing in her favor against her immediate vendors upon their warranty of title implied in their sale of the bond to her was barred by the statute of limitations. The trial court found that "neither said Elizabeth Maguire nor the plaintiff herein was guilty of laches in failing to inquire into or investigate as to the whereabouts or possession of said bond."

About two years elapsed between the purchase of the bond by appellant and the institution of this action. But respondent's testatrix did not discover the loss of the bond until about eight months prior to commencing suit, and nothing occurred before that time, so far as the record shows, to put her upon inquiry. Shay testified that possibly he continued paying the interest on the bond to Mrs. Maguire for some time after distribution of the Patrick Maguire estate. About four months after discovery of the loss of the bond Mrs. Maguire died, a month later respondent herein was appointed executor of her will, and two and a half months thereafter he commenced this action. It does not appear that either respondent or his testatrix knew who had possession of the bond until the action was commenced; it having been transferred on various occasions before it was purchased by appellant. Under the circumstances respondent was not guilty of laches barring the action. There is nothing in the record to show that appellant's conduct was in any wise affected by the deed transaction, or that, in reliance upon that transaction she permitted any cause of action in her favor to become barred, or that she acted upon such knowledge in any manner. On the contrary she alleged that she had no knowledge of the claims of any person in respect to the bond other than the person making the sale prior to the commencement of this action. The acceptance of the deeds by Mrs. Maguire was not alone sufficient to amount to an estoppel. The court found that the deeds were not in fact taken from Shay in settlement for the bond; and appellant was neither led to believe that they were taken in settlement nor to act upon such belief.

[8] (3) That, if there was a conversion, the settlement with Shay ratified and confirmed his sale. With respect to this defense the court found:

"That on or about the 5th day of March, 1918, Frank Shay executed a conveyance of his interest in certain real property to said Elizabeth Maguire, which consisted of equities in various parcels of land, each of which was

subject to prior obligations, but there was no accord or satisfaction executed between said Elizabeth Maguire and said Frank Shay with respect to said controversy arising over the sale and disposition of said bond; and said conveyance was not accepted by said Elizabeth Maguire in satisfaction or settlement of any claim of said Elizabeth Maguire against said Frank Shay arising out of his sale and disposition of said bond, but said conveyance was made by said Frank Shay to said Elizabeth Maguire as security for the redelivery of said bond to said Elizabeth Maguire."

Shay's offer was made by letter to Mrs. Maguire's attorney and contained the following statement:

"All of the properties above referred to belong to Mrs. Shay, her separate property, and she is willing to convey them to Mrs. Maguire in settlement of the lost securities. This might be considered as a final settlement or it might be agreed that upon the delivery to her of the securities within a reasonable time, she will reconvey."

And the statement which he and his wife thereafter signed as above set forth, specifically recited that the deeds "were executed for and intended as security for an obligation, and not otherwise." Shay testified the obligation referred to was "whatever might be due to Mrs. Maguire growing out of this bond transaction." This was sufficient evidence upon which to base the above finding. For this reason it is unnecessary to discuss further contentions of appellant based upon the assumption that the deeds were given in full settlement.

[7] (4) That if the deeds were not taken as settlement they were taken as mortgages to secure the return of the bond, and the action is barred by the provisions of section 726, Code of Civil Procedure, providing that but one action can be maintained for the enforcement of an obligation secured by mortgage—that is, an action to foreclose the mortgage. This action is not one coming within the provisions of that section; the defendant herein not being a party to the mortgage. Moreover, the court found that the equities of Elizabeth Maguire in the properties involved in the deeds "were and are of no value and have been lost to said estate of Elizabeth Maguire," and that they were not lost by reason of any negligence of Elizabeth Maguire or plaintiff herein. This finding was based upon admissions of counsel for appellant on the trial of the action.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(48 Cal. App. 140)

**HELMER v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Civ. 2201.)**

(District Court of Appeal, Third District, California. June 10, 1920. Hearing Denied by Supreme Court Aug. 9, 1920.)

**1. Municipal corporations §592(1) — Ordinances of chartered cities regulating municipal affairs prevail over state laws.**

The Constitution has granted to chartered cities the power to enact ordinances relating to municipal affairs, which ordinances prevail over legislative acts inconsistent therewith.

**2. Municipal corporations §592(1)—Regulation of motor vehicle traffic is no longer "municipal affair."**

The regulation of motor vehicle traffic has become a matter of state-wide importance in which uniformity is essential, and is no longer a municipal affair, even as to traffic within the streets, so that a chartered city cannot, under Const. art. 11, § 6, pass an ordinance regulating such traffic inconsistent with motor vehicle act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

**3. Municipal corporations §592(2) — State prohibition against driving motor vehicle while intoxicated applies in cities.**

Motor Vehicle Act of 1915, § 17, as amended by St. 1919, p. 214, § 11, making it a felony to drive a motor vehicle when intoxicated, is an act for the protection of the lives and property of citizens, not a mere regulation of motor traffic, so that a prosecution for violation thereof may be based on the state law, though the offense occurred in a chartered city having an ordinance making the same act misdemeanor, even if the regulation of motor vehicle traffic is a municipal affair within the jurisdiction of chartered cities.

Application for writ of prohibition by O. H. Helmer against the Superior Court of the County of Sacramento and Hon. Malcolm C. Glenn, as Judge thereof. Petition dismissed.

White, Miller, Needham & Harber, of Sacramento, for petitioner.

Hugh B. Bradford, Dist. Atty., and J. R. Hughes, Asst. Dist. Atty., both of Sacramento, for respondents.

PREWETT, Presiding Judge pro tem. The petitioner is charged in said superior court with the crime of driving a motor vehicle upon a public highway within the city of Sacramento while under the influence of intoxicating liquors. Said offense is made a felony, or, in the discretion of the court, a high grade misdemeanor, by section 17 of the Motor Vehicle Act (St. 1915, p. 406, as amended by St. 1919, p. 214, § 11). Section 20 of Ordinance No. 282 of said city prohibits the same act, but makes of it only a mis-

demeanor. Said city is governed by a charter adopted in the year 1911. Petitioner insists that the provisions of said ordinance prevail over the Motor Vehicle Act, and that, if he is prosecuted at all, it should be under the provisions of the ordinance. Said respondents have overruled his several objections to the proceedings in said superior court, and propose and intend, unless restrained by this court, to proceed with the trial of the charge against him.

This constitutes the only question to be determined in the case.

[1] 1. The respondent concedes that the Constitution has granted to chartered cities the power to enact ordinances relating to "municipal affairs," which ordinances prevail over acts of the Legislature inconsistent therewith. There are many authorities so holding. City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 Pac. 1169, and Loop v. Van Loben Sels, 173 Cal. 228, 159 Pac. 600.

[2] 2. The Motor Vehicle Act, so far as it applies to this case, is inconsistent with the ordinance of the city of Sacramento above referred to, since the former makes of the offense a potential felony, while the latter makes of it only a misdemeanor. If the offense in question is a "municipal affair," as that term is used in section 6 of article 11 of the Constitution, it must be conceded at once that the city ordinance is paramount. The regulation of street traffic has usually in the near past been treated as a municipal matter. Until the advent of the automobile, interurban traffic was so small as to be negligible, and, as a result, traffic regulations were a matter of concern only to the inhabitants of the city. But when autos and motor-trucks invaded our highways and streets in tens and hundreds of thousands, a matter that yesterday was local has become of state- and nation-wide importance today. An amendment to the Constitution has in a measure recognized this growth and has authorized the state to establish a system of state highways (section 36, art. 4) to meet its demand.

The term "municipal affairs" is not a fixed quantity, but fluctuates with every change in the conditions upon which it is to operate. Interurban traffic has grown in the past ten years into enormous proportions. It is said that during the past year tens of thousands of autos entered this state from other states. Tabulations made since this case was submitted justify the conclusion that 10,000 or 12,000 motor vehicles enter the city of Sacramento every ordinary business day. It is common knowledge that the number of auto passengers entering some of our cities on special occasions exceeds, in a single day, the entire population of the city. The great

number of autos, their high speed, their use of a nonintelligent motive power, the want of adequate room on roads and streets not laid out for such a congested traffic, and the overwhelming necessity for uniformity in handling the traffic, all have forced the conviction that the proper and orderly handling of this stupendous traffic has become a matter of the gravest concern to the people of the entire state. If the ordinance in question were the paramount law, then the city of Sacramento could provide that the signal for, say, a left-hand turn, should be an up-lifted arm. It is needless to say that such a regulation would be a great danger to thousands of residents and nonresidents every day in the year. In short almost every citizen of the state has as great an interest in the traffic regulations of neighboring cities as he has in his rural highways about him, and vastly more concern as to what they are and how they are to be observed. It may be doubted whether any other police problem requires such unfailing uniformity, one city or locality with another, as that of handling the endless procession of motor vehicles on our highways. That the Legislature intended the provisions of the Motor Vehicle Act to be supreme is beyond question. St. 1915, p. 409, § 22, as amended by Stats. 1919, p. 220, § 18.

The earlier cases holding that cities may pass local and police regulations governing motor traffic are of little value in this connection, since it is clear that, in the absence of a motor vehicle act, a city has such power under the provisions of the Constitution.

Since the advent of motor vehicles in such vast numbers and the passage of the Motor Vehicle Act, a number of cases have been decided by our state courts involving traffic regulations of the state and of chartered cities, and it is a persuasive fact that in no case has it been held that the city ordinance is supreme. The contrary assumption appears to have been universal. It is insisted that *Ex parte Snowden*, 12 Cal. App. 521, 107 Pac. 724, holds that the city ordinance is paramount; but an examination of the case discloses that the court arrived at the conclusion that no conflict existed, hence any observations as to the effect of a conflict were unnecessary to a disposition of the case and are not authoritative. Moreover, the infractions considered in that case took place under the Motor Vehicle Act of 1907 and at a date when autos had not become a matter of such universal interest, and, in addition, the act itself permits municipalities to establish speed limits.

Petitioner cites *City of Los Angeles v. Central Trust Co.*, *supra*, as sustaining his position. But that case involved neither speed limits nor intoxication and concerned only the opening of a street. The question as to the paramount effect of the Motor Ve-

hicle Act was in no way involved. The case is not authority in this connection. Petitioner relies mainly, however, upon the more recent case of *Muther v. Capps*, 38 Cal. App. 721, 177 Pac. 882, and he cites this case as showing that a speed ordinance of the city and county of San Francisco, if in conflict with the Motor Vehicle Act, is paramount thereto. But the case does not justify this position. A number of different questions were involved in that case. It was insisted by the appellant that a conflict existed between the ordinance and the state law; but the court expressly held that no ordinance was before it, and it does not decide, and does not purport to decide, the question of supremacy.

The Motor Vehicle Act was devised to meet a new and extraordinary condition, and it demands such a construction in view of the facts which brought it into existence as will maintain its symmetry and integrity unimpaired, if this can be done under established canons of adjudication.

There are, it happens, two California cases, so recent that they have not yet reached the official reports, which, by the strongest implication, if not in direct terms, uphold the position of respondents. The first of these is *Mann v. Scott*, 182 Pac. 281, decided June 13, 1919. In this case the court says:

"Upon a careful reconsideration of the appellants' contention that the State Motor Vehicle Act of 1913 is the controlling law upon the subject, and that it was error to give an instruction embodying the regulatory provisions of the city ordinance, we are constrained to confirm the opinion of the District Court of Appeal that the municipal ordinance in the respect noted is not inconsistent with the state law, but was valid and operative in the city of Los Angeles at the time of the plaintiff's injury. And this, we think, is so regardless of the question of whether or not the regulation of traffic upon the streets of a city is a 'municipal affair.' Conceding that, if there were in fact a conflict between the ordinance and the State Motor Vehicle Act, the state law would prevail, still we find no conflict or inconsistency between the two enactments."

And the following language, quoted from the same case, is particularly in point and may be cited as a distinct recognition by the court of the turning point in conditions which have made the regulation of auto traffic a matter of state and general concern:

"Upon a careful analysis of the Motor Vehicle Act of 1913 and of its purpose viewed in the light of the traffic conditions upon which it was intended to operate, we are of the opinion that the reasoning of the court in the case last quoted is decisive of the question now presented. In other words, we believe that by extending the operation of the act in terms to the traffic upon city streets the Legislature did no more than to prescribe obviously necessary safeguards for travel upon such streets viewed as part of

the public highways of the state in which all the people of the state are \* \* \* interested, and that it did not thereby intend to prohibit the enactment of such new and additional police regulations in furtherance of the purpose of the act as might appear reasonable and proper in a given locality. It is true that the Motor Vehicle Act of 1915 expressly limited the scope of such police regulations. Stats. 1915, c. 188, § 22d. It may perhaps be open to question whether the ordinance here in controversy falls within the prohibition of that act, but it is sufficient for the purpose of this case to say that the Motor Vehicle Act as in force at the time of the plaintiff's injury did not contain a clause prescribing limitations upon the local regulation of traffic."

In view of this language, it is impossible to avoid the conclusion that the court would have sustained the supremacy of the Motor Vehicle Act of 1915 as against a repugnant city ordinance.

The second case above referred to is that of *Ham v. County of Los Angeles*, 189 Pac. 462, decided February 14, 1920. The following quotation therefrom will show its assumption of the paramount force of the Motor Vehicle Act:

"Indeed, it seems now to be accepted law that local regulations may be adopted controlling street and highway traffic which are not in conflict with the State Motor Vehicle Act, and that such regulations are not in conflict which merely place additional and more stringent limitations upon the operation of motor vehicles than those prescribed by the state law."

[3] 8. But, viewed from another angle, the supremacy of the provision making the act a felony must be sustained.

Section 17, so far as pertinent, reads as follows:

"17. No person who is under the influence of intoxicating liquor and no person who is an habitual user of narcotic drugs shall operate or drive a motor or other vehicle on any public highway within this state."

It is true that the ordinances of a city are supreme in "municipal affairs." But the act charged against petitioner is not a "municipal affair." This is so even if the claim is sound that ordinances designed to control the use of streets prevail over general laws. The act of driving a motor vehicle while under the influence of intoxicating liquors is of no immediate or special concern to the city as such. It is of general concern to the inhabitants of a city in common with all other residents of the state. There exists a doubtful or twilight zone separating those matters that are clearly of municipal concern from those that are not. This doubtful zone is of greater or less width, according to the viewpoint of the observer, but there seems to be no satisfactory reason for assigning the act in question to this doubtful zone. It is not a "municipal affair." Section

17, although it forms a part of the Motor Vehicle Act, is not a traffic ordinance. It makes no provision of any kind whatsoever as to the method of driving, the rate of speed, the side of the road to be traversed, the giving of proper signals, nor, in fact, any sort of provision or condition having reference to the use of the roadway in any given manner. It relates wholly to the person himself and his then present condition, and without reference to the effect of his acts upon the roadway itself or of other persons making use thereof.

The interdicted act relates to traffic no further than that a person in the prescribed condition may not avail himself of the use of the streets whereon traffic exists. A person discharging firearms or spreading poison gases while driving an auto on the highway would be a menace, much as the drunken driver is, but in no sense would his act be a matter of municipal concern as distinguished from the general concern of the people of the state. Regulations as to speed have reference to both time and place. That which would be a reckless rate of speed in a crowded city during busy hours would entail little or no danger on a remote roadway or during slack hours. The act charged against petitioner has no reference either to time or place.

While it is more dangerous in a crowded street, it is so only because there are more persons to be injured, but as to each person it is but slightly more dangerous than to one of the smaller number in a less crowded locality. Speeding is dangerous because of the locality. The drunken driver is a danger in any locality, if there are persons present to be injured.

The fact that he is a menace to life and to private property justifies the state in prescribing penalties for the act, just as it may do for violations of general sanitary, health and comfort laws. A manslaughter committed by an intoxicated driver in driving his vehicle over a victim is as much punishable by the state when committed on the streets of a city as if committed elsewhere. A vast number of acts are made punishable by the Penal Code because their commission involves a general menace to the public, even though in their commission no person is injured. It is a felony for an intoxicated trainman to run a railroad train. A druggist must take certain precautions in selling poisonous drugs. It is a misdemeanor to carry concealed weapons or to leave a campfire burning and unattended. These cases and dozens of others that could be enumerated demonstrate that the state, in the exercise of its sovereign power and for the protection of its people, has authority to interdict on the public highways in every part of the state the driving of a motor or other vehicle by an intoxicated person. It is

a fundamental rule that the state may by appropriate penalties protect life, liberty, property, and the public peace in every part of its territory; and, except as to matters of purely municipal concern, it may extend this protection to the denizens of crowded cities the same as to those in rural districts.

Our conclusion is that the act charged against the petitioner is punishable under section 17 of the Motor Vehicle Act.

The petition is dismissed.

We concur: HART, J.; BURNETT, J.

(48 Cal. App. 73)

**PEOPLE v. KINGS COUNTY DEVELOPMENT CO. (Civ. 2142.)**

(District Court of Appeal, Third District, California. June 5, 1920. Hearing Denied by Supreme Court Aug. 2, 1920.)

**1. Dismissal and nonsuit § 57—Statute providing for dismissal for want of service mandatory.**

Code Civ. Proc. § 581a, providing for dismissal of action unless summons shall be served and return thereon made within three years after commencement of action, is mandatory; the right to dismissal becoming absolute when summons has not been served and returned within the required time.

**2. Prohibition § 5(2)—Will lie to prevent prosecution of action after failure to serve summons.**

Where summons has not been served and return thereon made within three years from the commencement of action, as required by Code Civ. Proc. § 581a, prohibition will lie to prevent the trial court from adopting any other course than to dismiss the action, and from issuing an alias summons.

**3. Limitation of actions § 11(1)—State not affected by limitations.**

A state is not bound by statutes of limitation unless by express words or by necessary implication on such statutes make it subject to their provisions or restrictions.

**4. Limitation of actions § 1—"Statutes of limitation" are statutes of repose.**

Statutes of limitation, in a strict or legal sense, are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Limitation of Actions.]

**5. Dismissal and nonsuit § 60(1)—Unreasonable delay in prosecution ground for dismissal.**

Courts, in the exercise of a power inhering in courts of justice, may dismiss an action for unreasonable delay in its prosecution, even independently of any express statutory warrant therefor.

**6. Dismissal and nonsuit § 60(1)—Statute requiring dismissal for delay in prosecution held applicable to action by state.**

Code Civ. Proc. § 581a, requiring dismissal of action on failure to serve summons and make return thereon within three years after commencement of action, held applicable to a suit by the state to annul patent to state lands in view of sections 315 and 345; the former statute not being a statute of limitations in the strict legal sense, but one main object of which is to require all litigants commencing actions to press actions to issue and trial with reasonable diligence.

**7. Statutes § 225, 239—All laws on subject to be read together in construing statute in derogation of common law.**

Where the Legislature has established a particular policy with respect to a particular subject of legislative cognizance which policy is in derogation of that of the common law, all the law or sections of the Code bearing upon or pertaining to that particular subject should be read and considered together, or as a whole, or by the light of each other, if the language of any one section or part of the law is so dubious or uncertain as to render its meaning or the legislative intent at the bottom of it lacking in clearness or certainty.

**8. States § 190—Bound by rules of procedure applicable to other litigants in its action.**

The state, when it voluntarily becomes a suitor in its courts and brings an action for relief of any character, is subject to or bound by the same rules of procedure or practice as to the prosecution of such action as govern and apply to litigants suing in their individual capacities.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the People of the State of California against the Kings County Development Company. From order granting motion to dismiss action, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., John T. Jones and C. F. Culver, both of Los Angeles, R. Justin Miller, of Hanford, and Wheaton A. Gray, of Los Angeles, for the People.

T. T. C. Gregory and D. Hadsell, both of San Francisco, and Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

HART, J. This is a suit in equity and was commenced by the state of California, through its Attorney General, by the filing of a complaint on the 21st day of November, 1914, for the purpose of obtaining a decree annulling a patent to certain state lands; the defendant having acquired title to said patent through certain mesne conveyances coming down from the original patentee. The patent in question was issued on November 23, 1904. Summons in the action was issued June 14, 1915, and was served on September 10, 1918. A notice of motion to dismiss the



action was served on the Attorney General on the 25th day of September, 1918. The ground of the motion was:

"That the summons and the complaint in said action were not served upon the defendant until more than three years after the commencement of said action, and that also on account thereof the above-entitled court no longer has jurisdiction over said action."

The court below granted the motion, and from the order granting said motion the people prosecute this appeal.

The order dismissing the action was based upon section 581a of the Code of Civil Procedure. The particular provisions of said section which are material to the inquiry presented by this appeal read as follows:

"No action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have issued within one year, and all such actions must be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served."

[1, 2] The provisions of said section are mandatory, and, if the section applies to the state, then the trial court lost jurisdiction of the action and could proceed no further therein, except to dismiss the action. In fact, the right to a dismissal becomes absolute where the summons has not been served and returned within the time prescribed by the said section (*Sharpstein v. Eells*, 132 Cal. 507, 64 Pac. 1080), and prohibition will lie to prevent the trial court from adopting any other course than to dismiss the action (*Modoc Land, etc., Co. v. Superior Court*, 128 Cal. 255, 60 Pac. 848), and such writ will lie to prohibit the issuance of an alias summons after the lapse of three years after the commencement of the action (*White v. Superior Court*, 128 Cal. 245, 58 Pac. 450).

The contention of counsel for the appellant is, however, that section 581a "is nothing more nor less than a statute of limitations, and does not bind the state, and that it was not the purpose or intention of the Legislature in adopting it that it should bind the state."

[3] The section, it will be observed, contains no express provision that the state shall be bound thereby. It is well settled and well understood that a state is not bound by statutes of limitation, unless by express words or by necessary implication such statutes

make the state subject to their provisions or restrictions.

[4] Statutes of limitations are, in a strict or legal sense, statutes of repose, and "are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced." Wood on Limitations (3d Ed.) § 1. The same author further observes:

"Those statutes which merely restrict a statutory or other right do not come under this head (i. e., under the head of "statutes of limitations"), but rather are in the nature of conditions put by the law upon the right given. Thus a statute that prescribes the term of court at which an indorsee of a note is required to sue the maker in order to hold the indorser liable (*McDaniel v. Dougherty*, 42 Ala. 506; *Davidson v. Peticolas*, 84 Tex. 27), or the time within which writs of error shall be brought (*Pace v. Hollaman*, 81 Tex. 158; *Trim v. McPherson* [Tenn.] 7 Coldw. 15), or a statute which fixes the time within which lands sold at execution may be redeemed (*Reynolds v. Baker* [Tenn.] 6 Cold. 221), or within which a judgment or other lien shall be enforced (*Battle v. Shivers*, 39 Ga. 405), or which merely postpones a claim unless enforced within a certain time (*Chandler v. Westfall*, 30 Tex. 475), or which provides that a certain class of evidence shall be admissible if action is brought within a certain time, are not statutes of limitation within the legal sense of the term. But statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are such statutes of limitation, even when they do not extinguish the claim."

The general legislative policy of California is that the state shall be bound by its statute of limitations with respect to the bringing of actions for the enforcement of any and all such rights as may accrue to the state. Code Civ. Proc. § 345, and sections immediately preceding in the same chapter; also Id. § 315. The last-named section fixes the period of limitation within which the state may bring an action for or in respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, at ten years; and, in passing, we may observe, although the observation is not germane to the discussion called for herein, that it has been held that said section applies to an action by the state where, as here, the purpose of the action is to procure a cancellation of a patent issued by the state for a parcel of its land, such action being "in respect to real property." *People v. Kings County Development Co.*, 177 Cal. 529, 534, 171 Pac. 102.

[5] The object intended to be attained by section 581a of the Code of Civil Procedure is, obviously, to compel reasonable diligence in the prosecution of an action after it has been commenced, and thus afford the party or parties against whom it is brought an opportunity to present such evidential support to

any defense he or they may have thereto as may be available at the time the action is instituted, but which may be lost or destroyed through the death of witnesses or otherwise before the action is brought to issue by reason of an unreasonably long delay in serving the defendant or defendants with appropriate legal process notifying him or them of the pendency of the action. It is settled in this state that, even independently of any express statutory warrant therefor, the courts may, in the exercise of a power inhering in courts of justice, dismiss an action for unreasonable delay in its prosecution.

In the early case *Dupuy v. Shear*, 29 Cal. 238, the proposition that the courts were possessed with the inherent power of dismissing actions because their prosecutions by the plaintiff had been inexcusably delayed after their commencement was laid down, and the court there said:

"We see no good reason why the court after the commencement of a suit may not dispose of it by striking the complaint from its files when the plaintiff has failed for many years to take any effective measure to procure a service, and give the court jurisdiction of the person of the defendant. Certainly it was never contemplated that a party may file a complaint and issue a summons, and then wait an indefinite period of time till the witnesses of the other party are dead, or his evidence destroyed, before he takes any effectual steps to procure a service of process. We do not think such a case is provided for in sections 148 and 149 of the Practice Act; but the court, having got possession of the case by the commencement of a suit, must have some power to dispose of it, when the plaintiff declines or neglects to proceed."

See, also, *People v. Jefferds*, 126 Cal. 296, 58 Pac. 704; *Bernard v. Parmelee*, 6 Cal. App. 537, 92 Pac. 658.

It was obviously upon precisely the same theory or for the identical reason which it is declared in the above excerpt supports the inherent power of the court to dismiss actions because of inexcusable delay in their prosecution that section 581a was founded, thus expressly vesting in the courts the right to exercise a power which was theretofore, and indeed still is, an inherent attribute of their constitution as judicial tribunals and specifically fixing the period of time which shall be deemed to constitute an inexcusable delay; and, as above indicated, the question here to be determined is whether said section is, in the true legal sense, a statute of limitations by the terms of which the state is not bound, since the section contains no express provision that it shall apply to the state.

[8] We have not been able to persuade ourselves that any other but a negative reply to that question may reasonably be returned. We are of the opinion rather that the section involves only a condition to which all

litigants, including the state itself, must conform to entitle them, after they have commenced an action, to proceed further with the prosecution thereof. The provisions of the section, in other words, involve merely a matter of procedure—that is the regulation of the conduct of the parties plaintiff with respect to actions after the commencement thereof for the same reason or purpose which is at the bottom of many other provisions of the code as to procedure, to wit, to facilitate or bring about a final or as speedy a disposition of the litigation as possible or as is deemed by the Legislature to be consistent with the rights, not alone of the plaintiff, but also of the adversary party or parties, and also to clear court calendars of cases as expeditiously as possible, thus and thereby preventing an accumulation upon such calendars of actions in which, by reason of long delays in their prosecution, it may become difficult, if not in some instances impossible, to adjudicate the issues according to the real merits or justice of such causes. Indeed, the terms of the section are, in their nature and purpose, analogous to the provisions of the Code of Civil Procedure which prescribe a time limit within which a bill of exceptions, or a notice of appeal, or a notice of intention to move for a new trial, or petition for a hearing in the Supreme Court after a cause has been heard and decided by a District Court of Appeal, must be filed. It surely will not be contended by counsel for the state that these last-mentioned provisions are not alike applicable to the state, as a litigant, as to private individuals likewise invoking the power or aid of the courts or who are compelled to appear therein to contest rights asserted against them.

The above view or construction of section 581a is sound in principle and in harmony with reason, in confirmation of which proposition we need go no further for an example than the case now before us, involving, as it does, an action which impeaches the title of the respondent to the lands in question. The effect of an action brought in the courts to determine the ownership of or title to real property is in a measure to put a cloud upon the title to such property, which will exist during the pendency of the action or until the latter is entirely disposed of. It thus can readily be perceived that if the state, in such a case, may postpone, in infinitum, the issuance or the service and return of summons, the defendant, who may have a meritorious defense to the action—who indeed, may be able to show an impregnable title to the land in dispute—would not be able to alienate or transfer the property during the pendency of the action, for no one would purchase property the title to which thus stands challenged. The defendant would not, under such a condition as to the title to his property, enjoy that unrestricted dominion over

the property which would enable him to do with it as he pleased. Indeed, the effect of the pendency of such an action, in almost all instances, would probably be to prevent the permanent improvement of the property and the full use of it for the purposes to which it may be peculiarly adapted, and the policy of the state is, of course, that its public lands shall be disposed of to private individuals so that they may be utilized to the highest advantage to which they can be put, and thereby enhance the general welfare of the citizens and consequently the general prosperity of the state.

We do not believe that the Legislature intended that any such situation should arise with respect to litigation inaugurated by the state for the purpose of determining whether title to its lands has been legally acquired by those who have at least a color of title to such lands or a paper title upon its face perfectly valid. In this immediate connection we may appropriately consider for a moment the asseveration of the Attorney General that "it was not the purpose or intention of the Legislature, in adopting it [section 581a], that it should bind the state."

[7] It will be observed that the section is in such sweeping language as to admit of no other construction than that the Legislature intended not to except from its operation any litigant or any action by whomsoever commenced. It reads: "No action heretofore or hereafter commenced shall be further prosecuted," etc. This means, of course, that all actions, regardless of who the party plaintiff may be, shall not be further prosecuted, etc. If the question as to the legislative intent were important in the solution of the problem herein submitted, we are prepared to say that our construction of the section for the purpose of ascertaining that intent would lead us to the reverse position of the Attorney General upon that proposition. The state has, through its Legislature, bound itself in express language to the terms of many of the provisions of our statute of limitations, and it is proper and indeed a cardinal rule of statutory construction that a particular provision of a statute which may be in ambiguous phraseology should, to get at its purpose and intent, be read and considered in the light, not only of other provisions of legislative enactments upon the same subject, but in view of the legislative policy affecting the subject as established by the statutory law generally. Thus viewing the section, the conclusion would seem to be reasonable, if not irresistible, that had the Legislature intended that the state should be exempt from the operation of its terms, there would have been incorporated into the section express language or words to that effect. To be more explicit, we thus formulate the proposition now in our minds: That, where the Legislature has established a particular pol-

icy with respect to a particular subject of legislative cognizance, which policy is in derogation of that of the rule of the common law, all the law or sections of the Code bearing upon or pertaining to that particular subject should be read and considered together, or as a whole, or by the light of each other, if the language of any one section or part of the law is so dubious or uncertain as to render its meaning or the legislative intent at the bottom of it lacking in clearness and certainty. Of course, the proposition here suggested merely goes to the question of the intention of the Legislature, and would be wholly without force or merit, if the state were not in any case made by express legislative mandate subject to or bound by the statute of limitations. But, in considering the nature or purpose of a statute such as the one with which we are here dealing, the question of the intention of the Legislature in enacting it is not controlling, or, indeed, of very great importance. The legal nature of the condition or restriction prescribed by the statute as affecting the primary right or the remedy to enforce such right is the all-controlling factor in determining the legal nature of the disabilities which the statute imposes upon litigants. We therefore fall back and wholly rely upon the proposition first above declared that the section merely involves a matter of procedure as to the conduct of an action after it has been commenced.

[8] That the state, when it voluntarily becomes a suitor in its courts and so brings an action for relief of any character, is subject to or bound by the same rules of procedure or practice as to the prosecution of such actions as govern and apply to litigants suing in their individual capacities, is well settled.

In *Commonwealth, etc., v. Helm*, 163 Ky. 69, 75, 178 S. W. 389, 392, it is said:

"It may be also confidently affirmed that, when the commonwealth comes into court to prosecute a suit, it occupies, in the absence of some controlling statute on the subject, the attitude of any other litigant, and is subject to the same rules of practice and procedure."

See, also, *Moore v. Tate*, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712, 715; *State v. Holgate*, 107 Minn. 71, 119 N. W. 792, 793; *Port Royal, etc., Co. v. South Carolina (C. C.)* 60 Fed. 552, 553; *State v. Zanco's Heirs*, 18 Tex. Civ. App. 127, 44 S. W. 527, 529; *State v. Pinckney*, 22 S. C. 484, 488; *State v. Pac. Guano Co.*, 22 S. C. 50, 74.

In *State v. Board of Commissioners*, 101 Ind. 69, 74, it is said:

"Not having taken an appeal from either of the former adjudications of its claim within the time limited by law, the state of Indiana, like any other claimant, must be held, we think, to be concluded and bound by such former judgments. When the state becomes a suitor in any of the courts it is as much bound by the laws

of the land, by the rules of pleading and practice, and by the decisions and judgments of the courts, inferior or superior, as any other suit-or."

The Supreme Court of the United States, in *Louisiana v. Jumel*, 107 U. S. 728, 2 Sup. Ct. 128, 27 L. Ed. 448, stated the principle as follows:

"When a state submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done."

While expressing no definite opinion on the question, the appellate court of the First district, in *Anderson v. Nawa*, 25 Cal. App. 151, 157, 148 Pac. 555, 558, seemed to be in very much doubt as to the soundness of the contention in that case that the section in question does not apply as well to the state as to other suitors. Note the language of the opinion therein:

"It is insisted that the action was instituted by the plaintiff upon behalf of the state in its sovereign capacity, and that, inasmuch as laches as a matter of law cannot ordinarily be imputed to the state, the motion to dismiss should have been denied for that reason alone. We are not prepared to say that the general rule in this behalf would operate to excuse an unreasonable delay in the service of summons, in an action instituted by the state in its sovereign capacity, for the purpose of asserting a public right or protecting a public interest; but we are satisfied that the present action does not involve in the slightest degree any such capacity, right, or interest."

The Supreme Court denied a hearing in that case without comment.

In his reply brief the Attorney General declares:

"The question in this case is not, as announced by respondent, whether the state may proclaim that rules of procedure do not apply to it, but rather the question before this court is: Can the state be held liable for the negligence of its agents, because those agents failed to comply with rules of procedure relating to the time within which acts must be done?"

But as has already been indicated herein, the real question here is not whether the state may be bound by the negligence of its agents, but whether the state, having commenced an action to enforce a claimed right against a citizen, may unreasonably postpone bringing it to issue and a final disposition according to the procedure prescribed by the law. Of course, every litigant who has committed his case to the care of a lawyer must suffer from the negligence or default of his attorney in complying with procedural rules required to be observed to preserve the rights of parties in actions pending before the courts, but the negligence of an attorney in the management of a case in court whereby

his client suffers some loss or injury is imputable to the client himself, since the legal relation existing between client and attorney is that of a principal and agent. No less is true of the legal relationship existing between the state and its attorney, and, while it may be that there is negligence involved in the omission of the state's attorney to proceed with the prosecution of this case according to the diligence or requirements pointed out by the statute in question, we can see no less reason for holding that such negligence or default is not to be imputed to the state itself than that similar negligence or default by an attorney representing a private suitor in a pending action should not be imputed to the latter. But, be that as it may, the simple question here is, as stated, whether the state is or is not bound by a matter of procedure or practice in the conduct of litigation instituted by it after it has commenced an action in court to enforce some right, and, as above indicated, our conclusion is that it is.

The Attorney General, in support of his position on this appeal, cites a large number of cases, of which we need name the following only: *Vrooman v. La Po Tal*, 113 Cal. 803, 306, 45 Pac. 470; *White v. Superior Court*, 126 Cal. 245, 58 Pac. 450; *Russ & Sons v. Orichton*, 117 Cal. 695, 49 Pac. 1043; *People v. Melone*, 73 Cal. 574, 15 Pac. 294; *Whittaker v. Tuolumne Co.*, 96 Cal. 100, 30 Pac. 1016; *Skelly v. School Dist.*, 103 Cal. 652, 37 Pac. 643.

We have found nothing in those cases which has led us from the conclusion above indicated. None of the cases named is directly in point here nor is any such claim made by the Attorney General. Most of them merely declare the following rules: That there is no presumption that the state is barred, and therefore that the statute of limitations must be construed, if possible, so as not to apply to the state; that the state is not bound by a statute of limitations unless there are words in the statute or some other statute clearly making the state subject to the limitations prescribed by the statute; that the state is not bound by general words of a statute which would operate to establish a right of action against it; that "the state is not bound by general words in the Political Code upon the subject of taxation, which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it." *Reclamation Dist. No. 551 v. County of Sacramento*, 134 Cal. 477, 66 Pac. 668. The principles thus stated are well established and have never been gainsaid; but they have no application to the present case, either directly or by analogy. As we have above tried to show, we are here dealing, not with a statute of limitations in the strict legal sense in which such a statute is juridically understood, but

with a statute whose main or central object is to require all litigants, after commencing actions against others to establish judicially some right to which they claim to be entitled as against those they have proceeded against, to press the actions to issue and trial with reasonable and proper diligence, and this because it is in the interest of justice to do so.

We conclude that the order appealed from should be affirmed; and it is so ordered.

We concur: NICOL, Presiding Judge, pro tem.; BURNETT, J.

(48 Cal. App. 795)

**PEOPLE v. KINGS COUNTY DEVELOPMENT CO. (Civ. 2144.)**

(District Court of Appeal, Third District, California. June 5, 1920. Hearing Denied by Supreme Court Aug. 2, 1920.)

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by the People of the State of California against the Kings County Development Company. From order dismissing action, plaintiff appeals. Affirmed.

U. S. Webb, Atty. Gen., John T. Jones, and C. F. Culver, both of Los Angeles, R. Justin Miller, of Hanford, and Wheaton A. Gray, of Los Angeles, for the People.

T. T. C. Gregory and D. Hadsell, both of San Francisco, and Gibson, Dunn & Crutcher, of Los Angeles, for respondent.

**PER CURIAM.** This is a companion case to civil No. 2142, 191 Pac. 1004, between the same parties, this day decided. The patents herein were issued on December 22 and December 30, 1904, the action was begun December 17, 1914, summons was issued June 14, 1915, and was served September 10, 1918.

For the reasons stated in our opinion in Civil No. 2142 the order appealed from is affirmed.

(48 Cal. App. 221)

**EATON v. YOUNT. (Civ. 3202.)**

(District Court of Appeal, Second District, Division 2, California. June 18, 1920. Hearing Denied by Supreme Court Aug. 16, 1920.)

1. Brokers  $\S$  43(1)—Broker's agreement for sale of real estate must be in writing.

A broker employed by a stockholder of a corporation to sell corporate property is not entitled to recover on an oral contract of employment in view of Civ. Code,  $\S$  1624, subd. 6, providing such agreements or a memorandum thereof must be in writing.

2. Brokers  $\S$  43(1)—A person acting only in one transaction held to be a broker within statute requiring written contracts.

A person whose business is to bring buyer and seller together, though he act as such in

but a single transaction, is a "broker" within Civ. Code,  $\S$  1624, subd. 6, requiring broker's contracts to sell real estate or some memorandum thereof to be in writing.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Broker.]

3. Brokers  $\S$  43(1)—Broker's contract with officer and stockholder of corporate owner must be in writing.

Civ. Code,  $\S$  1624, subd. 6, requiring broker's agreement for sale of real property to be in writing, is applicable whether made with the owner or with an officer and stockholder of a corporation owner.

4. Brokers  $\S$  43(1)—Stockholder held not liable for commission on parol agreement for sale of corporation's land on theory of advantage to him.

A stockholder owning a large part of a corporation's stock is not liable for broker's commission on his agreement for sale of the corporation's land, which was invalid because resting in parol, in contravention of Civ. Code,  $\S$  1624, on the theory that it was an agreement between him and the broker to share an advantage where there was no evidence that the land was not worth the selling price, though the purchaser's first payment was forfeited to the stockholder's advantage, since plaintiff's rights were based on facts existing when making the broker's agreement or at least not later than purchaser's first payment.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Annette Eaton against Samuel E. Yount. Judgment for plaintiff, and defendant appeals. Reversed.

F. R. McNamee and Leo A. McNamee, both of Los Angeles, for appellant.

Lewis Cruickshank and Vincent B. Vaughan, both of Los Angeles, for respondent.

**FINLAYSON, P. J.** This is an action to recover upon an oral contract for services in the sale of real estate—certain mining properties owned by the Boss Gold Mining Company, a corporation. Plaintiff recovered judgment for \$5,000, and defendant appeals.

Defendant, who was president of the Boss Gold Mining Company, the owner of the property, held and owned a little less than three-eighths of all the stock issued by that corporation. According to the findings of the trial court, defendant entered into an agreement with plaintiff whereby it was agreed that, if plaintiff would procure a person or persons to enter into a contract with the Boss Gold Mining Company to purchase its real property for the sum of \$150,000, and such person or persons would make a first payment of \$50,000 on account of the purchase price, defendant would pay plaintiff, in consideration of her services, 10 per cent. of such purchase price, her services to be paid for as and when payments should be

made by such person or persons. The lower court further found that, under and pursuant to the terms of the agreement between plaintiff and defendant, the former did procure a person or persons who entered into a contract with the Boss Gold Mining Company for the purchase of its real property at the price and on the terms aforementioned; that said person or persons paid the Boss Gold Mining Company the sum of \$50,000 as first payment on account of the agreed purchase price; and that thereupon, and under and by virtue of the terms of the agreement between plaintiff and defendant, there became due plaintiff from defendant a sum equal to 10 per cent. of such first payment, namely, \$5,000.

Defendant, in his answer, denied that he ever made any contract with plaintiff to procure a purchaser for the property of his corporation. The only contract with defendant that plaintiff sought to prove at the trial was an oral contract of employment. Defendant objected to the evidence on the ground that the sixth subdivision of section 1624 of the Civil Code requires such contract, or some note or memorandum thereof, to be in writing and subscribed by the party to be charged, or by his agent. The court, subject to defendant's objection, received evidence of the oral contract, and gave judgment for plaintiff, as already stated.

[1-3] It is clear to our minds that respondent was not entitled to recover on the oral contract of employment. Section 1624 of the Civil Code provides in express terms that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is "invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent." The oral agreement testified to by plaintiff and her witnesses was clearly within the terms of this Code section. The agreement, if its terms were as testified to by plaintiff and her witnesses, was "an agreement \* \* \* employing" plaintiff "as agent or broker to \* \* \* sell real estate for compensation or a commission." Within the meaning of this Code provision, a person whose business it is to bring buyer and seller together is a "broker," though he act as such in but the single transaction. *Stout v. Humphrey*, 69 N. J. Law, 436.<sup>1</sup> "The duty assumed by a broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made." *Shanklin v. Hall*, 100 Cal. 29, 34 Pac. 637. And that is precisely what plaintiff was employed to do, and precisely what she asserted she did do. Under the terms of the agreement, as testified to by plaintiff and her witnesses, "the party to be charged" was the defendant here, a stockholder in and president of the

corporation that was selling the property. Defendant had no authority from the owner, written or oral, to sell the property.

The theory advanced by respondent to sustain her asserted right to a recovery on defendant's oral agreement employing her to sell real estate owned by the Boss Gold Mining Company is that section 1624 is designed for the protection of "owners" only, and that, moreover, because defendant owned stock in the corporation he necessarily benefited by the sale and by plaintiff's services, and therefore plaintiff is entitled to recover under the rule enunciated in a line of cases wherein it is held, in substance, that an oral agreement by one person to share with another his advantage on a sale of real estate is a valid agreement. We can find no merit whatever in this argument.

To support her claim that she can recover for her services under the oral agreement because the property was owned, not by appellant, but by the Boss Gold Mining Company, respondent seizes upon that portion of the opinion in *Gorham v. Helman*, 90 Cal. 358, 27 Pac. 289, where it is said that subdivision 6 of section 1624 was "designed to protect owners of real estate against unfounded claims of brokers." This language of the opinion in the *Gorham* Case, wrenched from its context to support respondent's theory, was never intended to put without the pale of the statute of frauds one who, though the "party to be charged," does not happen to be the owner. The language of the Code is that the agreement is invalid unless it, or some note or memorandum thereof, be in writing, "and subscribed by the party to be charged, or by his agent." As said in *Aldis v. Schleicher*, 9 Cal. App. 373, 99 Pac. 526, the section is "equally applicable to any contract whereby one, whether owner or not, employs another to effect a sale of real estate and agrees unconditionally to pay a stipulated sum for the performance of such services." This emphatic and terse statement of the law has never been questioned in any of the many later decisions dealing with this Code provision, and to it we give our unqualified approval.

[4] Equally without merit is the contention that, because appellant owns almost three-eighths of all the stock issued by the Boss Gold Mining Company, he necessarily was benefited by the sale, and therefore respondent is entitled to her judgment for \$5,000. In the brief filed in her behalf, respondent says that the instruction given in *Jenkins v. Locke-Paddon Co.*, 30 Cal. App. 56, 157 Pac. 538, "clearly enunciates plaintiff's theory." The instruction given in that case, and to which respondent refers when she says it clearly enunciates her theory, was as follows:

"You are further instructed that, while a parol agreement by the owner of real property to pay

<sup>1</sup> 55 Atl. 281.

an agent a commission for the sale of real property is not valid because it rests in parol, nevertheless an agreement by one person to share his advantage on a sale of real estate with another person, though not in writing, is valid; and if you find that some advantage was to be derived to this defendant from the exchange, *and that the defendant was to share its advantage with plaintiff*, and that plaintiff consummated the exchange, and that defendant actually received some advantage from the exchange, the verdict should be for the plaintiff." (The italics are ours.)

There are at least two reasons why the doctrine enunciated in this instruction does not aid respondent here:

(1) There is no evidence that a consummation of the sale of the property of the Boss Gold Mining Company, as contemplated by the agreement between it and the persons whom respondent produced as purchasers, would have benefited appellant in any wise or to any extent, even though he did own a large block of the stock of that corporation. Respondent assumes that because \$50,000 was paid to the corporation on the sale of its property, appellant, merely because he was a stockholder, necessarily was enriched by the payment in an amount equal to \$17,000. It is true that the purchasers, after making the first payment, refused to go on with the sale, and that, under the terms of their contract with the mining company, they forfeited all of this first payment of \$50,000. But respondent's rights are to be determined from the facts existing at the time when the oral agreement of employment was made, or at any rate from the facts existing at a time not later than the payment of the \$50,000, at which time, if ever, she became entitled to the commission of \$5,000. Her claim here is that there was an executed contract of sale for \$150,000, binding upon both vendor and vendees. Had the contract of sale been fully performed, as contemplated when it was executed, the purchasers would have received the mining properties and the corporation the \$150,000. But there is no evidence that the properties that the mining company contracted to sell were not worth all of the selling price—\$150,000. Had the properties been worth that sum or more, as is quite possible, and had the sale gone through, appellant would not have been enriched merely because the corporation in which he happened to hold stock had \$150,000 in its treasury in

lieu of valuable mining properties the title to which it had conveyed.

(2) In the second place, and this is a decisive answer to respondent's contention, the contract of employment, as testified to by respondent and her witnesses, was an agreement to pay, as compensation or commission, a definite sum of money, namely, \$15,000, or ten per cent. of the selling price. It was not an agreement to share any advantage that, as a result of an advantageous sale, might indirectly accrue to appellant as a stockholder in the vendor corporation.

In *Sellers v. Solway Land Co.*, 31 Cal. App. 259, 160 Pac. 175, the court enumerates three classes of contracts wherein one who employs or receives the co-operation of another to sell real estate is liable though the contract be oral. The first class comprises cases where the agreement is purely and simply one of partnership; the second comprises cases where the agreement is to divide between the parties thereto, either equally or in a stated proportion, the commission or compensation to be received by one of them from the owner of the land to be sold; and the third class consists of cases in which one of the parties to the oral agreement, having a valid contract with the owner to sell the property, has agreed with the other party to pay him for his services either in procuring a buyer or in assisting toward that end. The instant case does not fall within any of these three classes. There was no partnership between plaintiff and defendant; there was no agreement between them to divide any commission or compensation to be received by defendant from the owner, or to divide or share any advantage of any kind that might accrue to defendant as a result of the sale; and defendant had no valid and enforceable contract with the owner.

Our conclusion is that respondent's oral agreement to find a purchaser is not within any of the recognized exceptions to the rule that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is "invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent."

Judgment reversed.

We concur: THOMAS, J.; WELLER, J.

(47 Cal. App. 730)

**PEOPLE ex rel. BRADFORD, Dist. Atty., v. GODDARD.** (Civ. 2136, Sac. 2810.)

(District Court of Appeal, Third District, California. May 25, 1920. Opinion of Supreme Court in Bank, Denying Hearing, July 28, 1920.)

**1. Evidence ⇨87—Presumption of continuation of condition may be overcome by other evidence.**

The presumption that a thing once proved to exist continues as long as is usual with things of that nature (Code Civ. Proc. § 1963, subd. 32) is a mere rule of evidence, and will stand as evidence, where applicable, only where it is not overcome by other evidence.

**2. Evidence ⇨89—Presumption that immoral acts continued held overcome.**

In an action under the Red Light Abatement Act, the presumption, under Code Civ. Proc. § 1963, subd. 32, that immoral acts testified to were continued until the time of the commencement of the action held overcome by evidence that the persons having committed such immoral acts were evicted prior to the commencement of the action, especially in view of subdivision 33 of such section, and the fact that the nuisance constituted a crime under Pen. Code, § 872.

**3. Nuisance ⇨65—Disorderly house held not nuisance.**

A disorderly house did not continue to be a nuisance under the Red Light Abatement Act, after the eviction of the immoral tenants, merely because the furniture used by such tenants was not removed.

**4. Trial ⇨404(2)—Finding that building was nuisance a mere conclusion of law.**

A finding, in an action under the Red Light Abatement Act, that the building "now is a nuisance" was a mere conclusion of law, and not a finding of fact.

**5. Nuisance ⇨84—Conclusion that building was nuisance not supported by finding.**

A conclusion of law, in an action under the Red Light Abatement Act, that the building "now is a nuisance," was not supported by a finding that the building was on and prior to a certain day used for purpose of lewdness, etc.

**6. Trial ⇨398—Cannot be based on inconsistent finding.**

Where there are inconsistent findings on a particular ultimate fact, a judgment or decree predicated upon such fact cannot be upheld.

**7. Nuisance ⇨84—Want of good faith held not established.**

In an action under the Red Light Abatement Act to abate a nuisance, a finding that the owner did not act in good faith in causing the place to be vacated and closed to the immoral purpose for which it had been previously used prior to the action held not sustained by the evidence.

**8. Nuisance ⇨84—Degree of proof stated.**

In an action under the Red Light Abatement Act to abate a nuisance, a finding of want of

good faith in vacation of premises prior to the commencement of the action should be supported by evidence, clear, satisfactory, and convincing.

**9. Nuisance ⇨84—Abatement by parties bars action.**

Where a nuisance, to abate which an action under the Red Light Abatement Act has been commenced has been abated or suppressed by the parties charged with maintaining the nuisance, or otherwise, prior to the commencement of the action, and the abatement is not a mere sham, the action should be dismissed.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by the People of the State of California, on the relation of Hugh B. Bradford, District Attorney of Sacramento County, State of California, under the Red Light Abatement Act, to abate a nuisance, alleged to be maintained on premises owned by Fannie H. Goddard. From a judgment of conviction, the defendant appeals. Reversed.

R. Platnauer, of Sacramento, for appellant.

Hugh B. Bradford, Dist. Atty., of Sacramento, in pro. per.

**HART, J.** The action was brought under the Red Light Abatement Act (St. 1913, p. 20) to abate a nuisance alleged to have been maintained in premises in the city of Sacramento owned by the defendant. It was decreed that defendant be perpetually enjoined from conducting said premises "for the purpose of acts of lewdness, assignation, and prostitution" and the premises were ordered closed for the period of one year. Defendant appeals from the judgment.

The contention of appellant that the judgment is not sustained by the findings, and that the evidence is insufficient to sustain the findings, may be considered together.

The court found (finding 3):

"That on, and for a long time prior to, the 13th day of September, 1917, said real property herein described, together with the upper story of the building situate and erected thereon, was, during all of said time, used for the purpose of lewdness, assignation, and prostitution, and the said upper story of said building was and now is a nuisance under the laws of the state of California. \* \* \*

"(3) That on or about the 17th day of September, 1917, said respondent was informed, through a newspaper, said premises were being used for immoral purposes, and she caused the persons so occupying the same to remove therefrom on September 25, 1917, but that the furniture in said premises still remained therein, and had been in said premises for a period of nearly two years prior to the commencement of this action. That said complaint in this action was filed on the 28th day of September, 1917. At the time of filing said complaint there was no tenant or other person whatsoever occupying said premises.



"(6) That the removal of the tenant from said premises was not made in good faith by said respondent for the purpose of permanently abating said nuisance."

The evidence may be briefly summarized as follows: Edwin E. Grant, executive officer of the State Law Enforcement and Protective League, an organization formed for the purpose of aiding officers in the enforcement of the law, particularly the laws against commercialized vice, and S. C. Barker, an employé of said league, testified that on the evening of September 13, 1917, they visited the premises in question; that they saw three girls there who were dressed in loose-fitting house dresses, and there were three or four drunken men lolling around; that beer was being served, and witnesses bought some; that they asked two or three different girls "what their price was, and in each case the girl answered \$1.50 a trick"; that Barker said, "We are interested in staying all night; what is your price for all night?" to which one of the girls answered, "Ten dollars," and further said, "Don't come back before 1 o'clock, as we are busy right up until then." Witness Barker said that the word "trick" was "a polite term for sexual intercourse." Two police officers testified that the general reputation of the premises was that it was used as a house of prostitution.

A. E. Goddard, a son of the defendant, testified that he acted for his mother in connection with her property; that he read an article in the Sacramento Union of September 17, 1917, regarding an affidavit made by Grant to the effect that the property in question was used as a house of prostitution; that he immediately notified Mr. George Locke, the tenant of the property, to have the people vacate if it was used for purposes of that kind, and that he visited the district attorney and told him that their instructions to their agent had been under no circumstances to rent the premises as a house of prostitution; that the people occupying the premises immediately moved out; that he visited the premises that evening, and found only a Chinese caretaker there; that he saw Mr. Locke several times after that, and that Mr. Locke assured him the place was closed. George Locke testified that immediately after Mr. Goddard called upon him he told the tenants to vacate, and that they did vacate the premises before September 25, 1917. The witness owned the personal property on the premises, and testified that, on the date of the trial, November 15, 1917, it was still there. A witness who had charge of the renting of the premises testified that they were occupied from September 7th until September 25th, and that they became vacant on the latter date.

[1, 2] The people presented no testimony showing or tending to show, other than the

inference which might be drawn from the testimony that acts of prostitution and lewdness were carried on in the building in question on and prior to the 13th day of September, 1917, that subsequent to the date just mentioned acts prohibited by the abatement act were committed in said building, or that the building was used subsequent to said date for purposes of assignation or prostitution, or that acts of lewdness were practiced therein. But it is the position of the people that, inasmuch as it would be practically impossible in most of such cases as the one here to show that acts of prostitution or of assignation or of lewdness were practiced in a building at the very instant that the complaint is filed, the presumption "that a thing once proved to exist continues as long as is usual with things of that nature (subdivision 32, § 1963, Code Civ. Proc.) applies, and that it was therefore not necessary to make affirmative or direct proof, or for the court to find that at the time of the commencement of the action the immoral acts mentioned were carried on in the building. See *People v. Macy*, 184 Pac. 1008. The presumption referred to is a mere rule of evidence, and will stand as evidence, where applicable, only where it is not overcome by other evidence, and, conceding that it applies in such a case as this, or does not run counter to the presumption declared in subdivision 33 of section 1963, Code of Civil Procedure, to wit, "That the law has been obeyed," the answer to the contention is that there was introduced by the appellant testimony which appears to have been, in the judgment of the court, of sufficient probative power to overcome the force or effect of the presumption relied upon by the people. The uncontradicted testimony of the agent and the original lessee of the building is that they, having read on September 17, 1917, in the Sacramento Union, a morning newspaper, of an affidavit filed with the district attorney of Sacramento county by the executive officer of the State Law Enforcement and Protective League, charging that the premises in question were being used for the immoral purposes prohibited by the Abatement Act, immediately proceeded to take steps looking to the closing of the place, and that, on the 25th day of September, 1917, they succeeded in causing, and did cause, the inmates of the building to be evicted and closed the place, and that from and after that date down to the date of the trial of this action, which was commenced on the 15th day of November, 1917, the building or the upper portion thereof complained of by the said executive officer had not been occupied or used for any purpose, except for the storing of the furniture used by the parties charged with conducting the premises in contravention of the mandates of the statute. The trial court evidently believed the testimony of the witnesses, Goddard and Locke, the

agent of the owner and the original lessee, respectively, of the building, for it found that the owner of the building, having been informed on the 17th day of September, 1917, that the upper story was being used for immoral purposes, caused the persons so occupying the same to remove therefrom on September 25, 1917, three days before the complaint invoking the injunctive power of the court against the building as a nuisance was filed, and that "at the time of the filing of said complaint there was no tenant or other person whatever occupying said premises." And it is upon this finding that we base the above declaration that the presumption "that a thing once found to exist continues as long as is usual with things of that nature," if it applies at all to the fact that a nuisance such as the one complained of here, which is itself a crime (Pen. Code, § 372), has been proved to have existed or to have been maintained at some time in the past, was dispelled or overcome by "other evidence." Code Civ. Proc. § 1963.

Of course, we are not to be understood as holding that in all cases brought under the Abatement Act it is necessary, to sustain the complaint, that immoral acts which constitute the nuisance under said statute must be directly or affirmatively shown to have been committed in the place down to the very time of the filing of the complaint. We simply hold here that there is a positive finding that, before the filing of the complaint, the place had been closed to immoral practices.

[3] We are now brought to the consideration of the question whether the findings support the decree. As we have seen, the action was commenced by the filing of a complaint on the 28th day of September, 1917, and finding No. 3 is the only finding which contains anything respecting the commission of acts of lewdness, etc., in and upon the premises. Said finding is:

"That on, and for a long time prior, to the 13th day of September, 1917, said real property herein described, together with the upper story of the building situate and erected thereon, was, during all of said time, used for the purpose of lewdness, assignation and prostitution, and the said upper story of said building was and now is a nuisance under the laws of the state of California."

On the other hand, as has been shown, the court found, in finding No. 5, that having been informed on the 17th day of September, 1917, that said premises were being used for immoral purposes, the owner caused the persons so occupying and using the same to remove therefrom on September 25, 1917, etc. It is very clear that the finding that "the said upper story of said building was and now is a nuisance under the laws of the state of California," taken alone or by itself, is a conclusion of law, and does not involve a finding of fact; but, if it were deem-

ed necessary to concede that, in the connection in which it is employed, it might justly be held to constitute a finding of an ultimate fact, it is nevertheless plainly manifest that it is wholly inconsistent with finding No. 5. It is obvious that if, as the court found, the owner of the building, on receiving information that the upper story thereof was being used for immoral purposes, caused the persons so using it to be removed therefrom before the filing of the complaint herein, the nuisance complained of was abated by the act of the owner herself before legal proceedings against her and the building under the Abatement Act were instituted. This is at least necessarily, and, indeed, the only rational inference following from said finding. That portion of said finding that the furniture in said building at and during the time the nuisance was being maintained therein was not removed from said premises at the time those using them for immoral purposes were compelled by the owner to vacate the building possesses no significance. Neither the furniture nor the building itself constituted the nuisance complained of. It was the manner in which and the purpose for which both were used that constituted the nuisance, and if those using the furniture and the building for immoral purposes were evicted therefrom, and the upper story, where the nuisance was being maintained, was closed to those persons and all other persons desiring or intending to use them for the same purposes, how could the nuisance be further maintained? The answer to this question is too obvious to require further consideration of the proposition.

[4, 5] But we are still of the opinion that the alleged finding that the building "now is a nuisance" is a conclusion of law, notwithstanding the connection in which it is used. In the initial portion of the finding (and, as stated, said finding is the only one of the several findings which finds that acts of lewdness, etc., had been practiced on and in the premises), it is found that the upper story of the building was not down to the filing of the complaint, but "on, and for a long time prior to, the 13th day of September, 1917, used for the purpose of lewdness, assignation, and prostitution," etc. This finding does not support the conclusion or the finding, if such it might properly be called, that the place "now is a nuisance under the laws of the state of California."

[6] It follows that, in any view of the findings, the decree cannot stand. Where there are inconsistent findings upon a particular ultimate fact—that is, where the findings are irreconcilably inconsistent, as would be true here as between finding No. 5 and that portion of finding No. 3 to the effect that the building is now a nuisance, assuming that the latter is a finding of fact and not a conclusion of law—a judgment or decree, so predicated, cannot be upheld.

It cannot in such case be determined upon which of the findings it was intended that the judgment should rest. The judgment may safely rest on one or the other, taken alone, if it be consistent with the finding, but it is very clear that it cannot rest on two findings in irreconcilable opposition to each other as to the same fact. And with the conclusion, stated as a finding, that the building "now is a nuisance," eliminated as a finding of fact, there is left no finding upon which the decree can rest.

It is contended, however, that the finding that the act of the owner of the building in evicting therefrom the parties who were using it for immoral purposes was not done "in good faith for the purpose of permanently abating said nuisance" destroyed whatever force there may be in the finding, which we hold establishes or finds the fact that the nuisance had been abated by the owner prior to the filing of the complaint, that the females who were conducting the premises for immoral purposes were evicted therefrom as indicated in said finding. This contention would no doubt possess much force if there was any evidence to support the finding of want of good faith on the part of the owner in causing the female inmates of the building to vacate it. As seen, the only testimony presented by the people is to the effect that the building, or the upper story thereof, was used for immoral purposes on and prior to the 13th day of September, 1917. The testimony introduced by the defense (and it is not contradicted, so far as the face of the record discloses) is that the son and agent of the owner, upon learning of the complaint made against the building, immediately went to the office of the district attorney, and stated to that officer that, "Our instructions to our agent had been under no circumstances to rent it for a house of that kind; that I told him the people moved out immediately—we had ordered to have it vacated;" that he went to the premises after the order to vacate was made, and that the women had all left the house and that there was no one remaining in the upper story but a caretaker in the person of a male Chinese. He further testified that he met a police officer, whose "beat" embraced the district in which the building is situated, and said to the officer "that if there is anything like that going on, we had given instructions that the house be cleaned out, be closed, just as soon as they could get their things out of there. As I understand, Mr. Locke said it had been closed, because I went to see Mr. Locke several times after that, and he assured me the place was closed." The witness, Locke, for the defense, corroborated Goddard as to the instructions given to him by the latter that the building should not be used for immoral purposes

and as to the eviction of the female inmates and the closing of the place as above indicated.

[7] It would thus seem very clear that the owner and her agent acted in perfect good faith in causing the place to be vacated and closed to the immoral purposes for which it had previously been used. This proposition becomes the more clearly apparent from the fact that the people introduced no testimony tending to show that the closing up of the place by the owner was not done in good faith—that is, that there were any act or acts on the part of the owner or the agent or lessee of the building to permit it to be reopened for use for immoral purposes. The case of *State v. Jerome*, 80 Wash. 261, 141 Pac. 753, cited by the district attorney on the question of good faith, is not in point here. In that case the female who had conducted a house of prostitution on the premises there in question and another female prostitute were still occupying the premises, not owned, but under lease, by one of them, when the action to suppress the nuisance was commenced, although there was no proof of actual acts of prostitution having been practiced in the house from the 29th day of June, 1913, when both women were arrested for practicing acts of prostitution, and the 30th day of June, 1913, when the complaint that the house was being maintained as a nuisance by the women was filed. Quite clearly, the fact that the women themselves remained in the house after it was claimed that they had ceased carrying on the business of prostitution therein constituted a circumstance from which the court could well draw the inference that immoral acts were still being committed in the place subsequent to the time that it was claimed that the nuisance was abated by the female inmates themselves. And the court, in that case, with apparent justness, held that, although some of the furniture had been removed from the building and the conditions therein generally changed to some extent, it was for the trial court to determine upon the whole evidence whether the house in good faith had been closed as one of prostitution, and refused to disturb the decree authorizing the sale of the furniture and enjoining the further use of the premises for any purpose for the period of six months. It is hardly necessary to repeat that in this case the women were all driven out of the place by the owner of the building through her agents before the complaint was filed, although, as seen, the furniture, which was not the property of the owner of the building, but belonged to Locke, the original lessee, had not then been removed therefrom.

[8] The decree herein enjoins the use of the building for any purpose for the period of one year, and it seems to us that in a case of this character, where, as here, the ques-

tion whether so severe and drastic a penalty should be visited upon the owner of real property turns upon the proposition of good faith—that is, whether the owner himself has in good faith abated the nuisance, with the intention that it shall remain abated for all time, before a complaint looking to the suppression of the nuisance theretofore maintained in and on the premises has been filed—a finding of want of good faith in such case should be supported by evidence clear, satisfactory, and convincing. The testimony presented by the people does not, in our opinion, make out such a case, while that of the defendant, as we have before said, appears to disclose perfect good faith in closing the place as it had been immorally maintained and an intention of permanently closing it as a house of assignation and prostitution or in which lewd conduct is practiced. The uncontradicted testimony of the owner's son, who was acting as the agent of the building, that he told a police patrolman of the particular district in the city in which the house is located that he desired that a stop should be put to any attempt to use the premises for immoral purposes is very strong evidence of the good faith of the owner in causing the building to be vacated by the women who had previously used it for purposes of prostitution and assignation, etc.

[9] It is, of course, well settled—indeed, it is but the statement of a rule necessarily following from the very logic of such a situation—that, where a nuisance to abate which an action has been commenced has been abated or suppressed by the parties themselves charged with maintaining the nuisance or otherwise prior to the commencement of the action the further prosecution of the action cannot be maintained, and the action should be dismissed, for the very obvious reason that there is then nothing existing against or upon which the injunctive process of the court can or will operate. *Joyce on Nuisances*, § 486, p. 704; 2 *Wood on Nuisances* (3d Ed.) § 864; *McCarthy v. Gaston Ridge Mill Co.*, 144 Cal. 542, 547, 78 Pac. 7; *Gilbert v. Peck*, 162 Cal. 54, 55, 121 Pac. 315, Ann. Cas. 1913C, 1349. And this rule, of course, applies as well to cases arising under the "Red Light Abatement" Act as in other cases of nuisances. See *People v. Dillman*, 37 Cal. App. 415, 174 Pac. 951; *People v. Burch*, 189 Pac. 716; *State v. Jerome*, 80 Wash. 261, 141 Pac. 753.

We conclude that the judgment should be reversed, but do not feel justified in ordering, as the counsel for the appellant requests us to do, the court below to enter judgment in favor of the appellant upon the findings as they appear in this record. Another trial might bring forth other and additional proof upon the question whether the nuisance was in good faith abated by the owner of the

building, which would support a finding of want of good faith.

The judgment is reversed.

We concur: NICOL, Presiding Judge pro tem.; BURNETT, J.

#### Opinion of Supreme Court in Bank, Denying Hearing.

**PER OURIAM.** A majority of the Justices not having assented to the granting of a hearing of the above-entitled cause in this court after decision by the District Court of Appeal of the Third Appellate District, it is deemed proper to say that the view of those opposed to the granting of such petition is that the District Court of Appeal opinion recognizes that a mere sham abatement of the nuisance prior to action would not be a defense, and that in so far as this feature of the case is concerned, the reversal was for want of evidence to sustain the finding of lack of good faith, and that upon the face of the opinion no error appears in this regard.

The application for a hearing stands denied.

LAWLOR, J., and OLNEY, J., voted for rehearing.

(48 Cal. App. 289)

#### ANDERSON v. WILLSON. (Civ. 2683.)

(District Court of Appeal, Second District, Division 2, California. June 22, 1920. Hearing Denied by Supreme Court Aug. 19, 1920.)

#### 1. Vendor and purchaser §231(1)—Record is constructive notice to subsequent purchasers.

Every conveyance of real property, acknowledged or approved, and certified and recorded as provided by law, is constructive notice of the contents thereof to the subsequent purchasers (Civ. Code, § 1213), and such presumption of notice is conclusive and incontrovertible.

#### 2. Vendor and purchaser §231(1) — Registration act protects owner of legal title.

The primary purpose of registration acts is to protect the true owner of the legal title to land, who may not be in possession against subsequent purchasers, by conclusively imputing to the latter notice of all previously recorded conveyances, so that one subsequently purchasing from vendor is not an innocent purchaser.

#### 3. Vendor and purchaser §144(1)—Vendor need not be owner of all the property at making of agreement.

Where defendant vendor had sold parts of lots to a canal company by a conveyance duly recorded, he could contract to sell all of such lots to the plaintiff, since it was not necessary that vendor should be the absolute owner of the property when agreeing to sell it.

4. Vendor and purchaser  $\S$  144(1)—Vendor need have no inchoate on other title when contracting to sell land.

A vendor need not have even an inchoate title, but may sell land to which he has no title, and the agreement will be valid and enforceable if when the time for performance arrives he is able to furnish the title he contracted to convey, and the contract will not be held fraudulent or void because vendor did not have the title when agreeing to pass it.

5. Specific performance  $\S$  10(1)—May be enforced in part, or purchaser may waive right to rescind for fraud.

Where vendor fraudulently represents himself as owner of more land than he has title to, his purchaser may waive the fraud and his right to rescind and sue for specific performance; and, if the court finds itself unable to enforce conveyance of all the agreed land, it will compel vendor to convey such title as he has, on being paid therefor at the rate agreed.

6. Vendor and purchaser  $\S$  68—Meaning of words "right of way for a canal" depends upon intent and circumstances.

Whether the words "right of way for a canal" used in contract mean a mere easement in the land for canal use, or the strip of land over which the canal runs, is purely a question of intention, and the sense in which the words are employed in the instrument by the contracting parties will depend upon the contract language, aided by reference to the attendant circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Right of Way.]

7. Vendor and purchaser  $\S$  176—Where represented easement was in fact lack of title, purchaser was entitled to rebate "on and over."

The representation in a contract of sale of land that the lots were subject to a right of way of a canal company "on and over" a strip of land four rods wide was equivalent to a representation that the lots were subject to an easement only in such strip; and, where plaintiff purchaser believed and relied upon such representation, neither the vendor who made such representation nor his grantee can be heard to say that plaintiff's understanding of the words "rights of way" was not that intended by both parties, so that, where the canal company in fact owned the fee of, and not merely an easement in, the four-rod strip, plaintiff was entitled to have deducted from the purchase price he was to pay an amount equal to the value of the part of the land to which defendant could not give title.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action for specific performance by John P. Clark against A. D. Willson, trustee, in which plaintiff died while appeal was pending, and Arthur Anderson was substituted as his administrator. Judgment for plaintiff, and defendant appeals. Affirmed.

Bradley & Bradley, of Visalia, for appellant.

D. E. Perkins, of Visalia, and Frank Kauke, of Fresno, for respondent.

FINLAYSON, P. J. Defendant, on the judgment roll alone, appeals from an adverse judgment. While this appeal was pending, the original plaintiff and respondent, John P. Clark, died, and the administrator of his estate, Arthur Anderson, was substituted in the suit. Notwithstanding this substitution, we shall, for convenience, refer to the original plaintiff, Clark, as the plaintiff in the action and the respondent on this appeal.

From the findings it appears that on March 5, 1908, the plaintiff, John P. Clark, and Thomas H. Thompson, defendant's grantor, entered into a written contract whereby Thompson, as vendor, agreed to sell and convey, and plaintiff, as vendee, agreed to purchase, for \$4,800, payable in installments, four lots in Tulare county. The property that Thompson thus agreed to convey to plaintiff is described in their contract as follows:

"Lots one, three, six and seven of Riverside Colony, as shown and delineated on the map of said colony on file in the office of the county recorder for the said county of Tulare, save and except some rights of way granted to the Consolidated Canal Company."

Prior to this contract, namely, on October 28, 1905, the California Savings & Loan Society, the then owner of the lots, had deeded to the Consolidated Canal Company a strip of land, four rods wide, on and along the north and east sides of lot 3, on and along the east side of lot 6, and on and along the south side of lot 7. So that, when plaintiff entered into his written agreement with Thompson to purchase the lots, the latter did not own the title, in fee, to every part of each of the four lots, free of all incumbrances, save a mere right of way or easement in favor of the Consolidated Canal Company for a canal, but the canal company owned the fee to all of a strip of land, four rods wide, along the north and east sides of lot 3, along the east side of lot 6, and along the south side of lot 7. The deed to the canal company was duly recorded on November 6, 1905, in the office of the county recorder.

At the time when plaintiff and Thompson entered into their written agreement, the latter represented to plaintiff that he then owned all of the four lots, and that he held the fee-simple title to the whole thereof, "free and clear of all incumbrances, save and except a right of way for a canal theretofore granted to the Consolidated Canal Company, a corporation, to wit, a right of way on and over a strip of land four rods wide on and along

the north and east sides of lot 3, on and along the east side of lot 6, and on and along the south side of lot 7." Plaintiff believed this representation, and relied upon it in making the contract to purchase the lots, and had no actual notice that there had been conveyed to the canal company the fee to a strip of land, four rods wide, on and along the sides of the lots.

Under the terms of the agreement between plaintiff and Thompson, the last installment of the purchase price was payable March 5, 1911, when, if all payments were made as they fell due, plaintiff, under the terms of his contract, would be entitled to a deed to the land for which he had bargained. Plaintiff, prior to March 5, 1911, promptly paid the several installments that had previously accrued, and, on March 5, 1911, offered to make payment of the final installment if Thompson, his vendor, would convey to him title to the lots, incumbered only with a right of way or easement for a canal or canals. This Thompson was unable to do, for the canal company owned the fee to a part of the lots, namely, the fee to a strip four rods wide on and along the sides of the lots, instead of a mere easement or right of way on and over the lots, as represented to plaintiff when he bargained for the property. Though unable to comply with plaintiff's offer, Thompson, nevertheless, demanded that plaintiff pay him the full amount of the balance of the purchase price as a condition precedent to a conveyance of the lots with the strip four rods wide excepted therefrom. This plaintiff declined to do; instead, he offered to pay Thompson the balance of the purchase price, less a certain amount found by the court to be the value of the title that Thompson was unable to convey by reason of the previous conveyance of the four-rod strip to the Consolidated Canal Company. Thompson thereafter conveyed the property to defendant, who took with knowledge of the contract previously made by his grantor with plaintiff.

Plaintiff brought this action to compel specific performance of Thompson's contract to convey to him the four lots, subject only to a right of way for a canal, on payment of the balance of the purchase price, or, in the event that defendant could not give all the title which plaintiff claimed he had bargained for in his contract with defendant's grantor, that defendant be ordered to convey to plaintiff title to such portion of the land as he owned, and that there be deducted from the purchase price an amount equal to the value of the part of the land to which defendant could not give title. The court found that defendant could not give title to the strip four rods wide, and that, at the rate agreed upon by plaintiff and Thompson in their contract, the amount already paid by plaintiff on the purchase price exceeded the value of the land

to which defendant could give title. The decree adjudges that, without any further payment by plaintiff, defendant forthwith convey to the former title to the land, excepting that portion, four rods wide, running on and along the sides of the lots, previously conveyed to the Consolidated Canal Company. From this judgment defendant has appealed, contending that the constructive notice of the deed to the canal company, afforded by its registration in the county recorder's office, raises a conclusive presumption that, at the time when he contracted with Thompson for the purchase of the lots, plaintiff had notice of the prior deed to the canal company, that therefore plaintiff is bound thereby, and that consequently payment of the full amount of the agreed purchase price is a condition precedent to any right to a conveyance.

[1] Every conveyance of real property, acknowledged or approved and certified and recorded as provided by law, is "constructive notice of the contents thereof to subsequent purchasers." Civ. Code, § 1213. Without doubt, the presumption of notice thus raised by this Code provision is conclusive and incontrovertible. 39 Cyc. 1719, 1720. Says the court in *Fair v. Stevenot*, 29 Cal. 488:

"A recorded deed is an instance of constructive notice, and upon proof being made that it has been duly recorded, the presumption of notice to the subsequent purchaser arises, and the presumption is a conclusive presumption of law, and no opposing evidence is admissible."

Plaintiff, therefore, could not have taken a conveyance of the lots from Thompson, or from defendant as Thompson's successor in interest, and have claimed that he was a bona fide purchaser without notice, and that, therefore, he, and not the canal company, owned the strip four rods wide on and along the sides of the lots.

[2] The primary purpose of registration acts is to protect the true owner of the legal title, who may not be in possession, against the claims of subsequent purchasers, by conclusively imputing to the latter notice of all previously recorded conveyances. And, of course, the recording of the deed to the canal company would secure its title from defeat by any subsequent sale of the land to plaintiff as an alleged innocent purchaser.

[3] But, though plaintiff could not defeat the title of the canal company under any claim that he was an innocent purchaser without notice of the prior deed to that company, he, nevertheless, could contract with Thompson for title to all the land contained within the boundaries of the four lots, and the latter could contract to give title thereto. It is not necessary that a vendor should be the absolute owner of the property at the time he enters into the agreement of sale. One in good faith may sell land which

he does not own, and yet, when the time for performance arrives, be able to furnish a good title.

[4, 5] It is the settled rule in this state that the vendor need not have even an inchoate title at the time of the contract; that he may sell land to which he has no title, and the contract will be valid and enforceable if, when the time for performance arrives, he is able to furnish the title he contracted to convey. His contract will not be held fraudulent or void by virtue of the mere fact that, when he made it, he did not have the title that he agreed to pass to his vendee. *Hanson v. Fox*, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 182 Am. St. Rep. 72; *Backman v. Park*, 157 Cal. 607, 108 Pac. 686, 137 Am. St. Rep. 153; *Brimmer v. Salisbury*, 167 Cal. 522, 530, 140 Pac. 30. And even where the vendor fraudulently represents himself to be the owner of more land than he has title to, his vendee, nevertheless, may waive the fraud and his right to rescind the contract, and may sue to enforce specific performance; and, if in enforcing the contract the court finds itself unable to enforce conveyance of all the land the vendor agreed to convey, it will compel compliance with the agreement, so far as possible, by compelling the vendor to convey such title as he has on being paid therefor at the rate agreed upon between the contracting parties; the compensation allowed for the deficiency in quantity being at the rate of the average price agreed to be paid for the entire tract. *Quarg v. Scher*, 136 Cal. 411, 69 Pac. 96; *Butte Creek, etc., Co. v. Olney*, 173 Cal. 697, 707, 161 Pac. 260. This is precisely what was done by the trial court here.

[6] As we view the case, the real question here is one respecting the intention of the contracting parties, Thompson and Clark. What did these two intend when, in their written agreement, they excepted from the conveyance to be made by Thompson "some rights of way granted to the Consolidated Canal Company"? What did they mean by these words, "some rights of way"? Technically, a right of way is an easement; and a right of way for a canal is, properly speaking, nothing more than a mere easement in the land of another. Civ. Code, § 801, subd. 4; *Blake v. Boye*, 38 Colo. 55, 88 Pac. 470, 8 L. R. A. (N. S.) 418, 422; 34 Cyc. 1787. As generally used, however, the term "right of way," when applied to railroads, canals, and similar instrumentalities, has no exact, well-defined meaning, but often is susceptible of a twofold signification. It is used indiscriminately to describe, not only the easement, or special and limited right to use another person's land, but as well the strip of land itself that is occupied for such use. This, at any rate, is the case when the term is used

with respect to railroads. *Kansas City, etc., R. Co. v. Littler*, 70 Kan. 556, 79 Pac. 114; *Central Trust Co. v. Wabash, etc., Ry. Co.* (C. C.) 29 Fed. 555. And we see no reason why it should not be equally true when the words are used with respect to a canal. So that, whether, in any particular case, the words "right of way for a canal" mean a mere easement in the land of another for the use of a canal or the strip of land over which the canal runs, is purely a question of intention; and the sense in which the words are employed by the contracting parties in any given case will depend upon their intention as disclosed by the language of their contract, aided, when proper, by reference to the attendant circumstances.

The question, therefore, that confronted the court below was this: In what sense did plaintiff and his vendor, Thompson, use the words "save and except some rights of way granted to the Consolidated Canal Company"? Did they intend thereby to except from the grant to be made by the vendor a mere easement for the use of the canals of the Consolidated Canal Company? Or, did they intend to except a strip of land, occupied, or to be occupied by the canals of that company? It is no answer to this question to say that plaintiff was conclusively charged with constructive notice of the prior recorded deed to the canal company. Intention is a state or condition of the mind. And while a concept, or state of mind, may depend upon or be influenced by facts of which the person has actual knowledge—facts of which he actually is or has been conscious—it cannot be engendered or in any wise conditioned or influenced by facts of which he always has been ignorant, even though they be facts notice of which the law imputes to him constructively for the purpose of protecting the title of the real owner against the claims of subsequent purchasers. In arriving at the intention of the contracting parties, we can derive no aid from the fact that section 1213 of the Civil Code raises a conclusive presumption of constructive notice. Unless the parties to a contract have actual notice of a fact, knowledge of which may be useful in arriving at a conclusion respecting their intention or how they understood the language of their contract, no amount of merely constructive notice will aid in solving the question as to their intention or their understanding of their agreement. The sense in which the parties to this contract used the words "some rights of way" is to be determined, therefore, from what they actually knew, not from what the law says they must be deemed to have known, in order that the title of a former grantee, the Consolidated Canal Company, may be secured against defeat by the subsequent sale to the plaintiff

here. As against the canal company, plaintiff cannot successfully claim that he is a bona fide purchaser for value and without notice. But there is nothing in the registry provisions of the Civil Code that prevents him from saying how he understood the words "some rights of way" were employed in his contract, or that prevents him from claiming that they were used to describe mere easements, or rights of way in the true and technical sense of the term.

[7] There is no finding that plaintiff actually knew that the "rights of way" of the canal company consisted of a four-rod strip of land that had been conveyed to it in fee in 1905 by a duly recorded deed. On the contrary, the court found that, at the time when plaintiff entered into his contract with Thompson to purchase the lots, his vendor represented to him that he owned the whole of each lot, and "that he held the fee-simple title thereto, free and clear of all incumbrances, save and except a right of way for a canal theretofore granted to the Consolidated Canal Company, a corporation, to wit, a right of way on and over a strip of land four rods wide on and along" the sides of the lots. The representation that the lots were subject to a right of way "on and over" a strip of land four rods wide was equivalent to a representation that the lots were subject to an easement only—an easement in the strip of land four rods wide along the sides of the lots. The court found that plaintiff believed and relied upon this representation. It is clear, therefore, that the parties to the contract, or, at any rate, one of them, the plaintiff here, understood the words of the contract to mean that there was excepted from the property to be sold an easement only, to wit, a certain right of way "on and over" a strip of land four rods wide. Neither the vendor, whose representations induced plaintiff's understanding of the contract, nor his grantee, the defendant here, can now be heard to say that plaintiff's understanding of the words "rights of way" was not the meaning intended by both parties to the agreement.

It is of no consequence that defendant finds himself unable to give all the title that plaintiff understood he had bargained for and purchased. As already shown, a person who has agreed to convey more title than he has, or can acquire, may be compelled to convey to his vendee such title as he possesses, upon being paid therefor at the rate agreed to be paid for all the property bargained for by the vendee. That is precisely what this judgment does, and it is, we think, supported by the facts found by the trial court.

Judgment affirmed.

We concur: THOMAS, J.; WELLER, J.

(48 Cal. App. 336)

**FREDERICK et al. v. SAN FRANCISCO-OAKLAND TERMINAL RYS. et al.**  
(Ch. 3315.)

(District Court of Appeal, First District, Division 1, California. June 28, 1920. Hearing Denied by Supreme Court Aug. 28, 1920.)

**1. Appeal and error §1010(1)—Findings supported by substantial proof conclusive.**

If there is any substantial proof in the record to support the findings and decision of the lower court, the Court of Appeals is bound by such findings, and the judgment will not be disturbed.

**2. Carriers §318(4)—In action for injuries from overturning car evidence held to show no negligence.**

In a passenger's action for injuries sustained from the overturning of street car in taking a curve after the air brakes were injured in collision with an automobile, evidence held to justify findings that there was no negligence in the operation of the car, as charged in the complaint.

**3. Appeal and error §1008(1) — Motorman's negligence in emergency held for trial court sitting without a jury.**

In a passenger's personal injury action, the question whether or not defendant street railway's motorman was negligent in attempting one of several courses open to him in an emergency is a question for the trial court, when sitting without a jury.

**4. Carriers §322 — Findings as to freedom from negligence held sufficient.**

In a passenger's personal injury action against a street railway company, where the court sitting without a jury found that defendant was free from all the acts of negligence charged against it in the complaint, outside agencies contributing to the cause of accident were immaterial and need not be found, where the findings made adequately cover the issues pleaded.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Tillie Frederick and husband against the San Francisco-Oakland Terminal Railways and others, which abated as to the defendant motorman, A. Stewart, on account of his death. Judgment for defendants, and plaintiffs appeal. Affirmed.

Ostrander, Clark & Carey, of Oakland, for appellants.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco (Chapman & Trefethen, of Oakland, of counsel), for respondents.

KNIGHT, Judge pro tem. This is an appeal by plaintiffs from a judgment rendered in favor of the defendant San Francisco-Oakland Terminal Railways, a corporation, in an action brought by plaintiff Tillie Frederick and her husband, Frank Frederick, to recover



(191 P.)

damages for personal injuries claimed to have been sustained by Mrs. Frederick through the negligence of the defendants while she was riding as a passenger on the street car of said defendant corporation in the city of Oakland. The action was tried by the court sitting without a jury. The street car on which Mrs. Frederick was injured was at the time in charge of the defendant A. H. Stewart, as motorman, and of William J. Morehead, as conductor. The action abated as to the defendant Stewart on account of his death, which occurred prior to trial.

The accident occurred on the evening of October 22, 1916, at about the hour of 9:40. The street car at the time was traveling eastwardly along East Sixteenth street and had just crossed the intersection of Twelfth avenue, which runs at right angles with East Sixteenth street, when it was struck by an automobile which had approached at a rapid rate of speed up Twelfth avenue, and, being unable to make the crossing at East Sixteenth street without colliding with the street car, had cut across the corner and attempted to make the turn around and down East Sixteenth street and run parallel with the car, but was unable to do so, and crashed into the side of the street car, breaking the air pipe line controlling the air brakes. There is a descent in the grade on East Sixteenth street eastwardly from Twelfth avenue, and, finding that the air brakes were out of commission, the motorman and conductor applied the hand brakes; but the speed of the car was not sufficiently checked to prevent it from overturning when it reached a sharp curve at the corner of East Sixteenth street and Fourteenth avenue. The plaintiff Tillie Frederick was injured when the car overturned.

Many witnesses were sworn on behalf of appellants, but all of them except one gave evidence concerning the character and extent of the personal injuries sustained by Mrs. Frederick. In view of the fact that the lower court held the respondent free from all negligence, those injuries, however serious, become unimportant on this appeal. The only witness for appellants whose testimony related to the cause of the accident was Mrs. Frederick herself.

In presenting their case to the lower court appellants relied upon the doctrine of *res ipsa loquitur* and the presumption of negligence carried with it. *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68; *Sellers v. Southern Pacific Co.*, 33 Cal. App. 701, 166 Pac. 599; *Patterson v. San Francisco & San Mateo Railroad Co.*, 147 Cal. 178, 81 Pac. 531. And it is contended by appellants on this appeal that the evidence offered by respondent was not only insufficient to rebut the presumption of negligence but, on the contrary, showed that re-

spondent was negligent in the following particulars: That the motorman failed to slacken the speed of the car when he saw the approach of the automobile up Twelfth avenue; that he failed to apply the hand brakes immediately upon learning that the air brakes were rendered useless; and that he failed to reverse the motor in order to check the speed of the car.

[1] There are no questions of law presented so far as the evidence or its admissibility is concerned. The appeal in the main merely presents the question of the sufficiency of the evidence. According to the well-settled rule, if there is any substantial proof in the record to support the findings and decision of the lower court, we are bound by such findings, and its judgment will not be disturbed. *Smith v. Gaylord*, 179 Cal. 106, 175 Pac. 449; *Newman v. City of Alhambra*, 179 Cal. 42, 175 Pac. 414; *Lutz v. Merchants' National Bank*, 179 Cal. 401, 177 Pac. 158; *Union Colonization Co. v. Madera Canal & Irr. Co.*, 179 Cal. 774, 178 Pac. 957; *Holroyd v. Gray Taxi Co.*, 179 Pac. 709; *Covel v. Price*, 179 Pac. 540; *Badger v. San Francisco*, 182 Pac. 978.

[2] After a careful examination of the record before us, we are of the opinion that ample proof exists to support the decision of the lower court. All of the testimony offered by respondent to rebut the presumption of negligence is in substantial accord, and we find nothing in it or in the entire record, which indicates that the conclusions reached by the lower court were not justified by the evidence. The street car was in charge of an experienced crew, who were thoroughly familiar with this particular run. The intersection of Twelfth avenue with East Sixteenth street marks the top of a grade on East Sixteenth street, after passing which there is a descent until Fourteenth avenue is reached. The car tracks there take a sharp curve into Fourteenth avenue. As the car crossed Twelfth avenue it was traveling at the rate of speed of from 17 to 19 miles an hour. Stewart the motorman, testified in his deposition that as he crossed Twelfth avenue he threw off the electric current and applied the air brakes in the ordinary and customary manner, preparatory to making a stop at Thirteenth avenue. He saw the approaching automobile as he passed Twelfth avenue, but, believing that it would clear the rear end of his car made no special effort to stop more than he had already done. The application of the air brakes reduced the speed of the car to about 15 miles an hour. As he crossed the east property line of Twelfth avenue he noticed the automobile cutting across the curb and making the turn to go down East Sixteenth street, parallel with the street car. The front end of the street car had proceeded no farther than about 27 feet east of the

east property line of Twelfth avenue when the automobile struck the side of the car. He immediately applied a greater force of air to the brakes and continued to manipulate the air brake controller in an effort to stop the car, until he reached the intersection of Thirteenth avenue, when he realized that the air brakes were of no avail. The speed of the car had increased in the meantime to about 24 or 25 miles an hour. Just as he crossed Thirteenth avenue he applied the hand brakes and, with the assistance of a passenger named Robbins, who had been standing near him, the hand brakes were applied to the limit. The conductor also applied the hand brakes from the rear platform, and the speed of the car was slackened to about 22 miles an hour, but not enough to prevent it from turning over on its side when it took the curve at Fourteenth avenue. The testimony of the motorman was fully corroborated by the witness C. E. Robbins, a passenger, who as above stated, had been standing close to the motorman and who assisted in applying the hand brakes. The conductor, Morehead, testified that he saw the rapid approach of the automobile as it came up Twelfth avenue, and that as it turned to go down East Sixteenth street he realized that a collision was inevitable and that he "gave three bells to the motorman, which is the emergency stop"; that the automobile struck the car and he waited for a return signal from the motorman, but, receiving none, he immediately jumped to apply the hand brakes; that as he was pulling the lever of the hand brakes he observed a woman passenger starting to jump off the platform, and he left the brakes temporarily to restrain the woman from jumping; that he then again applied the hand brakes with as much force as he could; and that he was thus applying the hand brakes when the car overturned.

W. P. Jackson, the master mechanic of the respondent company, was also a witness. He testified that on the night of the accident, after it had occurred, he examined the hand brakes and found nothing wrong with them, and on the next morning examined the air brake system and found that it was in perfect order, except that the "nipple in the main reservoir line" was cracked in two places which he explained was not an old break, and that it was also dented on the bottom side. He also explained that enough air would have been left in the air brake cylinder and air pipe line after the automobile ran into the car to give some indication of air brake control, and that the motorman would not realize at once that the air pipe line was broken, because his air brake equipment would for a few seconds function in part. He further testified that in putting on the air brakes the brake shoes will lock and the car slide, and that the practice to test

this is to release and reset the brake shoes until a reduction in speed indicates that the brake shoes are taking hold properly; that the release is always accompanied by a hissing of escaping air; and that there was enough air left in the air pipe line and cylinder to give the motorman the impression that the air brake would take hold properly and stop the car.

On the point that the motorman should have reversed the motor appellants rely upon the printed rules of the company, wherein it is stated that under certain emergency conditions the motor should be reversed; but those printed rules also state that reversing a moving car is a very serious strain on the mechanism, especially if running at a high rate of speed, and must never be resorted to except to avoid accident, and that in every case where a car or train is reversed a prompt report should be made to the station foreman, so that examination can be made of the controllers and motor and the motorman explained in his deposition that under the conditions present that night it would have been dangerous to reverse the motor, because, he stated, "It would have blown my overhead (fuse) and it would have had no effect."

[3] The evidence narrated shows sufficient justification for the findings of the lower court that respondent was not negligent in the operation of the car in the manner charged in the complaint, which brings the case within the rule that the conclusions of the lower court cannot be disturbed. Whether or not a motorman is negligent in adopting one of several courses open to him in an emergency is a question for the trial court. *Thomson v. Pac. El. Co.*, 177 Cal. 728, 171 Pac. 956.

[4] Appellants' final point is that the findings do not cover the material issues, the two principal objections urged being that, while the court negatives the specific acts of negligence charged in the complaint, it fails to find the facts which would explain the real cause of the overturning of the car, and that the court fails to affirmatively find that respondent at the time of the accident was exercising the highest degree of care in the operation of the car. There is no merit in these objections. The court did find that respondent was free from all of the acts of negligence charged against it in the complaint. The negligence pleaded in the complaint was the ultimate fact, and, having negatived the acts of negligence pleaded, the court was compelled to go no further. *Todd v. Orcutt*, 183 Pac. 963. Whatever outside agencies may have contributed to the cause of accident was immaterial, so far as the findings are concerned. Neither was there any prejudice to appellants because the court did not find on those facts about which there was no dispute, such as the fact that the

car actually overturned, particularly in view of respondent's failure to deny that said car did overturn. *Tolbard v. Cline* (Sup.) 180 Pac. 610. Nor is there anything objectionable in the court's findings as to the injuries of Mrs. Frederick. The court merely found to the effect that such injuries were not caused by the negligence of respondent. There was no attempt to find that she had not been injured at all as a result of the accident, and we do not so construe the findings. Taken in their entirety the findings adequately cover all of the issues raised by the pleadings, and are sufficient in form and in substance. In *Cooley v. Brunswick Drug Co.*, 30 Cal. App. 58, 157 Pac. 13, it is said:

"It is an established rule of law that the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon; and whenever from the facts found other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court. *Warren v. Hopkins*, 110 Cal. 506, 512, 42 Pac. 986; *Gould v. Eaton*, 111 Cal. 639, 645, 52 Am. St. Rep. 201, 44 Pac. 319; *Breeze v. Brooks*, 97 Cal. 72, 22 L. R. A. 256, 31 Pac. 742."

We find no error in the record, and the judgment is therefore affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(48 Cal. App. 162)

POTTER v. SMITH et al. (Civ. 3323.)

(District Court of Appeal, First District, Division 1, California. June 12, 1920. Hearing Denied by Supreme Court Aug. 9, 1920.)

1. Husband and wife §258—Improvements made with community funds belong to spouse owning land.

Where a house was improved with community funds, the improvements belong to the spouse owning the land.

2. Husband and wife §262(1)—No presumption that gift is community property.

While, prior to the amendment of 1889 (St. 1889, p. 328) to Civ. Code, § 164, property conveyed to either husband or wife after marriage was presumed community property, such presumption does not arise in case of the conveyance by one spouse to the other, and where a husband conveys real or personal property to his wife, whether it be his separate or the community property, there is a presumption that it becomes her separate property.

3. Husband and wife §248—Whether property is community to be determined by mode of acquisition.

Whether property is community or separate is to be determined by proof showing the mode of acquisition, rather than by declarations of

one of the parties that the property was or was not community.

4. Husband and wife §262(1)—Court bound by presumption as to status of property only when there is no other evidence.

The presumption that property conveyed by a husband to his wife is her separate property is binding in a controversy between the husband and the wife's legal representatives only when there is no evidence, direct or indirect, controverting it.

5. Appeal and error §1010(1)—Findings of trial court, supported by evidence, conclusive.

The fact findings of the trial court are conclusive on the appellate court, unless they are manifestly without sufficient support in evidence.

6. Husband and wife §262(1)—Presumption that property conveyed to wife became her separate estate disputable.

The presumption that property, whether real or personal, conveyed to a wife became her separate property, is disputable.

7. Husband and wife §262(2)—Burden on husband to establish that property in wife's name was community.

Where, after the death of a wife, the husband asserted that property standing in her name was community property, and it appeared that it was purchased with funds delivered by the husband to the wife, the husband has the burden of rebutting the presumption that such funds became the wife's separate property, and to sustain the presumption that the property was community property, which arose by reason of its conveyance being before the amendment of 1889 (St. 1889, p. 328) to Civ. Code, § 164.

8. Husband and wife §264—Evidence held to warrant finding that property was wife's separate estate.

In an action by the husband to quiet title to property standing in the wife's name, evidence held to warrant finding that the property, which was acquired with moneys delivered by the husband to his wife, was her separate property, on the theory that the delivery of the money was a gift.

9. Evidence §273(3)—Declaration in wife's will that property was separate property inadmissible.

Declaration in the will of a wife that property, the title to which was in her name, was separate property, is inadmissible in an action by the husband against the devisees to quiet title.

10. Appeal and error §926(4)—Presumption that trial court struck out improper evidence.

Where the trial court reserved the right to strike out evidence, concerning the admissibility of which it was doubtful, it will be presumed on appeal, the action having been tried without a jury, that the improper evidence was stricken.

11. Appeal and error §1031(3)—No presumption of prejudice.

Prejudicial error is not presumed, and it cannot be assumed that the improper admission

of evidence was prejudicial, where it did not add anything to the weight of the other facts on which the court decided.

**12. Evidence ⇨123(2)—Letters showing relations between spouses many years after conveyance inadmissible as res gestæ.**

Letters passing between spouses many years after the husband delivered moneys to his wife, with which she purchased property, are not admissible in an action by the husband against the wife's legal representative, etc., to quiet title, on the theory that the property was community, for they in no way related to the transaction and formed no part of the res gestæ.

**13. New trial ⇨108(2)—Newly discovered evidence, having little weight, no ground for new trial.**

Where judgment was rendered against a husband, who sought to quiet title to property purchased by the wife with moneys which he delivered her, newly discovered evidence that the wife referred to the property as the marital home, and stated that the husband's earnings paid for it, was no ground for new trial.

**14. Appeal and error ⇨977(1)—Grant of new trial rests in discretion of lower court.**

The granting or refusing of new trial rests so largely in the discretion of the lower court that its action will not be disturbed, except in case of a manifest abuse.

Appeal from Superior Court, Humboldt County; Geo. D. Murray, Judge.

Action by Henry Potter against Charles Henry Smith, Emma Gertrude Smith, and Charles Henry Smith, as executor of the last will and testament of Martha R. Potter, deceased. From a judgment for defendants, plaintiff appeals. Affirmed.

Pierce H. Ryan, of Eureka, for appellant.

Puter & Quinn, of Eureka, for respondent Emma G. Smith.

W. F. Clyborne and J. H. G. Weaver, both of Eureka, for other respondents.

**WASTE, P. J.** This is an action to quiet title. The plaintiff contends that the land, consisting of two lots with a dwelling house thereon, situated in the city of Eureka, the title to which stood of record in the name of his deceased wife, Martha R. Potter, was community property, and upon her death vested absolutely in him. The defendants claim under the will of the deceased wife. Judgment was entered for the defendants, from which the plaintiff appeals.

Prior to the acquisition of the lots in question, the plaintiff had intrusted the accumulation of his earnings to his wife, and had assigned, indorsed, and delivered to her two notes, representing other portions of his earnings and his wife's savings. The lot was paid for out of this fund. The lower court found that the consideration paid for the land was

the separate property of the wife, and that from the date of the conveyance in 1885 the land was her separate property. The sufficiency of these findings presents the serious question on this appeal. A solution of the controversy depends largely upon the nature of the transaction between the plaintiff and his wife, by which, so the respondents contend, all the prior earnings of the plaintiff, including two promissory notes, became the separate property of the wife.

Plaintiff and his wife were married in Michigan in 1872. Neither of them at that time had any property. They came to Humboldt county to reside five years later. They had then accumulated some \$400 or \$500 and owned a house in Michigan. The plaintiff opened a merchant tailoring establishment in Eureka, and, having no bad or expensive habits, was soon in possession of a lucrative business. According to the testimony of the plaintiff, he gave his wife all his earnings from the time they were married. They occasionally loaned money on notes in the name of plaintiff, but the wife kept the notes in her possession. Plaintiff later began drinking and gambling. What then occurred is best told in his own words:

"When I was about 40 years old I acquired the habit of gambling to some extent; that was about 1885 or 1886, along there, I should judge; it was before the property was bought from Pratt. The deed is dated in 1885, and my wife and I picked out the lot. At one time I had some money loaned out on notes; I couldn't say the exact amount, but to my best knowledge it amounted to something as near as I can remember between \$1,500 and \$1,600, approximately. I do not remember whose notes they were; one was Dunlap, who had a ranch on Eel River Island. I gave those notes—I assigned them over, or had them assigned over—to my wife because she requested me to do so. She said one morning to me; I had been upon a spree, and she said, 'Henry, better put what you have in my name, as I save it for you;' and I hesitated a few moments, and I said, 'I will let you know at noon.' She said, 'No, don't wait till noon; do it right now;' and I said, 'All right.' She also had a paper, and put here how much I had. I don't know what I had. I said, 'Go to Ernest Sevier (he did my little work) and have them assigned over to you;' and I guess she did. I never asked her whether she had done it, or whether she had not. I never asked her, but I gave her this with that understanding, to save it for us for our old days, so that, if anything happened, there would be something left."

[1] Some time after the transfer of the property by plaintiff to his wife was effected, the lots in question were purchased, that "they might have a home and avoid paying rent." The plaintiff seems to have had but little to do with the transaction, his wife attending to the details. The purchase price of \$600 was paid out of the money in the

wife's possession. Some time later the plaintiff and his wife purchased a block of land, paying \$1,550 for it, out of the same fund. This land was sold a few months later for \$3,300, and the money was used in the erection of a house, costing that sum, on the lots which had been purchased for the home. It thus appears without contradiction that the premises, which are the basis of this action, were purchased and improved with funds turned over by the plaintiff to his wife, in the manner indicated, and the accumulation thereof. It was furnished in the same manner. The plaintiff testified that he spent some \$480 in the doing of some additional work on the place, which "did not pass through his wife's hands." Assuming that this last amount was community property, the owner of the lots was the owner of the house, and the improvements made with that money belonged to the spouse owning the property. *Shaw v. Bernal*, 163 Cal. 262, 267, 124 Pac. 1012. The plaintiff's expenditure of that sum of money does not enter into the consideration of the case.

According to the plaintiff, there was never any friction between his wife and him; she exercising "a great deal of patience" with him during his lapses from the straight and narrow path of sobriety. They lived together on the premises in question for nearly 20 years, during the latter 10 years of which period plaintiff's business "ran down pretty bad." During the entire period all his earnings, other than what he spent in his business or for himself, he gave to his wife. In 1903, in order to get away from the old influences, which lured him into evil ways and spendthrift habits, plaintiff left Eureka and went to the state of Idaho, where he established a business and acquired a home. When he went away, he took \$2,500, which, he testified, he realized from the sale of a timber claim. He does not appear to have ever solicited his wife to join him there, for she told him she preferred to remain in California. He visited her but once during the 15 years, remaining for about 2 weeks. He never sent her any money during that time, and appears to have once written to her for financial assistance.

For the purpose of tending to offset plaintiff's contentions in this action, it was shown by various witnesses that subsequent to the death of the wife, and after plaintiff's return to California, he made declarations and admissions, the effect of which, respondents claim, was to destroy his present claim. When he was informed by the witness Rotermund that his wife had willed the property to the defendants, he remarked:

"That he was sorry that he gave the property to her, that it was his hard-earned money that bought it; that if Mrs. Potter had left him part of it he would have been satisfied."

The same witness testified that during the trial the plaintiff had stated to him:

"I have given this to Mrs. Potter, and it was my hard-earned money."

In two conversations with the defendants, plaintiff said:

"The property belonged to Mrs. Potter [his wife]. \* \* \* It is my own hard earnings that bought this property. I gave it to her, but it is mine now."

On these facts the respondents defend the conclusions and judgment of the lower court upon the theory, as stated by them:

"That when the plaintiff delivered the money and notes to the wife, and gave the possession of them to her, and in addition transferred and conveyed the same from his name to hers, the presumption immediately arose that said money and notes thereupon became and were thereafter to be treated as her separate property. This is the presumption," they contend, "that applied to the consideration for the lots. Unless the presumption was overcome, the court was justified in finding that the consideration paid for the property was the separate property of the wife, and that the lots were her separate property. The controversy on this phase of the case then resolves itself," they say, "into a question of what the intention of the plaintiff was when he transferred the money and notes from himself to his wife."

[2] Prior to the adoption of the amendment of 1889 (Stats. 1889, p. 328) to section 164 of the Civil Code, the prima facie presumption was that property conveyed to either husband or wife, after their marriage, was community property. *Nilson v. Sarment*, 153 Cal. 524, 527, 96 Pac. 815, 126 Am. St. Rep. 91, and cases cited. But it has never been held that such a presumption arises in case of a conveyance by one of the spouses to the other. *Estate of Klumpke*, 167 Cal. 415, 423, 139 Pac. 1062. A husband may convey real or personal property to his wife, and whether the property conveyed be his separate or the community property, the presumption is that it thereby becomes, and is thereafter treated as, her separate property. *Carter v. McQuaide*, 83 Cal. 274, 278, 23 Pac. 348. The presumption of community property cannot apply, where the transaction was in effect a gift from the husband to the wife. In the absence of evidence of a contrary intent, the transfer will vest the property in the wife as her separate property and estate. *Hamilton v. Hubbard*, 134 Cal. 603, 606, 65 Pac. 321, 66 Pac. 360.

[3-6] The Supreme Court has on several occasions expressed the view that the character of the ownership of property, whether separate or community, is to be determined by the proof showing the mode of acquisition, rather than by any declarations of one of the parties that the property was or was not community property. *Bias v. Reed*, 169 Cal. 83, 42, 145 Pac. 516; *Hammond v. Mc-*

Collough, 159 Cal. 639, 649, 115 Pac. 216; Estate of Granniss, 142 Cal. 1, 4, 75 Pac. 324. The court will decide the question of the alleged donor's intention from his acts, declarations, and conduct at the time of the transaction. *Killian v. Killian*, 10 Cal. App. 312, 319, 101 Pac. 806; *Woods v. Whitney*, 42 Cal. 358. When the controversy, under such circumstances, is between the husband and the legal representative of the wife, the presumption may be controverted by other evidence, direct or indirect, and it is only where it is not so controverted that the court is bound to find in accordance with the presumption. Whether or not it is so controverted, or is sustained, is a question of fact, for the trial court, and the conclusions of that tribunal are conclusive upon an appellate court, unless it be manifestly without sufficient support in the evidence. *Fanning v. Green*, 156 Cal. 279, 282, 104 Pac. 308. The presumption, one way or the other, although disputable, is itself evidence, and it is for the trial court to say whether the evidence offered to support or overthrow the presumption has sufficient weight to effect that purpose. *Gilmour v. North Pasadena Land, etc., Co.*, 178 Cal. 6, 171 Pac. 1066; *Pabst v. Shearer*, 172 Cal. 239, 242, 156 Pac. 466.

[7, 8] The burden was on the plaintiff to rebut the presumption, on the one hand, that he did not intend to make a gift to his wife of the money and notes transferred to her and from which the home was purchased and furnished, and to sustain, on the other hand, the presumption arising from the acquisition of the real property before the amendment to the Code section, that it was community property. *Alferitz v. Arrivillaga*, 143 Cal. 646, 648, 77 Pac. 657. From all the circumstances, the trial court may well have concluded, as it did, that the transfer of the money and notes in the first instance was a gift from the plaintiff to his wife, and that the subsequent purchase of the lots from that fund was a further consummation of a like intent. It requires no unreasonable or strained interpretation of the evidence to so hold. *Auener v. Suiter*, 189 Pac. 120. While the plaintiff testified that there was no intent or purpose on his part to give any of the money or any of the notes to his wife, to be hers absolutely, his evidence, competent and admissible as bearing upon the intent of the plaintiff in the transaction, was not conclusive. *Gilmour v. North Pasadena Land, etc., Co.*, supra. The court was not bound to believe the plaintiff when he testified he did not have such intent. *Fanning v. Green*, 156 Cal. 285, 104 Pac. 308.

[9-11] Defendants offered the will of Mrs. Potter, devising the property in question to defendants Smith. Plaintiff objected generally to its introduction, and particularly to a portion of the will which stated:

"I hereby declare that all the property, both real and personal, of which I may die, constituted my sole and separate estate."

The objection was overruled pro forma, and the will admitted. When the evidence was all in, plaintiff moved to strike out the portion of the will to which he had objected. The motion was submitted, but was never ruled upon, and the objectionable matter remains in the record. The declaration of the deceased wife in the will was not competent proof that the property in question was her separate property, and should not have been admitted. *Rowe v. Hibernia S. & L. Socy.*, 134 Cal. 403, 407, 66 Pac. 569; *Estate of Granniss*, supra; *Estate of Learned*, 156 Cal. 309, 311, 104 Pac. 315; *Crowley v. Savings Union Bank & Trust Co.*, 30 Cal. App. 144, 151, 155, 157 Pac. 516. The lower court seemed to be in doubt upon the matter and expressed the opinion that the declaration in the will was not competent to prove ownership or a separate interest in the property in Mrs. Potter, and, in admitting the document, reserved to itself the right to strike it out, without motion, if it saw fit. In this condition of the record we may assume that it did so, and that the declaration was disregarded. Furthermore, prejudicial error will not be assumed. *Estate of Angle*, 148 Cal. 102, 107, 82 Pac. 668. We are unable to see that any prejudicial result followed the court's error. The declaration did not add anything to the weight of the other facts upon which the court has decided against the plaintiff. With or without its consideration we feel the result must have been the same.

[12] The plaintiff offered in evidence two letters—one written by himself and received by his wife during her lifetime; the other written and mailed some time after her death—as tending to show a friendly relation between himself and his wife. They were properly excluded. They formed no part of the res gestæ, and were in no way connected with the circumstances surrounding the transactions involved in the action.

[13, 14] The plaintiff moved for a new trial below, basing his motion upon alleged newly discovered evidence, the purport of which was that the witnesses would testify that Mrs. Potter in her lifetime frequently referred to the property as "our home; Henry's [plaintiff's] earnings paid for it, and it is in my name for us both." As we have already pointed out, such declarations, if made, would have little weight, in the face of the controlling circumstances under which the property was acquired. The granting or refusing of a new trial rests so largely in the discretion of the court that its action in that regard will not be disturbed, except upon the disclosure of a manifest and unmistakable abuse. *Harrison v. Sutter St. Ry. Co.*, 116

Cal. 156, 161, 47 Pac. 1019. No abuse of that discretion appears in the instant case.

The consideration for the purchase and improvement of the lots in question having been paid by the wife of the plaintiff from her separate funds, it follows that the lots themselves did not become a part of the community property of the spouses. No error appearing in the record requires a reversal.

The judgment is affirmed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

(48 Cal. App. 185)

W. P. FULLER & CO. et al. v. McCLURE.  
(Civ. 3190.)

(District Court of Appeal, Second District, Division 2, California. June 15, 1920, as Modified by Order, July 16, 1920, Denying Rehearing.)

1. Appeal and error  $\S$  694(1)—Particulars of insufficiency of evidence must be specified in bill of exceptions.

The sufficiency of the evidence to sustain the findings cannot be considered on appeal, based on bill of exceptions, where the bill contains no specification of the particulars wherein the evidence is claimed to be insufficient, as required by Code Civ. Proc.  $\S$  648.

2. Mortgages  $\S$  151(3)—Priorities as to mechanics' liens, stated.

A mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of mechanics' liens, where the making of such advances was obligatory upon the mortgagee under the terms of his contract with the mortgagor, but as to mere voluntary advances, made after the mechanics' liens accrued, and with notice thereof, the mortgage is postponed.

3. Bills and notes  $\S$  167 — Note secured by mortgage on land not negotiable in law if purchaser has notice.

If a note is secured by a mortgage on land, and both are executed at the same time, or as parts of one transaction, the note, though negotiable in form, is not negotiable in law, if the purchaser takes it with knowledge of the existence of the mortgage.

4. Mortgages  $\S$  151(3) — Priorities between mechanics' liens and mortgage under which optional advancements are made, stated.

Where advances under a mortgage are optional after the payment of a certain fixed amount, and material is being furnished to the mortgagor by which mechanics' liens may attach, the mortgagee having notice thereof as to each advancement made under the mortgage, the mortgage is to be regarded as a fresh mortgage, subject to the liens of such of the materialmen as had commenced furnishing material prior to the time when the advancement was made, in view of Code Civ. Proc.  $\S$  1186.

5. Evidence  $\S$  441(5) — Parol evidence that advances under mortgage were optional held admissible.

In a suit to foreclose mechanics' liens, where the question of the priority of the mortgage under which the advancements had been made was raised, parol evidence held admissible to show that, though the note and mortgage were made for a definite sum, they were executed as part of an oral agreement that the mortgagee should be obligated to advance a lesser sum merely, and that any additional payments should be optional and not obligatory.

6. Evidence  $\S$  419(1)—Recitals of written instrument as to consideration not conclusive.

The recitals of a written instrument as to the consideration are not conclusive, and it is competent to inquire into the consideration, and show by parol what the real consideration was, provided the legal effect or operation of the instrument is not thereby altered or defeated.

7. Mortgages  $\S$  50—Nature of debt intended to be secured need not be truly set forth.

It is not necessary to the validity of a mortgage that it should truly set forth the nature and character of the debt that it is intended to secure.

8. Evidence  $\S$  419(10) — True consideration for mortgage admissible in suit to foreclose mechanic's lien.

In a suit to foreclose mechanics' liens, where the question of the priority of a mortgage under which optional payments had been made was raised, parol evidence as to the true character of the consideration for the mortgage held admissible, not to defeat the mortgage, as such, but to show when the mortgage lien attached.

9. New trial  $\S$  153—Affidavits, not filed within 30 days after notice of intention, too late.

On motion for new trial, where notice of intention was served July 6, 1917, and the affidavits upon which movant relied were not served until August 7, 1917, nor filed until August 8th, the motion must be denied, since the affidavits were not filed within 30 days after notice of intention, as required by Code Civ. Proc.  $\S$  659.

10. New trial  $\S$  153—Failure to file affidavits held not cured by notice of intention to party not interested.

Where in a suit to foreclose mechanics' liens, decree adjudged that a trust deed was prior to a mortgage held by an assignee, and the assignee moved for new trial on ground of want of consideration given for trust deed, but failed to file affidavits within 30 days after notice of intention of motion, as required by Code Civ. Proc.  $\S$  659, the failure was not cured by service of notice of intention on a mechanic lien claimant, not interested in priority issue, at a later date, which would make affidavits in time.

11. Mortgages  $\S$  25(2)—Agreement whereby purchaser of mortgage was authorized to foreclose at profit held sufficient consideration.

Where a mortgagor found a purchaser of the note and mortgage under an agreement with

the mortgagee whereby the purchaser was to be entitled to foreclose the mortgage in an amount greater than the amount actually advanced, thereby allowing the purchaser a profit, such agreement constituted sufficient consideration as between the mortgagor and the purchaser.

**12. Mortgages  $\Leftrightarrow$  159—Mortgage held prior to trust deed for fixed amount, although less than such amount had been actually advanced.**

Where a trust deed was expressly made subject to a mortgage for a stated amount, but under which a lesser sum only had been advanced, the holder of the trust deed took the instrument subject to the right of the holder of the mortgage to enforce it to the extent that it was enforceable against the mortgagor.

**13. Mortgages  $\Leftrightarrow$  159—Trust deed subject to mortgage held not subject to mechanics' liens to which mortgage was subject.**

Where a trust deed, reciting that it was subsequent to a previously recorded mortgage, was recorded before any work had been done or materials furnished, forming the basis for a mechanic's lien, and the mortgage authorized the mortgagee to pay all liens or incumbrances that were prior to the mortgage, and alleged that it was given to secure all sums that might be paid by the mortgagee to satisfy prior liens, such recitals held not to make the trust deed subject to the mechanic's lien to which the mortgage was subject, where the mortgage on its face did not indicate that the payment of the whole mortgage indebtedness was not obligatory upon the mortgagee.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Consolidated actions by W. P. Fuller & Co. and others against John Q. McClure, with cross-complaint by defendant. Decree for plaintiffs, and defendant appeals. Modified and affirmed.

Charles Robert McCarty, of Los Angeles, Frank O. Sherrer, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent W. P. Fuller & Co.

Sheldon Borden and Richard J. O. Culver, both of Los Angeles, for respondents Simons Brick Co., Frank Wilson Young, and Title Guarantee & Trust Co.

E. S. Williams, of Los Angeles, for respondent L. W. Blinn Lumber Co.

William Hazlett and Glenn M. Ely, both of Los Angeles, for respondent Lawyer and others.

Kenton A. Miller, of Los Angeles, for respondent Simons Brick Co.

R. L. Horton, of Los Angeles, for respondent Hammond Lumber Co.

Kemp, Mitchell & Silberberg, of Los Angeles, for respondent Weaver.

Robert W. McDonald and Edward R. Milliken, both of Pasadena, for respondents Hart and Graver.

**FINLAYSON, P. J.** The defendant and cross-complainant, John Q. McClure, the holder of a mortgage, appeals from a decree of foreclosure given in several actions for the foreclosure of mechanics' liens. The actions were consolidated and tried as one action. The sole question is one of priority as between appellant, the holder of the mortgage, the defendant Young, who is the beneficiary under a trust deed, and the mechanics' lien claimants.

[1] The case comes to us on a bill of exceptions. The bill contains no specification of the "particulars" wherein the evidence is claimed to be insufficient. By a long line of decisions it is settled that the question of the sufficiency of the evidence to sustain the findings cannot be considered on an appeal based upon a bill of exceptions, where, as here, the bill contains no specification of "particulars," as required by section 648 of the Code of Civil Procedure. *Millar v. Millar*, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184; *Regoli v. Stevenson*, 179 Cal. 257, 176 Pac. 158. We shall therefore accept as true the facts as found by the trial court.

The case, as shown by the findings, is substantially as follows: The lot cumbered by the liens originally was owned by Lillian Young, who, on April 27, 1916, conveyed it to A. T. Storch. On May 9, 1916, Storch executed to the Title Guarantee & Trust Company, as trustee, for the benefit of Lillian Young, the beneficiary of the trust, a trust deed securing the payment of a promissory note for \$2,500, payable two years after date, and executed by Storch to Lillian Young as payee. The trust deed contains a recital to the effect that it is given as a part of the purchase price due to Lillian Young on her conveyance of the premises to Storch. Meanwhile, namely, on April 27, 1916, Storch had executed a promissory note, for the principal sum of \$6,500, to one Fred H. Richman, as the payee, payable three years after date, and had secured its payment by a mortgage of even date, duly recorded May 9, 1916. The trust deed, recorded May 10, 1916, referring to the mortgage to Richman, contains this recital:

"This trust deed is subject to a first mortgage of \$6,500, at eight per cent. for three years, in favor of Fred H. Richman. This trust deed is second and is given as part of the purchase price of the above-described premises."

The trust deed is now held by the defendant and respondent Frank Wilson Young. By assignment of the mortgage, appellant, McClure, has become the owner of the mortgage and of the note for \$6,500 secured thereby. No mechanic's lien claimants commenced to perform labor or furnish materials before May 11, 1916, on which day two of



them commenced furnishing materials. The mechanic's lien claimant last to commence furnishing materials did so on June 5, 1916.

When Storch purchased the lot from Lillian Young it was unincumbered. At the time when Storch executed the note to Richman for \$6,500, and gave the latter the mortgage to secure its payment, the mortgagee paid Storch the sum of \$1,600. That payment was made, and the note and mortgage executed, pursuant to an oral agreement between Storch and Richman that the latter would advance and loan the former \$1,600. At the same time Storch told Richman that he intended to erect buildings upon the lot, and that, in order to get money to carry on the building, he would endeavor to find some one who would purchase the note and mortgage and pay therefor such an amount as might be agreed upon by himself and such purchaser of the mortgage; and the \$1,600 was paid by Richman, and the note and mortgage executed, pursuant to an oral agreement between the mortgagor and mortgagee whereby the latter agreed that if the former found a purchaser for the note and mortgage, he, the mortgagee, would transfer the note and mortgage to such purchaser upon the repayment to him of the total amount that he might actually have advanced to Storch in the meantime. At the same time the mortgagee told the mortgagor that if, in his opinion, there should be sufficient security afforded by the mortgage after the building was in progress, he, the mortgagee, would advance, from time to time, further sums until the mortgagor should succeed in selling the note and mortgage, but that all loans or advances that he might make, over and above the first payment of \$1,600, should be entirely optional on his part, and that the only amount that he should be obligated to loan or advance, on account of the note or mortgage or otherwise, was to be said sum, \$1,600, and no more. Richman had actual knowledge of the construction work from the time of its commencement, and personally inspected the work every time he made an advancement. About June 20, 1916, Storch found a purchaser for the note and mortgage in the person of McClure, the appellant here. On that date the note and mortgage were assigned to McClure. Up to that time, Richman, in addition to the \$1,600 paid by him at the date of the execution of the note and mortgage, had made four payments to the mortgagor, aggregating \$1,300, making, with the original payment of \$1,600 a total of \$2,900 paid or advanced by Richman to Storch before the assignment of the note and mortgage to McClure. The respective mechanic's lien claimants commenced furnishing material on dates intermediate the time when Richman made the initial payment of \$1,600 to his mortgagor and the time when he made the last advancement on the mort-

gage loan. When the note and mortgage were assigned to McClure, the latter paid \$5,000, a part of which was used in repaying to Richman the \$2,900 that he had theretofore paid to the mortgagor. The balance was received and kept by Storch. It was agreed by Storch and McClure that, though the latter should pay not more than \$5,000, the note and mortgage should stand as an obligation on Storch's part for \$6,000, with interest thereon. This was done in order that McClure might thus make a profit of \$1,000. McClure took the note and mortgage and paid his money with notice of the agreement that Storch and Richman had made, and of the optional nature of all the payments that had been made by Richman after the payment of the first sum of \$1,600, and also with notice of the amounts of these several optional payments. When he bought the note and mortgage, McClure had actual notice that the construction work was going on. No part of the \$5,000 has been repaid.

As already stated, the several mechanics' liens accrued, respectively, on dates intermediate the first payment of \$1,600 by the mortgagor and the date when he made his last advancement on the mortgage loan. And in fixing the order of priority of the several liens, the foreclosure decree adjudges, in substance and effect, that the liens attach to the property in the following order: (1) That the holder of the mortgage, appellant, has a first lien to secure the original payment of \$1,600; (2) that the liens of the mechanics' lien claimants and the lien of the mortgage to secure the optional payments that were made thereunder after the initial payment of \$1,600, attached, respectively, as of the time when the several mechanics' lien claimants commenced to furnish materials and when the several optional payments were made under the mortgage—the lien of each optional advancement made by the mortgagee being deferred to the liens of such of the mechanics' lien claimants as had theretofore commenced furnishing materials for use in the building; and (3) that the lien of the mortgage, to the extent of the amount actually paid thereunder, namely, \$5,000, is prior to the lien of the trust deed.

Because the mortgage was recorded before the building was commenced or materials were commenced to be furnished, appellant contends that he has a lien on the premises prior to all the other liens to secure the payment of the full amount of the principal and interest of the note that the mortgage secured, \$6,500, citing in support of this contention, among other cases, Valley Lumber Co. v. Wright, 2 Cal. App. 293, 84 Pac. 58. In that case it was held that where the owner of a building executes a promissory note for a definite amount, in consideration of the loan of all of that amount by the payee, the amount so loaned to be used

in the construction of the building, a deed of trust, given to secure the payment of the note and recorded before the building is commenced or materials are commenced to be furnished, will take precedence over the mechanics' liens, though no part of the agreed loan be paid until after the commencement of the work. In that case the payee was under an enforceable obligation to furnish a sum equal to the principal of the note. The execution of the note and trust deed was therefore a sufficient consideration for the payee's binding obligation to advance the full amount. In the instant case the mortgagee was under no obligation to pay anything beyond the initial payment of \$1,600. All payments over and above the first payment were optional with the mortgagee. This distinction is vital, and is recognized in the Wright Case, where the court said:

"There is a marked distinction recognized by the cases between advances which are optional with the mortgagee and advances which are agreed to be made, i. e., obligatory, and the amounts definitely fixed. This distinction is stated in *Savings, etc., Socy. v. Barrett*, 108 Cal. 514, 532, 533, 39 Pac. 922, where the court seems to regard *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641, as stating the rule as to optional advances, as also does *Hall v. Glass*, 123 Cal. 500, 11 Am. St. Rep. 288, 56 Pac. 336." 2 Cal. App. 291, 84 Pac. 59.

[2] Where a mortgagee has obligated himself to make advances, such advances tack, and the mortgage, when recorded, is a valid lien for all the advances actually made, although they may have been made after notice of a subsequent mortgage or incumbrance of the property. Where, however, the mortgagee is not obligated to pay the full amount of the sum named or to make all the advances mentioned in the mortgage, but it is optional with him to do so or not, and he makes advances or payments after having notice that a lien has attached in favor of a third party, his lien for payments or advances made after such notice will be postponed to that of the junior incumbrance, and each of such advances will be deemed the equivalent of a new mortgage. In such cases the mortgage lien attaches as and when the optional advancements are made. The rule is stated in *Cyc.* as follows:

"A mortgage given to secure future advances has priority over mechanics' liens subsequently arising to the extent of the full amount advanced, including what is advanced after, as well as before, the accrual of the mechanics' liens, where the making of such advances was obligatory upon the mortgagee under the terms of his contract with the mortgagor; but as to mere voluntary advances made after the mechanics' liens accrued, and with notice thereof, the mortgage is postponed." 27 *Cyc.* 239, 240.

This statement of the rule is, we think, substantially correct, and is either sustained

or recognized by the following authorities: *Finlayson v. Crooks*, 47 Minn. 74, 49 N. W. 398, 645; *Gray v. McClellan*, 214 Mass. 92, 100 N. E. 1093; *Davis v. Carlisle*, 142 Fed. 106, 73 C. C. A. 330; *Ladue v. Detroit, etc., R. Co.*, 13 Mich. 380, 87 Am. Dec. 759; *Boswell v. Goodwin*, 31 Conn. 74, 81 Am. Dec. 169; *Brinkmeyer v. Browneller*, 55 Ind. 488; *Blackmar v. Sharp*, 23 R. I. 412, 50 Atl. 852; *Erickson v. Ireland*, 134 Minn. 156, 158 N. W. 918; *Savings & L. Socy. v. Burnett*, 106 Cal. 532, 533, 39 Pac. 922; *Hall v. Glass*, 123 Cal. 504, 56 Pac. 336, 69 Am. St. Rep. 77; *Valley L. Co. v. Wright*, *supra*; 1 *Jones on Mortgages*, § 369.

[3] The note, of which appellant, who was conversant with all the facts, became the owner by assignment, is not negotiable in the hands of appellant. He has none of the rights peculiar to the ownership of negotiable paper. He stands in the shoes of Richman, the original mortgagee. This is so because the rule in this state is that if the note is secured by a mortgage on land, and both are executed at the same time or as parts of one transaction, the note, although negotiable in form, is not negotiable in law, if the purchaser takes it with knowledge of the existence of the mortgage. *National Hardware Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881.

[4] According to the findings of the trial court, all advancements made on the mortgage after the original payment of \$1,600 were optional with the mortgagee and his assignee, this appellant. Neither was obligated to make any further payment. Prior to making any of the optional payments, the mortgagee and his assignee, appellant, had actual notice that material had been furnished by some of the mechanics' lien claimants. Each, therefore, being charged with knowledge of the law, had actual notice that the liens of the mechanic's lien claimants had attached. *Finlayson v. Crooks*, *supra*; *Allen Co. v. Emerton*, 108 Me. 221, 79 Atl. 905. As to each advancement so made, therefore, the mortgage is to be regarded as a fresh mortgage, subject to the liens of such of the materialmen as had commenced furnishing material prior to the time when the advancement was made. The liens provided for in the chapter on mechanics' liens "are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced \* \* \* or materials were commenced to be furnished." *Code Civ. Proc.* § 1186.

The foreclosure decree accords with the principles thus far announced, and we find no error in the decree in so far as it gives to the mechanics' liens priority over the mortgage.

[5-8] Parol evidence was admissible to show that, though the note and mortgage

were made for a definite sum, \$6,500, they were executed as part of an oral agreement that the mortgagee should be obligated to advance but \$1,600, and that any additional payments should be optional and not obligatory. The note and mortgage were by their terms the unilateral obligations of the mortgagor, executed by him to the mortgagee for a consideration. The consideration for the note and mortgage is that which the mortgagee did or agreed to do. As a general rule, the recitals of a written instrument as to the consideration are not conclusive, and it is competent to inquire into the consideration and show by parol what the real consideration was, provided the legal effect or operation of the instrument is not thereby altered or defeated. It is not necessary to the validity of a mortgage that it should truly set forth the nature and character of the debt that it is intended to secure. *Shirras v. Calg.*, 7 Cranch (U. S.) 34, 13 L. Ed. 260. The evidence was not introduced to defeat or alter the legal effect and operation of the mortgage, but to show the times at which the mortgage lien attached. Therefore, on the issue of priority as between the holder of the mortgage and the mechanic's lien claimants, parol evidence as to the true character of the consideration for the mortgage was admissible, not to defeat the mortgage as a mortgage, but to show when the mortgage lien attached. For this purpose, it is permissible to show by parol that a mortgage, which upon its face appears to be for the payment of a specified sum of money, was in fact given as security for future optional advances. Moreover, the note and mortgage being in the usual form and containing no indication of the purpose for which they were given, the parol evidence does not tend to vary their terms, but to show the whole agreement in which they originated and of which they constitute but a part. *McKinstler v. Babcock*, 26 N. Y. 381; *Shirras v. Calg.*, *supra*; *Kaphan v. Ryan*, 16 S. C. 352; *McAteer v. McAteer*, 31 S. C. 313, 9 S. E. 966; *Louisville Banking Co. v. Leonard*, 90 Ky. 106, 13 S. W. 521; *Hall v. Tay*, 131 Mass. 192; *Wilkerson v. Tillman*, 66 Ala. 532; 1 Jones, Mtgs. § 384. See, also, *Vogan v. Caminetti*, 65 Cal. 433, 4 Pac. 435.

[9] Appellant moved for a new trial in the court below. His motion was denied. In support of his motion he filed affidavits intended to show that there was no consideration for the trust deed that had been executed for the benefit of Lillian Young, and now held by the respondent Frank Wilson Young. The sole purpose of the affidavits was to show that the trust deed should not be given priority over appellant's mortgage. The bill of exceptions shows that on July 6, 1917, the attorneys for all the respondents acknowledged, in writing, service upon them of appellant's notice of intention to move

for a new trial. The affidavits upon which appellant relied for a new trial were not served until August 7, 1917, nor filed until August 8, 1917, which, if the notice of intention was served on July 6, 1917, was too late. Where a motion for a new trial is to be made upon affidavits, the moving party must serve and file his affidavits not later than 30 days after serving his notice of intention. Code Civ. Proc. § 659.

[10] There would, therefore, be no question as to the failure of appellant to serve his affidavits within the time provided by the Code, were it not that the bill of exceptions also states that, as shown by a certain affidavit of service, the notice of intention was served on the attorneys for one of the mechanic's lien claimants on July 9, 1917. But the mechanics' lien claimants are not interested in any issue of priority as between the mortgage and the trust deed. The affidavits upon which appellant relied pertained to an issue in which none of the respondents is interested, except Young, the holder of the trust deed. The record shows without doubt that the notice of intention was served on the attorneys for Young, the holder of the trust deed, on July 6, 1917. The affidavits, therefore, were not served in time to entitle appellant to a new trial of any issue affecting the rights of Young as the holder of the trust deed. For this reason the motion for a new trial was properly denied.

Though the foreclosure decree conforms with the views we have thus far expressed, we think that in the particular about to be noticed it is not justified by the findings, and that it should be modified to accord with what is said *infra*.

[11] The facts disclosed by the findings show that the mortgage was entitled to priority over the trust deed to the extent of \$6,000—not merely \$5,000, as adjudged by the trial court. The trust deed, it will be remembered, expressly recites that it is subject to the mortgage of Richman for \$6,500. The trial court gave effect to this declaration of the trust deed by allowing to the mortgage priority over the trust deed to the amount actually advanced or loaned under the mortgage, namely, \$5,000, but held that the mortgage was subordinate to the trust deed as to so much of the mortgage as was not advanced, \$1,500. Of this sum of \$1,500, \$500 was voluntarily deducted by appellant from the face of the mortgage when he bought it, and the balance, \$1,000, represents the amount that Storch agreed should be allowed appellant as a profit or discount. That is, when Storch sold the mortgage to McClure, pursuant to the agreement that Storch theretofore had made with the mortgagee, Richman, it was agreed between Storch and McClure that if the latter would credit \$500 on the mortgage, thus reducing it to \$6,000, Storch would sell it to him for

\$5,000, thus allowing McClure a profit or discount of \$1,000. Therefore, when Storch, the mortgagor, sold the note and mortgage to McClure, he, in effect, agreed that, though the latter was to pay but \$5,000, nevertheless he should be entitled to foreclose the mortgage to the extent of \$6,000; in other words, that the mortgage should be a lien on the land to the extent of \$6,000. It is probable that it was only by allowing McClure this profit of \$1,000 that Storch was able to secure the \$5,000. There was therefore ample consideration, as between Storch and McClure, to support a lien to secure the full amount agreed upon, \$6,000. When the beneficiary under the trust deed declared therein that that instrument should be subject to the mortgage, she declared, in effect, that it should be subject to what, apparently, was the amount secured thereby, \$6,500. If the trust deed had been recorded before the mortgage, and if the court had found that the beneficiary in the trust deed had agreed that that instrument should be subject to the mortgage if all the moneys to be advanced under the mortgage were used in the construction of the building, it would have been proper to adjudge that the mortgage was entitled to priority to the extent, and only to the extent, that the moneys furnished by the holder of the mortgage were used in the construction of the building, which could not exceed the \$5,000 actually paid. *Jorlmon v. McPhee*, 31 Colo. 26, 71 Pac. 419. But there was no such understanding. By accepting the trust deed with the clause that it is subject to the mortgage, the beneficiary under the trust deed agreed that it should be subject to the mortgage to the extent of any indebtedness that might be owing by the mortgagor on the note and mortgage, not exceeding the face of the note, which indebtedness was, as we have seen, the amount agreed upon by the mortgagor and McClure when the latter bought the mortgage, namely, \$6,000.

[12] Under the circumstances of this case we think that the holder of the trust deed took that instrument subject to the right of the holder of the mortgage to enforce it to the extent that it is enforceable against the mortgagor. Without doubt, a junior incumbrancer may always allege and show that the claim of a prior mortgagee is exaggerated. But here the claim of the holder of the mortgage that \$6,000 is the amount secured thereby is not exaggerated. That is the amount that the mortgagor, for a valuable consideration, agreed should be paid to the purchaser of the note and mortgage if he should purchase and pay \$5,000 therefor. There are circumstances under which it is proper for the holder of a mortgage to enforce it to the full extent of the amount named therein, though but a part thereof has been paid. *Freeman v. Auld*, 44 N. Y.

50. See, also, *Crawford v. Edwards*, 33 Mich. 355. In *Freeman v. Auld*, supra, it was held that, as against the grantee of a lot who purchased subject to a prior mortgage, an assignee of the mortgage can enforce the mortgage to the full extent expressed therein, although he purchased the mortgage with knowledge that but one-half of that sum had actually been loaned thereon, and he himself had paid the mortgagee only that amount as consideration for the assignment. It is possible that there are material points of dissimilarity between that case and this. We only cite it to show that there are cases where it is proper to give priority to a mortgage for the full amount named therein, though less than that amount has actually been loaned by the mortgagee or his assignee. And we think that this is just such a case, except that here the assignee of the mortgage is entitled to priority over the trust deed only to the extent that he agreed to take the mortgage as security, namely, \$6,000.

[13] Though subject to the mortgage lien to the extent of \$6,000, we do not think the trust deed is subject both to the mechanics' liens and the mortgage, thus making it subordinate to liens that, in the aggregate, exceed \$6,000. Though recorded after the mortgage was recorded, and though it recites that it is subject to the mortgage, the trust deed was recorded before any work was done or materials were commenced to be furnished. In the ordinary course of things, therefore, the trust deed would be prior to any of the mechanics' liens. But the mortgage, which the trust deed says it is subject to, declares that the mortgagee may pay all liens or incumbrances that are prior to the mortgage, and that it is given to secure all sums that may be paid by the mortgagee to satisfy any prior liens. Because of these provisions in the mortgage it is suggested by the mechanic's lien claimants that the trust deed, which is declared to be subject to the mortgage, must also be subject to the mechanics' liens to which the mortgage is subject. We think, however, that this argument gives to the clause in the trust deed declaring that it is subject to the mortgage a meaning never intended by the trustee or by the beneficiary named in the trust deed. It may be conceded, for the purpose of this decision, that by reason of these provisions in the mortgage and the trust deed the latter is subordinate to all liens that are prior to the mortgage, and which were within the contemplation of the parties as possible prior liens when the trust deed was executed. But we do not think that the mechanics' liens are within that category. Neither the trustee nor the beneficiary under the trust deed could have anticipated, when it was agreed that the trust deed should be subject to the mortgage, that the latter would ever

be subordinate to any mechanics' liens in any particular or to any extent whatever. The mortgage was recorded before any work was done or materials furnished, as was also the trust deed. The mortgage, upon its face, gives no inkling that the advancement of the whole mortgage indebtedness, \$6,500, was not obligatory upon the mortgagee. Neither the trustee nor the beneficiary under the trust deed knew aught of the oral agreement between Storch and Richman, or between Storch and McClure. So far as the trustee and the beneficiary are concerned, the agreement that the trust deed should be subordinate to the mortgage was not made in contemplation of the mortgagor's oral agreement with his mortgagee that all advancements that the latter might make over and above the initial payment of \$1,600 should be optional only. If that oral agreement had not been made, the mortgage never would have been subordinate to any of the mechanics' liens, and consequently the trust deed would not be subordinate to any of them either. Our conclusion is that the security afforded by the trust deed should in no wise and to no extent be impaired by reason of the secret oral agreement between Storch and his mortgagee, whereby there was created a situation not contemplated by the trustee or the beneficiary under the trust deed when the latter instrument was executed.

For the foregoing reasons we conclude that the foreclosure decree should provide that the trust deed is subordinate to an amount equal, in the aggregate, to said sum of \$6,000, together with any unpaid and accrued interest on such sum of \$6,000, at the rate provided for in the mortgage, and a reasonable attorney's fee to be fixed by the trial court and based upon said sum of \$6,000 and said interest thereon.

There are no other assignments of error that merit discussion.

The result of our conclusions is that the judgment is correct, except in the particular above mentioned. The facts appear with sufficient certainty in the findings to authorize the entry of a judgment modified to accord with these conclusions. There is, therefore, no necessity for remanding the case for another trial. The proper result can be reached by directing a modification of the judgment. This will necessitate a recasting of the entire judgment—a task that should devolve upon the court below, where the trial judge, if he please, may avail himself of the assistance of counsel for the respective parties in drafting the modified judgment.

It is adjudged that the cause be, and it is, remanded, with directions to the court below to modify the judgment in the particular indicated, and to re-enter the judgment as thus modified. And as so modified, the judg-

ment will stand affirmed. Appellant will recover his costs of appeal against the respondents Frank Wilson Young and Title Guarantee & Trust Company.

We concur: THOMAS, J.; WELLER, J.

(79 Okl. 121)

BUSEY, County Treasurer, et al. v. PREHISTORIC OIL & GAS CO. (No. 9754.)

(Supreme Court of Oklahoma. July 20, 1920.  
Rehearing Denied Aug. 31, 1920.)

(Syllabus by the Court.)

1. Equity §46—No relief where there is adequate remedy at law.

Relief will not be granted by a court of equity where at the time there is a plain, specific, and adequate remedy at law.

2. Taxation §453—Statutory mode of appeal from equalization assessment is exclusive.

Whenever the statutes of the state provide a mode by which appeals may be taken from the assessment of equalization of property, that remedy is exclusive. Resort cannot be had to equitable remedies.

3. Taxation §498—Where no appeal from assessment, collection will not be restrained.

Article 9, c. 81, Sess. Laws, 1907-08, providing for the listing and assessing of omitted property, known as the Tax Ferret Law, provides a remedy by appeal to the county court from the final action of the county treasurer upon any assessments of omitted property made thereunder to the party aggrieved, and where the aggrieved party neglects or refuses to avail himself of the remedy provided by statute for the correction of error of which he complains, the court is without jurisdiction to exercise its equitable powers by restraining the collection of taxes due under such assessment.

Error from District Court, Hughes County; W. M. Engart, Special Judge.

Application and petition by the Prehistoric Oil & Gas Company for dissolution, in which cause W. C. Rogers filed his protest and objection, and suit by the Prehistoric Oil & Gas Company against J. F. Busey, County Treasurer of Hughes County, Okl., to restrain his proceeding to assess its taxes, with demurrer by defendant. Cases consolidated and tried together in the district court on an agreed statement of facts, and judgment for the Prehistoric Oil & Gas Company on the issues joined in both cases, granting an injunction against the county treasurer, and an order authorizing dissolution of that corporation, and J. F. Busey, County Treasurer of Hughes County, Okl., and W. C. Rogers bring error. Judgment granting injunction reversed, and cause remanded, with directions.

Diamond & Orr, of Holdenville, for plaintiffs in error.

M. S. Singleton, of Oklahoma City, for defendant in error.

JOHNSON, J. This appeal is one in which two causes in the district court of Hughes county were consolidated and tried before the court on an agreed statement of facts. One to dissolve a corporation and the other to enjoin J. F. Busey, county treasurer of Hughes county, from collecting taxes for the years 1916 and 1917 on the capital stock of the Prehistoric Oil & Gas Company, said capital stock being in the sum of \$20,000. The appeal is by a transcript of the record, which discloses that: In September, 1917, the defendant in error, the Prehistoric Oil & Gas Company, a corporation, filed its application and petition for dissolution as a private corporation in case numbered 2454 in the district court of Hughes county, Okla. On the 25th day of October, the plaintiff in error, W. G. Rogers, filed in said cause his protest and objection to the dissolution of said corporation on the ground that all claims and demands against said corporation had not been satisfied or discharged as required by law. On the 21st day of November, 1917, the defendant in error, the Prehistoric Oil & Gas Company, filed in the district court of Hughes county, in case numbered 2512, its petition for injunction against the plaintiff in error, J. F. Busey, county treasurer of Hughes county, Okla., to restrain him from proceeding in the hearing and assessing its taxes discovered by the tax ferret. Plaintiff in error, J. F. Busey, county treasurer of Hughes county (the defendant in said case number 2512), filed by his attorneys a pleading styled "motion," which in effect was a demurrer. The two causes, No. 2454 and No. 2512, as set out above, with the issues duly joined, were on November 24, 1917, consolidated and given the number 2454, and came on for trial on said date before Judge Wm. Engart, Special Judge. The court thereupon found for the defendant in error, the Prehistoric Oil & Gas Company, on the issues joined in both causes, and granted said defendant in error an injunction against the county treasurer, and granted an order authorizing dissolution of said corporation as prayed for. From this judgment, plaintiffs in error appealed and assign error:

"First. That the court erred in overruling the 'motion' of plaintiffs in error to dismiss petition of defendant in error for injunction.

"Second. That the court erred in granting defendant in error an injunction.

"Third. That the court erred under the agreed statement of facts in finding that the taxes sought to be levied and collected were illegal and void.

"Fourth. That the court erred in granting defendant in error an order of dissolution"

—concerning which assignments plaintiffs in error say in their brief:

"The first two assignments of error will be argued together. It is the contention of the plaintiffs in error that injunction was an improper remedy in this case. It is a well-settled principle, and enunciated by this court time after time, where there is an adequate remedy at law, an injunction will not lie.

"It seems clear to us that in this case the defendant in error had an adequate remedy by appealing to the county court and from there to the Supreme Court, and hence this remedy of injunction should have been denied. Section 7449, Rev. Laws 1910, provides: 'The board of county commissioners of any county in this state may contract with any person or persons to assist the proper officers of the county in the discovery of property not listed or assessed, as required by existing laws, and fix a compensation at not to exceed fifteen per cent. of the taxes recovered under this article. Before listing and assessing property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same, ten days' notice thereof, by registered letter, addressed to him at his last-known place of residence, fixing the time and place when objection in writing to such improper listing and assessment may be made. An appeal may be taken to the county court from final action of the treasurer within ten days, by giving notice thereof in writing and filing an appeal bond, as in cases appealed from the board of county commissioners to the district court.'"

The material part of plaintiff's petition in case No. 2512, the injunction suit, is as follows:

"Plaintiff states: That it is a corporation created and doing business under the laws of the state of Oklahoma, with a capital stock of \$20,000; that defendant is treasurer of Hughes county, state of Oklahoma. That on October 12, 1917, defendant sent plaintiff notice of proposed assessment by him under the Tax Ferret Law, for purposes of taxation for the years 1916 and 1917, of its capital stock amounting to said sum of \$20,000, and that the proposed taxes would be for the year 1916, \$750, and for the year 1917, the sum of \$800; that said notice read in part as follows: 'Your personal taxes have been certified to me by the tax ferret for collection for the years 1916 and 1917, and your assessment is \$20,000.00, same being the amount of your capital stock and said capital stock being taxable in the city of Holdenville, Hughes county.'

"That thereafter, and on or about the 17th day of October, 1917, plaintiff filed its protest in writing to such proposed assessment of its capital stock for taxation, and showing therein that it was not the owner of any of its capital stock for either of said years, alleging that same had been sold to private individuals and the proceeds thereof invested in real and personal property which had been duly assessed and the taxes thereon paid for the years 1916 and 1917. That notwithstanding said protest said defendant has set said matter for hearing, and intends to proceed to hear said matter,

(191 P.)

and will, unless restrained, require this plaintiff to appear and contest said matter before him, or suffer default to be taken; that said capital stock is not subject to taxation for either of said years, for the reason that plaintiff did not own same; that such capital had been sold to private individuals and the proceeds invested in real and personal property on which the taxes for said years had been paid. That such proposed proceedings on the part of the defendant are void. That unless restrained, defendant is liable to overrule the objections and protest of this plaintiff, and extend such taxes on the rolls in his office, and make it necessary for plaintiff to appeal from his ruling. That plaintiff has filed an application in this court for its dissolution, and that said defendant has filed a claim for such taxes in said proceedings, and is resisting the dissolution of this corporation because of said claim for taxes. Wherefore plaintiff says that it is entitled to an injunction, enjoining the defendant from taking any further steps or action in said proposed assessment. That plaintiff has no adequate remedy at law.

"Wherefore plaintiff prays an injunction herein against said defendant, enjoining and restraining him from taking any further steps, actions, or proceeding in said proposed assessment of its capital stock for taxation for the years 1916 and 1917, and for its costs."

The defendant's motion or demurrer to the petition alleged as follows:

"Comes now J. F. Busey, county treasurer of Hughes county, and by his attorneys, Diamond and Sherrow, moves the court to dismiss the petition for injunction filed herein this 24th day of November, 1917, and for ground thereof, says: 'First, that the district court of Hughes county, Okl., is without jurisdiction of the subject-matter; second, that said plaintiff has an adequate and effective remedy at law; third, that said petition does not state facts sufficient to entitle said plaintiff to the equitable relief prayed for. Wherefore defendant prays that said petition be dismissed, and that he go hence with his costs'

—which being overruled by the court, the defendant J. F. Busey filed his answer, consisting of a general denial.

[1-3] The demurrer should have been sustained. The petition showed that the county treasurer was proceeding under the Tax Ferret Law, as was his duty to do, and unless restrained would determine whether or not the plaintiffs should be assessed for taxes for the years 1916 and 1917. This stated no cause for injunctive relief. The essential part of the judgment rendered by the trial court is as follows:

"Wherefore the petition of the Prehistoric Oil & Gas Company praying for an injunction to issue to J. F. Busey, county treasurer of Hughes county, Okl., restraining him from taking any further action in regard to placing said capital stock of the Prehistoric Oil & Gas Company on the tax rolls for the years 1916 and 1917, is sustained, and it is ordered, adjudged, and decreed that J. F. Busey, county

treasurer of Hughes county, be, and he is hereby, enjoined and restrained from further proceeding in the matter of taxation of said Prehistoric Oil & Gas Company for the years 1916 and 1917.

"The court further finds that the said Prehistoric Oil & Gas Company is entitled to an order of dissolution, and it is further ordered that said Prehistoric Oil & Gas Company be, and it is hereby, dissolved."

The transcript shows that the county treasurer proceeded regularly under the section of the statute supra, and that the plaintiff was notified and filed its protest in writing to such proposed assessment, and thereafter, before the hearing thereof, the plaintiff instituted a suit for injunction against the county treasurer with the result stated, and from an order of the court in said cause granting the injunction this appeal is prosecuted.

The precise question here involved was decided by the court in the case of Perry, County Treas., et al. v. Carson, 61 Okl. 283, 161 Pac. 175, wherein article 9, c. 81, Sess. Laws 1907-08, the provision herein involved and known as the Tax Ferret Law, was under consideration, and in the body of the opinion this court said:

"The statute under which this assessment was made provides: 'An appeal may be taken to the county court from the final action of the treasurer, within ten days.' It thus appears that if the county treasurer acted upon insufficient evidence, or upon no evidence, as contended in the brief of plaintiff, the Legislature had provided a means of review of the action of the county treasurer of which plaintiff might avail himself.

"It has been repeatedly held by this court 'that relief will not be granted by a court of equity, where at the time there is a plain, specific, and adequate remedy at law,' and 'where the statutes provide a plain, specific, and adequate remedy for the correction of erroneous assessments, a court will not exercise its equity powers by restraining the collection of taxes due under an alleged error in assessment, where the complaining party neglects or refuses to avail himself of the remedy provided by statute for the correction of the error of which he is complaining.' East v. Rogers, 30 Okl. 289, 119 Pac. 241.

"Again, in Williams v. Garfield Exchange Bank of Enid, 38 Okl. 539, 134 Pac. 863, it is held: 'Whenever the statutes of a state provide a mode by which appeals may be taken from the assessment or equalization of property, that remedy is exclusive. Equitable remedies cannot be resorted to.' Under these authorities, it is apparent that the only remedy of plaintiff against the action taken by the county treasurer consisted in appeal to the county court under the provisions of the statutes, and that he was not entitled to maintain an action of injunction to restrain the collection of the taxes levied against him."

It is clear to us that the plaintiff's petition failed to state a cause of action, and that the

defendant's demurrer should have been sustained, and the cause dismissed; that plaintiff had an adequate, legal remedy, that of appeal from the action of the county treasurer, if it felt aggrieved by such action, to the county court of Hughes county. The judgment of the trial court, granting the injunction, is reversed, and the cause remanded, with directions to proceed in accordance with the views herein expressed.

RAINEY, C. J., and KANE, HARRISON, PITCHFORD, and McNEILL, JJ., concur.

(79 Okl. 120)

**GRECO v. KOOL KOLA CO.** (No. 11435.)

(Supreme Court of Oklahoma. June 29, 1920.  
Rehearing Denied Aug. 31, 1920.)

*(Syllabus by the Court.)*

1. Appeal and error  $\S$  564(4)—Where case-made is not served in time, court will dismiss.

Where a case-made shows that it was not made and served within the time provided by law or within an extension of this time through a valid order of the trial court or judge, this court is without jurisdiction, and the appeal will be dismissed.

2. Appeal and error  $\S$  564(4)—Where case-made void, and errors not reviewable on transcript, appeal dismissed.

Where a case-made is not served until the expiration of the time made by a valid order of the court has expired, it is void; and, where the proceeding in error presents no errors that can be reviewed upon a transcript of the record, the proceeding will be dismissed.

Error from District Court, Oklahoma County; Hal Johnson, Judge.

Action by Joe S. Greco against the Kool Kola Company. Judgment for defendant, and plaintiff brings error. Dismissed.

Gustave A. Erixon and John J. Carney, both of Oklahoma City, for plaintiff in error.

H. F. Tripp and Ledbetter, Stuart, Bell & Ledbetter, all of Oklahoma City, for defendant in error.

KANE, J. This cause comes on to be heard upon the motion to dismiss, filed by defendant in error upon the ground that the case-made was not served within 15 days after judgment, or within the extension of time granted by a lawful order of the trial court.

The record discloses that judgment herein was rendered on November 29, 1919, and that on the same date a motion for new trial was overruled by the court, and plaintiff in error granted an extension of time of 90 days from said date in which to make and serve a case-made, and defendant in error 10 days thereafter in which to suggest amendments; said case-made to be settled upon 5 days' no-

tice in writing by either party. Thereafter, on February 25, 1920, the following order was entered:

"Motion for new trial overruled. Plaintiff excepts. Notice of appeal given in open court. 90--10--5 days to make and serve case-made."

No additional motion for new trial had been filed, and no reason appears why the second order was made.

Defendant in error contends that the time to make and serve a case-made on appeal expired February 27, 1920, 90 days from November 29, 1919, and that the case-made filed herein and served on defendant in error on May 11, 1920, is void and of no effect because not served within the extension of time granted by order of the court. Section 5242, Revised Laws, 1910, as amended by section 1, c. 218, Session Laws 1917, provides that a case-made shall be served upon the opposite party or his attorney within 15 days after judgment or order is rendered; and section 5244, Revised Laws 1910, provides that an extension of time to make and serve case-made may be granted upon good cause shown. Time to make and serve a case-made can only be extended by the court or judge upon good cause shown, and not otherwise. *Pappe v. American Fire Insurance Co.*, 8 Okl. 97, 99, 56 Pac. 860.

It is the duty of the party appealing to prepare the case-made within the time allowed by law or the extension granted by the trial court; and, where more time than that allowed by the first order of the court is needed, it is the duty of such party to make a showing of cause to the trial court or judge, and secure further extension of time. The order of the trial court herein of February 25, 1920, does not purport to be an order extending the time for making case-made. It purports to do what has already been done by the order of November 29, 1919, and is therefore, in the absence of a showing of the invalidity of the first order, a nullity.

There has been no second motion for new trial filed, and no reason appears of record, and none has been shown by counsel for plaintiff in error why the order of February 25, 1920, was made. It therefore appears to have been done by inadvertence. It is insufficient to relieve plaintiff in error of his duty to secure an extension of time in which to make case-made upon a showing of cause.

[1] The case-made not having been served within the time provided by law, or within an extension of the time granted by any valid order of the trial court, this court is without jurisdiction, and the appeal should be dismissed. *Colter et al. v. Martin et al.*, 60 Okl. 181, 159 Pac. 853.

[2] Where a case-made is not served until the expiration of the time allowed by a valid order of the court has expired, it is void; and, where the proceeding in error presents



no errors that can be reviewed upon a transcript of the record, the proceeding will be dismissed. *Midland Savings & Loan Co. v. Miller et al.*, 53 Okl. 149, 155 Pac. 864.

For the reasons stated, the proceeding in error herein is dismissed.

HARRISON, V. C. J., and PITCHFORD, JOHNSON, McNEILL, and RAMSEY, JJ., concur.

(79 Okl. 141)

WOOTEN v. LACKEY et al. (No. 10744.)

(Supreme Court of Oklahoma. June 8, 1920.  
Rehearing Denied Sept. 7, 1920.)

(Syllabus by the Court.)

1. Appeal and error ⇨1009(4)—Judgment on findings in equity case not disturbed, unless clearly against evidence.

In an equity proceeding the judgment and findings of the trial court will not be disturbed, unless clearly against the weight of the evidence.

2. Mines and minerals ⇨78(7)—Evidence sufficient to sustain judgment cancelling oil and gas lease.

Record examined, and held, that the judgment is sufficiently supported by the evidence.

Error from District Court, Caddo County; Will Linn, Judge.

Action by Wesley Wooten against Bert Lackey and others for the cancellation of an oil and gas lease. Judgment for defendants, and plaintiff brings error. Affirmed.

Morris & Jameson, of Anadarko, for plaintiff in error.

Bond, Melton & Melton, of Chickasha, and M. G. Melster, of Oklahoma City, for defendants in error.

RAINEY, C. J. The plaintiff in error, Wesley Wooten, filed this action in the district court of Caddo county, Okl., on January 17, 1917, to cancel an oil and gas lease upon 80 acres of land which he, as lessor, executed to one Bert Lackey, as lessee, on January 6, 1916; the lease being subsequently assigned to the persons who were made defendants to the action. The lease provided for a term of five years, or as long thereafter as oil or gas was found in paying quantities and further provided, in case no well be commenced within one year from the date of the lease, the lessee to pay \$80 annually thereafter, and to forfeit the lease in default of the payment. The lease contained the following provision:

"Second party agrees that a test well will be drilled in the vicinity of Cement to a depth of 3,000 feet if oil and gas is not found in paying quantities at a lesser depth, said well to be completed within one year."

Among other grounds for cancellation, plaintiff alleged that the well which lessee agreed to drill in pursuance to the provision quoted was not drilled to a depth of 3,000 feet, nor was oil or gas found in paying quantities in said well, nor the well completed within the year. The defendants in their answer alleged a full compliance with the terms of the lease, and further alleged that the test well drilled in pursuance to such provision in the lease was completed within one year and produced oil in paying quantities. Upon the issues thus joined the case was tried to the court, who, after hearing all the evidence held that the terms of the lease had been fully complied with by the defendants, and refused to cancel it. From this judgment the plaintiff appealed, and under his assignments of error asserts the following propositions: (1) The original test well provided for in the lease within the vicinity of the land of plaintiff did not produce oil in paying quantities; and (2) the test well was not completed within the year after January 6, 1916.

[1, 2] The record shows that the original lessee procured this lease, together with others in the same community, agreeing to drill or procure the drilling of a test well within the vicinity of Cement, Okl. The Keechi Oil & Gas Company, started the drilling of the test well, in pursuance of this understanding, on the farm of Emily Kunsemuller, and later made a contract with the Oklahoma Star Oil Company to complete the well. On or about the 2d day of December, 1916, at a depth or about 1,500 feet, an oil sand was struck, which gave evidence of oil and gas in considerable quantities. The driller, C. W. Duncan, appearing as a witness for the plaintiff on the trial, testified on cross-examination that at the time of striking the sand it appeared to be a good well, and he thought it would make 200 barrels of oil per day. At first the well flowed, and was pumped for some time thereafter, producing oil, however, only in small quantities. The owners of the well were trying at all times to increase its production, but were having continuous trouble with the machinery, pump and other equipment. Witnesses testified to the amount of oil the well produced while being pumped, from the time it was drilled in until the well was sold to one Williams, who, on encountering salt water, abandoned it and drilled another well within 50 feet.

On January 5, 1917, the defendants herein, as the assignees of the original lessee, tendered their annual rental, which the lessor refused, and the defendants thereupon deposited the money in the bank designated in the lease as the depository, to the credit of the lessor. The agreement to drill the test well was without question the main consideration for the execution and delivery of

the lease, and cancellation of the same is sought by plaintiff because, as he alleges, this provision has not been complied with. It was not agreed by the parties that the test well should be drilled on the lands of plaintiff; the only benefit, therefore, which could accrue to him by reason of this provision, and for which evidently the provision was inserted, was a test of the territory for oil and gas, and if oil were found in sufficient quantities it would lead to a further development of the territory. The evidence shows that the finding of oil in the test well accomplished this purpose, for a number of wells were drilled in the vicinity almost immediately thereafter, and large sums of money were expended in such development by other companies and persons.

The assignments urged by counsel raise the question whether the judgment of the court is sustained by the evidence. The rule is well established that in actions of purely equitable cognizance the Supreme Court will not disturb the findings of the trial court, unless the same is clearly against the weight of the evidence. *Winemiller v. Page*, 75 Okl. 278, 183 Pac. 501; *Prentice v. Freeman*, 76 Okl. 260, 185 Pac. 87; *Benn v. Trobert*, 76 Okl. 184, 184 Pac. 595; *Miller v. Howard*, 76 Okl. 237, 184 Pac. 773; *Haynes v. Gaines*, 76 Okl. 268, 185 Pac. 74; *Blackwell Oil & Gas Co. v. Whitesides*, 174 Pac. 573; *Schock et al. v. Fish*, 45 Okl. 12, 144 Pac. 584; *Crump v. Lanham*, 168 Pac. 43. It will serve no useful purpose here to review the evidence, to show that the same is sufficient to support the judgment and finding of the trial court in refusing to cancel the lease here involved. It is sufficient to say that, after a careful examination of the record, although the evidence is conflicting, we are unable to say with any degree of certainty that the judgment is clearly against the weight of the evidence; but under all the facts it appears to us that it would be unjust and inequitable to cancel this lease.

The judgment of the trial court is therefore affirmed.

HARRISON, KANE, PITCHFORD, JOHNSON, and McNEILL, JJ., concur.

(79 Okl. 152)

RATLIFF et al. v. STATE ex rel. WOODS, Co. Atty. (No. 11254.)

(Supreme Court of Oklahoma. Aug. 10, 1920. Rehearing Denied Sept. 7, 1920.)

(Syllabus by the Court.)

1. Schools and school districts §38 — That voters had actual notice of and participated in election, though not duly notified, was complete defense.

In a quo warranto proceeding on behalf of the state of Oklahoma against the officers of

a consolidated school district to declare the organization of a school district illegal and void, where it is stipulated the county superintendent failed to mail notice to the women voters of the district, and the defendants offered to prove that all of the women voters in said district had actual notice and knowledge of the election and participated therein, and the court sustained an objection to said evidence, *held* error; that said evidence was a complete defense.

2. Elections §45—Though notice not given, election will not be held void, where electors had actual notice.

Where a special election is assailed on the ground of lack of compliance with all of the statutory requirements in reference to notice, but there is no averment or showing that the electors did not have actual notice or knowledge of the election, and failed to participate therein by reason thereof, the same will not be held void on this account.

3. Schools and school districts §38—In election to consolidate districts for white children, negro voters not qualified.

In an election for consolidating certain school districts into a consolidated district to be used for the benefit of the white children, the negro voters were not qualified electors to participate in said election by reason of section 7899, Revised Laws 1910.

Appeal from District Court, McClain County; F. B. Swank, Judge.

Proceeding in the nature of a quo warranto by the State of Oklahoma, on the relation of W. H. Woods, County Attorney of McClain County, Okla., against J. A. Ratliff and others. Judgment for relator, and defendants appeal. Reversed and remanded, with directions to grant plaintiffs in error a new trial.

Shartel, Dudley & Shartel, of Oklahoma City, for plaintiffs in error.

McMillan & Gresham and Williams & Luttrell, all of Norman, for defendant in error.

McNEILL, J. This was a proceeding in the nature of a quo warranto, brought by the state of Oklahoma, on the relation of W. H. Wood, county attorney of McClain county, against J. A. Ratliff, O. A. Madden, and W. A. Harding, to declare the organization of consolidated school district of Cole null and void. The petition alleged the organization of the district was illegal for several reasons. The material allegations are contained in paragraph 10 of the petition, which alleged that certain citizens of Ross district No. 6, which is embraced in the consolidated district, did not receive any notice of the election, and that none of the women received any notice, and that none of the negro citizens living in Ross district received any notice. To this petition, the defendants filed an answer, which was a general denial, and pleaded the fact that the district had been legally organized, and they were the duly elected officers of

said consolidated school district. Upon the trial of the case to the court certain facts were stipulated: First, it was stipulated that there was no newspaper published within said district; second, it was agreed that the notices required to be posted in each district, were posted as required by law; third, it was agreed that notice was mailed by the county superintendent of the special election to the list of voters as shown by the certified list of taxpayers furnished by the clerk of the several school districts involved, and also as shown by the school census for each district, and where the school census duplicated the list of taxpayers the superintendent of schools only sent notice to one of them. It was further agreed that in using the census card and list of taxpayers no notice was sent to the wife of any voter, except where it might appear that her name was on the certified list as a taxpayer or on the census enumeration, and that no notice was mailed to any negro voter in any of the several districts. After these facts were agreed upon, the plaintiff moved for judgment on the pleadings and the stipulated facts, and the defendants then made the following offer:

"In connection with this agreement which we made in order to expedite matters, the defendants will offer proof before the case is closed that the women—all the women—participated in this election and voted and had knowledge of the election"

—and further offered to prove as follows:

"We now offer to show that the women voters of the district who did not receive notice by mail each voted and participated in the election, and that the larger majority of them voted favorably to the consolidation of the districts, and that is true as to each of the four districts, and that the vote in the general election stood 117 for the consolidation and 43 against.

"We also offer the vote from district 46 and from districts 43, 27, and 28, showing the names of the women that voted in this election and participated in it."

The court stated as follows:

"I hold that the election could not be made valid. It don't make any difference what happened after they failed to give this notice. I would just as soon state that in there as not."

[1] The court refused to hear or consider any evidence except the stipulation, but held the failure of the county superintendent to mail written notice to all the voters in the different districts was jurisdictional, and when it was admitted no notice was mailed to the women except those whose names appeared as taxpayers, and on the census enumeration, the proceedings were void, although all of them might have voted. With the record disclosing the above facts the court rendered judgment for the plaintiff and against the defendants, and held the organization of said consolidated school district illegal. From

said judgment the defendants below have appealed.

The question presented as stated by defendants in error in their brief is as follows:

"The statute as to notice is directory and not mandatory, and a substantial compliance therewith renders the election valid, in the absence of a showing that a sufficient number of voters were not notified of the election and did not actually participate therein to have changed the result."

The law applicable to the holding of a special election for the purpose of consolidating school districts is regulated by chapter 186, Session Laws 1919, which provides that the following notice shall be given:

"Notices of said special meeting shall be posted in at least five public places in each of the districts or parts of districts, proposed to be consolidated, at least ten days prior to date of said meeting, and also by publication, for at least two consecutive weeks in a weekly newspaper, if same be published in the school district, and in addition thereto, notices of said special meeting shall be mailed by such county superintendent to each voter residing in the districts proposed to be consolidated."

It is admitted that the notices to be posted as provided by statute were posted. The defendants offered to prove that all the persons in the district had actual notice of the election, and irrespective of the fact that the county superintendent had not mailed notice to the women, all the voters in the district, including the women who did not receive notice from the county superintendent, participated in the election. This court in a long line of cases has held that the notice in special elections is directory and not mandatory, and that a substantial compliance renders the election valid, and in the absence of allegations and proof that a sufficient number of voters were not notified of the election and did not actually participate therein to have changed the result, the election would not be held void. The rule was first announced in the case of *Town of Grove v. Haskell*, 24 Okl. 707, 104 Pac. 56, stated as follows:

"The vital and essential question in such cases is, Did the want of notice or knowledge result in depriving a sufficient number of the electors of the opportunity to exercise their franchise as to change the result of the election? If not, then the will of the electors, as expressed, should be sustained."

The fourth syllabus is as follows:

"Elections are the ultimate expression of the sovereign will. When fairly expressed—that is, free from taint of fraud or charge of improper conduct—it becomes the duty of courts to sustain them, where it can be done by a liberal construction of the laws relating thereto, rather than defeat them by requiring a rigid conformity to technical statutory directions, which do not affect the substantial rights of the elec-

tors. All reasonable presumptions as to their regularity will be indulged, and the penalty of disfranchisement will not be visited upon a qualified voter where he is not at fault, except in response to a plain mandatory requirement of the statute."

[2] In the case of *McCarty v. Cain*, 27 Okl. 82, 110 Pac. 653, this court stated as follows:

"Where a special election is assailed on the ground of lack of compliance with all of the statutory requirements in reference to notice, but there is no averment or showing that the electors did not have actual notice or knowledge of the election and failed to participate therein by reason thereof, the same will not be held void on this account."

The case of *Hughes v. City of Sapulpa*, 75 Okl. 149, 182 Pac. 511, Justice Kane, referring to the case of *Grove v. Haskell*, stated as follows:

"Elections are not held in order to give opportunities to post notices and to conform to other technical details and requirements of law, but notices and other legal requirements are provided in order that elections may be lawfully and fairly held, and that people entitled to participate therein may have notice thereof. The end to be accomplished in every case, not the means, is the chief purpose of the law."

Following this rule, it was incumbent upon the petitioner to prove, not only that the county superintendent had not only failed to notify the women, but that the women did not have actual notice, and did not participate in the election, and there was sufficient voters who did not participate in the election to change the result of said election. When the plaintiffs in error offered to prove that the women did have actual notice, and they participated in the election, they were offering to prove a complete defense to the allegations of the petition, and when the court refused to permit said evidence the court committed error.

The defendants in error, however, contended that under the pleadings the evidence was incompetent, as the defendants failed to plead a waiver of notice. We think this contention cannot be sustained, not only were the facts offered to prove by the plaintiff in error material and a complete defense, but were facts that were necessary to be proven by the petitioner. It was necessary for the petitioner to prove, not only that the county superintendent did not mail the notice to all the voters, but that the voters did not have actual notice, and did not participate in the election by reason thereof, and there was sufficient number who did not receive notice, and failed to vote by reason thereof to have changed the result of the election.

[3] It was next contended that the election was illegal for the reason that no notice was mailed to the negro voters, but in this we

think there was no merit. Section 7899, Revised Laws 1910, provides:

" \* \* \* One race shall not participate in any election pertaining to the schools of the other race."

This being a school election which pertained simply to the schools of the white race, the negro race were not interested therein, nor were they qualified voters, or entitled to notice.

For the reasons stated, the judgment of the district court is reversed and remanded, with instructions to grant the plaintiffs in error a new trial, and take such other proceedings not inconsistent with the views herein expressed.

RAINEY, C. J., and HARRISON, KANE, PITCHFORD, and JOHNSON, JJ., concur.

(79 Okl. 132)

**WILSON et al. v. GRANT.** (No. 9465.)

(Supreme Court of Oklahoma. Jan. 27, 1920.  
Rehearing Denied Sept. 7, 1920.)

(Syllabus by the Court.)

Process  $\Rightarrow$  31.—Summons for nonresident defendant, addressed to sheriff of his county and served, is insufficient.

The requirement of section 4727 of the Revised Laws of 1910 that a summons for a nonresident defendant be addressed to him is not satisfied by it being addressed to the sheriff of the county in which he resides, and served on him.

Error from District Court, Tulsa County; Conn Linn, Judge.

Action by Louisa Grant against E. G. Wilson and others. Defendants' motion to quash the summons denied, and judgment for plaintiff, and defendants bring error. Reversed and remanded, with direction to set aside the order overruling the motion to quash the summons and to sustain the motion and to set aside the judgment rendered.

E. G. Wilson, of Tulsa, and Fred W. Casner, of Kansas City, Mo., for plaintiffs in error.

William B. Moore, of Muskogee, and West, Sherman, Davidson & Moore, of Tulsa, for defendant in error.

HIGGINS, J. In this case personal service was had upon nonresident defendants without the state of Oklahoma. The summons issued was directed to the sheriff of the county in which the nonresident defendants resided, commanding him to notify them of the suit. Section 4727 of the statutes of Oklahoma of 1910 required the summons issued to be directed to the defendants. The sum-

mons was served on them without the state of Oklahoma by the sheriff of their county, and they specially appeared and moved to quash the summons, for the reason that it was directed to the sheriff and not to them.

In the action of First State Bank of Addington v. Latimer, 48 Okl. 104, 149 Pac. 1099, a judgment therein was relied upon wherein personal service on the judgment debtor was had without the state. There was no affidavit filed prior to the issuance of the summons. It was directed, as in this case, to the sheriff, and not to the defendant, and the service was made by a deputy sheriff, and not by the sheriff as the law at that time required. This court held that the judgment was void on account of these irregularities.

Texas appears to have a statute similar to ours, requiring that a summons to be served out of the state must be directed to the defendant to be served. In Porter v. Hill County, 83 S. W. 383, the summons was issued, as in this case, commanding the sheriff of the county in which the nonresident defendant resided to notify him of the suit. The court held that—

"The requirement of Rev. St. art. 1230, that citation for a nonresident defendant be addressed to him is not satisfied by its being addressed to the sheriff and served by him."

In Romig v. Gillett, 10 Okl. 186, 62 Pac. 805, it is held:

"Where a party seeks to bring a defendant into court upon service by publication under the Code, he must strictly comply with the requirements of the statute, and unless this be done the judgment will be void for want of jurisdiction of the person of the defendant."

In 32 Cyc. 483:

"The means and methods provided by statute for obtaining service by publication must be strictly followed, since the whole proceeding is in derogation of the common law."

In view of the holding in First State Bank of Addington v. Latimer, supra, and the universal holding that the statute must be strictly followed, we are forced to the conclusion that in this case the summons served on the nonresident defendants and the judgment rendered thereon was void. The summons being void, then an attempt to breathe life therein by amendment would be futile. There are many other assignments of error; but, in view of the fact that we hold that the court did not have jurisdiction of the nonresident defendants, a discussion of the other assignments of error will not be necessary. In this case personal service was had upon E. G. Wilson, the first grantee in the deed, and also a tenant on the farm. The first grantee had conveyed his interest to the nonresident defendants. We believe

the judgment should be reversed as to all, and it is hereby reversed and remanded as to all the defendants, and the trial court is directed to set aside its order overruling the motion to quash the summons on the nonresident defendants, and to sustain the motion and to set aside the judgment rendered.

Reversed and remanded.

All the Justices concur.

(17 Okl. Cr. 426)

REED et al. v. STATE. (No. A-3417).\*

(Criminal Court of Appeals of Oklahoma.  
March 31, 1920. On Rehearing,  
Sept. 15, 1920.)

(Syllabus by the Court.)

1. Indictment and Information  $\S$  71 — Information must be concise and certain.

An information is sufficient if it charges an offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.

2. Criminal law  $\S$  622(1) — Severance in prosecution for gambling games granted for good cause only.

A severance in a prosecution for unlawfully conducting gambling games is not a matter of right on the part of a defendant, and may only be granted for good cause shown. Section 12, c. 23, Session Laws 1916.

3. Criminal law  $\S$  1159(2) — Conviction on uncontradicted testimony will not be reversed.

Where the uncontradicted testimony sustains a conviction, the judgment will not be reversed on appeal.

On Rehearing.

(Additional Syllabus by Editorial Staff.)

4. Gaming  $\S$  96(1) — In prosecution for opening a gambling game, the elements of offense must be proven.

In a prosecution for the opening and conducting of prohibited gambling games, the particular facts constituting the offense must be proved.

5. Criminal law  $\S$  1183 — For admission of evidence possibly prejudicial as to assessment of punishment, sentence would be reduced to minimum.

In a prosecution for opening and conducting prohibited gambling games, wherein the state's testimony was uncontradicted, and no defense was made, any error in the admission of evidence that the general reputation of the house where the games were alleged to have been opened and conducted was that of a gambling place could have prejudiced defendant only in the matter of the assessment of the punish-

\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

\*Supplemental petition for rehearing granted and judgment reversed as to defendant Ford. See 192 Pac. 426.

ment by the jury, for which reason the sentence would be modified and reduced to impose the minimum punishment fixed by the statute.

Appeal from District Court, Carter County; W. F. Freeman, Judge.

Ed Reed, J. M. Barron, and Tom Ford were convicted of conducting prohibited gambling games, and they appeal. Modified and affirmed.

Reversed on rehearing as to defendant Ford. See 192 Pac. 426.

W. F. Bowman, of Ardmore, for plaintiffs in error.

W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiffs in error, Ed Reed, J. M. Barron, and Tom Ford, were tried and convicted, and the punishment of each assessed at imprisonment in the penitentiary for two years and a fine of \$500, on an information which, after alleging venue and time, charges:

"They, the said Ed Reed, J. M. Barron, and Tom Ford, did then and there unlawfully, willfully, feloniously, open, conduct, and cause to be opened and conducted in a certain upper story of a certain brick building, situated on lot 5, in block 328, in the city of Ardmore, Carter county, Okla., and by them occupied and of which they had control, and did then and there permit and caused to be set up and used for the purpose of gambling certain tables, to wit, poker and crap tables, and divers other gambling devices at which banking and percentage games were played with cards, for chips, money, credits, and other representatives of value, and were conducted by the said Ed Reed, J. M. Barron, Tom Ford, and divers other persons to your informant unknown, contrary to," etc.

From the judgment rendered on the verdict an appeal was taken by filing in this court on June 8, 1918, a petition in error with case-made. There was a demurrer to the information that was overruled, and this ruling is the first error assigned.

The information charges a violation of section 1, c. 26, Session Laws 1916, which provides that—

"Every person who opens, or causes to be opened, or who conducts, whether for hire or not, or carries on either poker, roulette, craps or any banking or percentage, or any gambling game played with dice, cards or any device, for money, checks, credits, or any representatives of value, or who either as owner or employé, whether for hire or not, deals for those engaged in any such game, shall be guilty of a felony, and upon conviction thereof, shall be punished by a fine of not less than five hundred dollars, nor more than two thousand dollars, and by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years."

[1] An information is sufficient if it charges an offense in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, and with

such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case. Code Crim. Proc. § 5746, Rev. Laws.

No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in the matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Code Crim. Proc. § 5747, Rev. Laws.

Tested by the above rules the information in this case is sufficient, and the court did not err in overruling the demurrer thereof.

[2] There was a demand for a severance that was denied, and this ruling is the second error assigned.

Section 12, c. 26, Session Laws 1916, provides:

"Persons jointly charged with the violation of any of the provisions of this act shall be tried together, provided the court for good cause shown may grant a severance."

It thus appears that a severance in a prosecution for a violation of any of the provisions of chapter 26, Session Laws 1916, is not a matter of right on the part of the defendants, but will only be granted for good cause shown. In this case the record shows that the defendants merely requested the court that a severance be granted, and no showing was made why the same should be granted.

[3] The overruling of the defendants' motion for an instructed verdict is the next error assigned. The undisputed facts show that the defendant Reed had a lease and paid the rent to the owner of the place described in the information, and on the date alleged Deputy Sheriff Brooks, accompanied by Fred Pyeatt, raided the place. When the officer went up the stairs to raid the place the defendant Barron opened the door to allow a man to pass out, and as the officer stepped in he tried to push him back and said, "Don't go in there." The officer passed in and found the defendant Ford standing in the second door. They passed in and found seven or eight men sitting at the tables gambling. The defendant Reed was sitting behind one of the tables, on which were cards, dice, money, and chips. The officer picked up from the tables about \$62. The defendants all asked the officer to let them down as light as he could. The defendants did not offer any evidence.

The principal question in the case is whether the evidence is sufficient to support the verdict, and we are of the opinion that it is, and for this reason the court did not err in refusing to advise the jury to acquit the defendants. On the whole case we find nothing in the record indicating that the defendants did not have a fair and impartial trial.

The judgments of the lower court are therefore affirmed.

ARMSTRONG and MATSON, JJ., concur.

On Rehearing.

DOYLE, P. J. [4, 5] We have carefully reviewed the record in the light of the petition for rehearing. It appears that over the defendants' objections the court admitted evidence of the general reputation of the house where the games were alleged to have been opened and conducted to be that of a gambling place. If the prosecution had been for keeping and maintaining a gambling house, this evidence might have been competent. However, where the offense charged is the opening and conducting of prohibited gambling games, the particular facts constituting the offense must be proved, and that was done in this case. In view of the fact that the testimony for the state was uncontradicted, no defense having been made, the only possible prejudice to the defendants that could arise was in the assessment of the punishment by the jury, and for this reason the judgment and sentence herein that each of the defendants be imprisoned in the penitentiary for the term of two years and pay a fine of \$500 will be modified, to the extent that each of the defendants shall be imprisoned for the term of one year and pay a fine of \$500. This is the minimum punishment fixed by the statute.

As thus modified, the judgment will be affirmed.

ARMSTRONG and MATSON, JJ., concur.

(17 Okl. Cr. 627)

STATE v. CHILDERS. (No. A-3527.)

(Criminal Court of Appeals of Oklahoma.  
Sept. 3, 1920.)

(Syllabus by the Court.)

Criminal law §1079—Where neither statutory notice nor process in error is served, Criminal Court of Appeals acquires no jurisdiction.

Before this court can acquire jurisdiction of an appeal, either the notices required by section 5992, Rev. Laws 1910, must be served in the manner and upon the persons therein designated, or else a summons in error must be issued and served, or its issuance and service waived, as provided in the Code of Civil Procedure. Where neither of these methods are complied with, this court does not acquire jurisdiction of the appeal, and the same will be dismissed.

Appeal from District Court, Love County; Thomas W. Champion, Judge.

Dave Childers was charged by information with the crime of perjury. From a judgment setting aside the information, the State

takes a pretended appeal. Pretended appeal dismissed.

T. B. Wilkins, Co. Atty., of Marietta, for the State.

Graham & Logsdon, of Marietta, for defendant in error.

PER CURIAM. This is a pretended appeal by the state from a judgment for the defendant quashing and setting aside a certain information filed in the district court of Love county, Okl., in which the said defendant, Dave Childers, was charged with the crime of perjury, alleged to have been committed before a certain court of inquiry held in said county.

Section 5990, Revised Laws 1910, permits appeals to be taken by the state from judgments for the defendant, quashing or setting aside an indictment or information. Section 5992, Id., is as follows:

"An appeal is taken by the service of a notice upon the clerk of the court where the judgment was entered, stating that the appellant appeals from the judgment. If taken by the defendant, a similar notice must be served upon the prosecuting attorney. If taken by the state, a similar notice must be served upon the defendant, if he can be found in the county; if not there, by posting up a notice three weeks in the office of the clerk of the district court."

Section 5997, Id., provides:

"Instead of the appeal hereinbefore provided for any party desiring to appeal to the Criminal Court of Appeals in any criminal case may proceed by case-made and petition in error in all respects and with all the rights, as provided in 'Procedure, Civil,' and the summons in error shall be served upon the Attorney General, unless the same is waived as in other cases. Instead of the case-made plaintiff in error may attach to his petition in error a transcript of the proceedings of record in the trial court."

Section 5238, Id., Procedure Civil provides:

"The proceedings to obtain such reversal, vacation or modification, shall be by petition in error, filed in the Supreme Court, setting forth the errors complained of; and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record, in the original case, shall be sufficient. The summons shall notify the adverse party that a petition in error has been filed in a certain case, naming it, and shall be made returnable on or before the first day of the term of the court, if issued in vacation, ten days before the commencement of the term. If issued in term time, or within ten days of the first day of the term, it shall be returnable on a day therein named. If the last publication or service of the summons shall be made ten days before the end of term, the case shall stand for hearing at that time."

Section 5239, Id., further provides:

"The summons mentioned in the last section shall, upon the written praecipe of the plaintiff in error or his attorney, be issued by the clerk of the court in which the petition is filed, to the sheriff of any county (in which the defendant in error or his attorney of record may be; and if the writ issue to a county) other than that in which the petition is filed, the sheriff thereof may return the same by mail to the clerk, and shall be entitled to the same fees as if the same had been returnable to the district court of the county in which such officer resides. The defendant in error, or his attorney, may waive, in writing, the issuing or service of the summons."

Counsel for the state attempted to take this appeal by service of a notice of appeal upon the court clerk of Love county, and also by service of a similar notice upon counsel for the defendant. No notice was served upon the defendant himself, nor is there any proof that the defendant could not be found within the county, and that in his absence a notice was posted for three weeks in the office of the court clerk, as required by section 5992, supra.

Further, no attempt was made to perfect this appeal by the service of a summons in error, as provided in Procedure Civil, sections 5238 and 5239, supra, nor is there any waiver of the issuance and service of such summons in error by counsel representing defendant.

Where the appeal is taken by the service of notices, as provided in section 5992, the statute must be strictly complied with by the service of a written notice, where the appeal is taken by the state, both upon the clerk of the court where the judgment was entered and a similar notice upon the defendant, if he can be found within the county, and if the defendant cannot be found within the county, then it is incumbent upon the prosecuting attorney to post a written notice of appeal for three weeks in the office of the court clerk. In this case, the state attempted to take the appeal solely by serving the notices as required by section 5992, supra, and failed to either serve a notice on the defendant or to show that he could not be found in the county, and thereafter failed to post a notice in the manner above set out. Before this court can acquire jurisdiction of an appeal, either the notices required by section 5992, supra, must be served in the manner and upon the persons therein designated, or else a summons in error must be issued and served, or its issuance and service waived, as provided in the Code of Civil Procedure. Neither of these methods were complied with by counsel representing the state. It is apparent, therefore, that this court has never acquired jurisdiction of this

appeal, and that the same must be dismissed. For reasons stated, the pretended appeal is dismissed.

(17 Okl. Cr. 604)

DAVIS v. STATE. (No. A-3485.)

(Criminal Court of Appeals of Oklahoma.  
Aug. 28, 1920.)

(Syllabus by the Court.)

1. Rape  $\S$ 1—Elements of "rape in the first degree" stated.

Rape in the first degree may be committed upon a female of any age, when accomplished by force and violence overcoming her resistance, or by means of threats of immediate and great bodily harm, accompanied by apparent power of execution.

2. Rape  $\S$ 20 — Indictment held insufficient to charge rape in the first degree.

An information for rape alleged that the defendant did make an assault upon and ravish and have sexual intercourse with a certain female under the age of 18 years, of previous chaste character, and not the wife of the defendant, and against the will and without the consent of said female. Held, that the information is insufficient to charge rape in the first degree as defined by the fourth subdivision of section 2414, Rev. Laws 1910.

3. Rape  $\S$ 13—Elements constituting "rape in the second degree."

Carnal knowledge of a female over the age of 16 years and under the age of 18, of previous chaste and virtuous character, other than the wife of defendant, whether accomplished with or without the consent of such female, is rape in the second degree.

4. Rape  $\S$ 23—Information not alleging female was "over the age of sixteen years" not fatally defective.

An information alleging that the defendant did make an assault upon, and ravish and have sexual intercourse with, a certain female under the age of 18 years, of previous chaste character, and not the wife of defendant, without the consent and against the will of said female, was not fatally defective for failure to allege that the female was "over the age of 16 years."

5. Rape  $\S$ 4—Previous character of prosecutrix is a material element.

Under the statute (second subdivision of section 2414, Rev. Laws) the previous chaste and virtuous character of the prosecutrix is a material element of the offense, and must be alleged, and the state must prove in the first instance that she was of previous chaste and virtuous character.

6. Rape  $\S$ 36—State must prove that prosecutrix was of previous chaste character.

In a prosecution for statutory rape, where the previous chastity of the female is an essential element of the offense as defined by the statute, it cannot be said that the law presumes



that the female was not of chaste character when the act was committed, although such chaste character must be alleged, and the burden is on the state to prove beyond a reasonable doubt that she was of previous chaste and virtuous character.

**7. Criminal law §1172(2)—instruction as to presumption of previous chaste character harmless where that was uncontested.**

In a prosecution for rape as defined by second subdivision of section 2414, Rev. Laws, an instruction that every female is presumed to be of previous chaste character until the contrary is shown, was harmless error, where the proof of the prosecutrix's previous chaste character was not contested.

**8. Criminal law §333, 572—Burden of proof not shifted by alibi; reasonable doubt of presence at place of crime entitles accused to acquittal.**

The burden of proof is not shifted by the defense of an alibi, and the defendant is entitled to an acquittal if the evidence raises a reasonable doubt of his presence at the time and place where the crime was committed.

**9. Criminal law §778(5) — instruction to acquit if defendant established an alibi was erroneous.**

An instruction to find the defendant not guilty if the jury believe from the evidence that the defendant was not present when the crime was committed, if it was committed, is erroneous.

Appeal from District Court, Roger Mills County; T. P. Clay, Judge.

A. B. C. Davis was convicted of rape in the second degree, and he appeals. Reversed.

John R. Guyer and Burns & Toney, all of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of conviction for rape in the second degree and sentence in accordance with the verdict for the term of five years in the penitentiary. The information charged that—

"within the county of Roger Mills, state of Oklahoma, on the 25th day of June, 1916, one A. B. C. Davis, late of the county aforesaid, did then and there unlawfully, intentionally, feloniously, make an assault in and upon Iva Nettles, and ravish and have sexual intercourse with the said Iva Nettles, a female under the age of eighteen years, of previous chaste character, and not the wife of the said A. B. C. Davis, without the consent of the said Iva Nettles, and against the will of the said Iva Nettles, the said Iva Nettles then and there being under the age of 18 years, contrary to and in violation of the statutes in such case made and provided, and against the peace and dignity of the state."

A demurrer was duly interposed on the grounds that more than one offense is charg-

ed in the information, and that the facts stated do not constitute a public offense. When the motion for new trial was overruled, the defendant thereupon moved in arrest of judgment upon the same grounds. The court overruled the demurrer and the motion in arrest of judgment, and these rulings of the court are assigned as error.

[1-4] The first contention of the defendant is that the two offenses, rape in the first degree by means of force and statutory rape, are so mingled and included in one count as to make the information duplicitous.

The section of the Penal Code defining rape reads as follows:

"Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances:

"First. Where the female is under the age of sixteen years.

"Second. Where the female is over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character.

"Third. Where she is incapable through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.

"Fourth. Where she resists but her resistance is overcome by force and violence.

"Fifth. Where she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution.

"Sixth. Where she is prevented from resisting by any intoxicating narcotic, or anesthetic agent, administered by or with the privity of the accused.

"Seventh. Where she is at the time unconscious of the nature of the act and this is known to the accused.

"Eighth. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by artifice, pretence or concealment practiced by the accused, or by the accused in collusion with her husband with intent to induce such belief. And in all cases of collusion between the accused and the husband of the female, to accomplish such act, both the husband and the accused shall be deemed guilty of rape." Section 2414, Rev. Laws.

The sections defining the degrees of rape and the punishment read as follows:

"Rape committed by a male over eighteen years of age upon a female under the age of fourteen years, or incapable through lunacy or unsoundness of mind of giving legal consent; or accomplished with any female by means of force overcoming her resistance, or by means of threats of immediate and great bodily harm, accompanied by apparent power of execution, preventing such resistance, is rape in the first degree. In all other cases rape is of the second degree." Section 2417, Rev. Laws.

"Rape in the first degree is punishable by death or imprisonment in the penitentiary, not less than fifteen years, in the discretion of the

jury, or in case the jury fail or refuse to fix the punishment then the same shall be pronounced by the court." Section 2418, Rev. Laws.

"Rape in the second degree is punishable by imprisonment in the penitentiary not less than one year nor more than fifteen years." Section 2419, Rev. Laws.

The sufficiency of the information must be tested by these provisions of the Penal Code. Rape may be committed upon a female of any age when accomplished by force and violence overcoming her resistance, and an indictment or information for rape, as defined by the fourth subdivision of section 2414, should contain a sufficient allegation that the rape was committed by force and violence overcoming the resistance of the female. The allegation in the information in this case that the defendant did "ravish and have sexual intercourse with the said Iva Nettles, \* \* \* without the consent and against the will of the said Iva Nettles," is insufficient to charge rape in the first degree as defined by the fourth subdivision of section 2414, supra. A charge of rape in the second degree as defined by the second subdivision of section 2414, would be fully sustained by proof of carnal intercourse with a female "over the age of sixteen years and under the age of eighteen, and of previous chaste and virtuous character," and this allegation did not extend, limit, or modify the crime charged, and might have been omitted as mere redundancy.

The defendant also contends that the information was fatally defective in that it did not allege that the female was "over the age of sixteen years."

The information charges that the defendant feloniously did ravish and have sexual intercourse with a certain female under the age of 18 years, of previous chaste and virtuous character, and not the wife of the defendant. Thus it sufficiently negatives the fact that said female was not under the age of 16 years, and must be understood as meaning that she is above that age. *Hast v. Territory*, 5 Okl. Cr. 162, 114 Pac. 261.

A defendant is sufficiently informed of the nature and cause of the accusation against him if the information contains such a description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same offense.

The record shows that when the jury was sworn to try the case the court, on the request of the defendant, required the state to elect whether it would try the defendant on the charge of rape in the first or second degree, and thereupon the state elected to try him on the charge of rape in the second degree.

For the reasons stated, we think the information is not fatally defective, and the de-

murrer thereto and the motion in arrest of judgment were properly overruled.

The other questions raised by the errors assigned require a brief statement of the facts in evidence. It appears that the prosecutrix at the time said crime is alleged to have been committed was in her seventeenth year of age, and would have been 18 on the following 20th of October, and was in her nineteenth year at the time of the trial, in May, 1918. She was living with her folks on a farm about four miles from the town of Durham. The defendant was a practicing physician at Durham, and had been their family physician. The prosecutrix testified that in the afternoon of the date alleged he called at her home, and she and her baby sister were the only persons at home at the time; that her father was working in the field, that her brother was away working in the harvest, and her stepmother was at Durham; that the defendant sat down, and while she was combing her hair he got up and came over where she was, and she told him to go away, and he went and looked out the window towards the field, and she went into the other room and tried to lock the door, but he followed her in before she had time to lock it and said, "I just as well give up;" that she said she would not, and he pushed her over across the bed, and pulled up her clothes and unbuttoned her drawers, and had sexual intercourse with her; that one of his hands was on her throat at the time; that after she got up he asked her if she was going to tell, and she told him she was; that he said he would kill her if she did; that he stayed at the house for about an hour; that she continued friendly relations with the defendant, and he was back at the house nearly every week until Christmas, and on that day he came and took her and her little brother to his home for dinner; that she went with him in his car to go to a neighbor's for milk, and when they were about a mile and a half from his home he stopped the car and pulled up her dress; that she slipped down on the seat, and he was on top of her, when four men in a car passed them and one of the men hallooed; that the defendant at that time did not have intercourse with her; that up to that time she had never told any person that the defendant had intercourse with her; that the only sexual intercourse she ever had with a man was with the defendant at her home, and she did not become pregnant; that the men who passed the car told her father, and when he spoke to her about it she told her father that at that time the defendant only attempted to have sexual intercourse with her, and denied that he had ever had sexual intercourse with her, and then she told her father about the occurrence on June 25th at

their home; that she fixes the date by the entries in their store book.

Three witnesses testified that on Christmas day they were on their way to the Nettle's place, and saw Dr. Davis, the defendant, and the prosecutrix in a car which was stopped by the side of the road; that she was lying down in the seat, and Dr. Davis was on top of her, apparently in the act of having sexual intercourse; that it was about 1 o'clock p. m. when they passed the car; that they informed the father of the prosecutrix what they had observed.

The defendant, as a witness in his own behalf, testified that he had never had intercourse with the prosecutrix, and was never at her home at a time when other adult members of the family were not present. His further testimony tends to prove an alibi. The testimony of several other witnesses proves, or tends to prove, an alibi.

[5-7] The trial court instructed, among other things, as to reasonable doubt and the presumption of innocence, and also gave the following instruction:

"You are instructed that every female is presumed to be of previous chaste and virtuous character until the contrary is shown."

On the question whether the presumption of chastity obtains in a case of this kind, and relieves the state of the necessity of bringing forward, in the first instance, evidence of the previously chaste character of the prosecutrix, the decisions of this court are not in accord.

In the case of *Marshall v. Territory*, 2 Okl. Cr. 136, 101 Pac. 139, it is said:

"Wherever character is an element of the crime—that is, where the statutory definition of the crime involves chastity, wherein the act constituting the offense must have been concerning a female having previous chaste and virtuous character—the law will not presume such character to exist. The burden is upon the state to establish, beyond a reasonable doubt each material allegation in the indictment, and each material element of the crime charged, one of which is that the female was of previous chaste and virtuous character."

In the case of *Diffey v. State*, 10 Okl. Cr. 180, 135 Pac. 942, it is said:

"The law presumes that the female is chaste and virtuous, and this presumption authorizes the jury to assume at the outset that the prosecutrix was chaste and virtuous. If any evidence is introduced tending to show a want of previous chaste and virtuous character, then the state is required to establish the previous chaste and virtuous character of the prosecutrix beyond a reasonable doubt."

In the case of *Butts v. State*, 12 Okl. Cr. 391, 157 Pac. 704, it is said:

"Under the statute the previous chaste character of the prosecutrix in a prosecution for seduction is a material element of the offense, and must be alleged and proved beyond a rea-

sonable doubt, and in this case the court so instructed the jury. The law presumes that every female is chaste, but the presumption in favor of the chastity of the prosecutrix in a seduction case is overcome by the presumption of the innocence of the defendant."

On this question Mr. Bishop says:

"Where the woman's previous chaste character is an element in the offense, and it must be alleged, it must also be passed upon by the jury. But,

"Some courts deem the presumption of her chastity sufficient to establish it until evidence appears to the contrary. Others hold that, since also the defendant is presumed to be innocent, and so the two presumptions are in conflict, some evidence of her chastity must be brought forward in the first instance. This conclusion seems better to accord with the legal analogies and reasons than the other, while yet ordinarily such evidence can in the nature of things be only slight and circumstantial. If the woman is a witness, she may testify to her previous virtue." Bishop on Statutory Crimes, par. 648.

Prof. Wigmore says:

"It is sometimes said that there is a presumption of chastity, or of chaste character. But commonly in such cases the result is really determined by the incidence of the first burden of proof."

In prosecutions for sexual crimes, where the previous chastity of the female is an essential element of the offense as defined by the statute, it cannot be said that the law presumes that the female was not of chaste character when the act was committed, although such chaste character must be alleged, and the burden is on the state to prove beyond a reasonable doubt that the prosecutrix was of previous chaste character.

Under the statute the previous chaste and virtuous character of the prosecutrix in a prosecution for rape, as defined in the second subdivision of section 2414, is a material element of the offense, and must be alleged, and the state must prove in the first instance that she was of previous chaste and virtuous character.

In our opinion this rule is more logical than the rule stated in the case of *Diffey v. State*, supra. Said instruction was therefore erroneous. But upon the record in this case we do not think that the giving of said instruction was prejudicial. The proof of the prosecutrix's previous chaste character was uncontested. If there had been an actual contested issue concerning the prosecutrix's chastity, then there can be no doubt the error would be prejudicial. However, upon the record it clearly appears that the defendant could not have been harmed by the error.

[8, 9] On the question of an alibi the court gave an instruction which reads as follows:

"(19) In this case the defendant interposes as a defense what in law is known as an alibi; that is, if the offense was committed, that the

defendant was not at the place at the time of its commission, and therefore was not and could not have been the person who committed the same. Therefore, if you believe and find from the evidence that the crime of rape in the second degree, or assault with intent to rape, was committed on or about the time alleged in the information as hereinbefore instructed, and you further believe from the evidence that the defendant, A. B. C. Davis, was not present at the time and place when the same was committed, if it was committed, then you will find the defendant not guilty."

The Attorney General concedes that this instruction is erroneous. The defense was largely in the nature of an alibi, as shown by the testimony of several witnesses, including the defendant. The correct rule is that if the evidence of an alibi produces upon the minds of the jury a reasonable doubt of the defendant's presence at the time and place where the alleged crime was committed, it would be sufficient to require an acquittal, and the court should have so instructed the jury. The instruction given shifts the burden of proof, and was therefore prejudicial to the substantial rights of the defendant.

For this error the judgment is reversed.

ARMSTRONG and MATSON, JJ., concur.

(17 Okl. Cr. 587)

ROE v. STATE. (No. A-3242.)

(Criminal Court of Appeals of Oklahoma.  
Aug. 28, 1920.)

(Syllabus by the Court.)

1. Criminal law §48—Test of criminal responsibility under the statute stated.

Under subdivision 4 of section 2094, Rev. Laws 1910, the test of criminal responsibility for committing an act which is declared to be a crime is fixed at the point where the accused has mental capacity to distinguish between right and wrong as applied to the particular act, and to understand the nature and consequences of such act.

2. Criminal law §48—Same responsibility as to insane persons and those temporarily insane, because not having will power to refrain from crime.

For reasons holding refusal to give certain requested instructions on the subject of insanity not to be reversible error in this case, see body of opinion.

3. Criminal law §342—Evidence of motive admissible, where accused denies commission of offense.

Where one of the defenses interposed is that defendant did not commit the crime, evidence tending to establish a motive on the part of the defendant to commit the crime is properly admitted.

4. Witnesses §318 — Where no effort was made to impeach, evidence that nonexpert expressed same opinion as to accused's sanity before the crime was inadmissible.

Where a nonexpert witness is permitted, after proper predicate, to express an opinion that defendant is insane, the fact that such witness expressed the same opinion to the brother of defendant prior to the commission of the alleged crime is immaterial, and properly excluded, where no effort was made to show that the witness had expressed opinions out of court inconsistent with such testimony.

(Additional Syllabus by Editorial Staff.)

5. Criminal law §1037(2)—Error in prejudicial remarks of state's counsel in argument not reviewable, where no request to admonish jury.

A contention that counsel for the state made improper and prejudicial remarks during the closing argument, to which no objection was then made, or any request to admonish the jury not to consider such remarks, where they were not such as are made grounds for reversal by statute, presented no question for consideration.

6. Criminal law §48—"Lunatics" and "insane persons" defined.

The terms "lunatics" and "insane persons," as used in Rev. Laws 1910, § 2094, subd. 4, excepting lunatics, insane persons, and all other persons of unsound mind from criminal responsibility, on proof that at the time of committing the acts charged against them they were incapable of knowing their wrongfulness, refer to those persons totally deprived of the power of reason, and who would not under any circumstances have mental capacity sufficient to know the wrongfulness of the acts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insane; Lunatic.]

Appeal from District Court, Pawnee County; Conn Linn, Judge.

Mary F. Roe was convicted of the crime of murder, and she appeals. Affirmed.

William L. McCann, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Pawnee county, wherein the defendant, Mary F. Roe, was informed against and charged with the murder of her husband, Jesse Roe, on the night of April 25, 1917. The trial resulted in a verdict of guilty of murder, and punishment fixed at confinement in the state penitentiary for life. From the judgment rendered in accordance with the verdict, defendant has appealed to this court, and seeks a reversal upon several grounds, which will be hereafter considered. A short statement of the facts connected with the killing follows:

(191 P.)

Mary F. Roe at the time of the killing was in the neighborhood of 35 years of age, and was keeping a rooming house at Drumright, Okl. She had been previously married, when about 19 years of age, to one Vernon Osborne, an oil well driller, and to this union one son was born, Bernard Osborne, who was about 16 years of age at the time of the trial. Vernon Osborne was addicted to hard drinking, and some 5 or 6 years after the marriage the defendant procured a divorce from him and the custody of her son. Some 6 months thereafter Vernon Osborne died of typhoid fever. Defendant never married again, until her marriage to Jesse Roe at Pawnee, Okl., on April 23, 1917. After defendant's marriage to Osborne, she lived in Ohio, West Virginia, Indiana, and Illinois, and in 1912 came to Drumright, Okl. She lived almost exclusively in localities where oil development was active. Two of her brothers were drilling contractors, and after her divorce from Osborne assisted her materially in a financial way. So far as this record shows, the defendant lived, prior to the commission of this alleged homicide, a clean and moral life in a rather rough environment. She was considered industrious, but not a successful business woman. She had worked as a domestic, and at times had kept boarding house camps in and around the oil fields.

It was while engaged in the latter business that she first met the deceased, Jesse Roe, about the year 1914. Roe was considerably older than the defendant, and was not a man of education. During his frequent visits to the defendant, he often got her to transact his business for him. He had furnished her money, and she said that she married him for money. Before their marriage, and just after, she went to various banks inquiring as to Roe's financial condition, his deposits, his checks, and his lands, and made special inquiry about cashing checks, and of her own authority to sign checks for Roe. Defendant appeared to be ashamed of her marriage with Roe, but excused it for the reason that she had a sick boy that had to be provided for. It was the request of both parties that the marriage be kept a secret. Deceased told that he had procured a farm and was going to move out onto it when married. About the time they moved onto the farm, and 2 or three days before the commission of the homicide, the defendant obtained a new pistol and cartridges for the same, and also got a new trunk and rope for the same. She told a person residing close by that there were rats at their new place, and that she was afraid of rats, and that if he heard a shot fired he need not be alarmed or come to her. She also told neighbors, before she was married, that she was going away and would be gone about 10 days. Jesse Roe was shot in the head, and

by a bullet of the same size as that of defendant's pistol. Her pistol had one chamber that had been fired. The killing took place at the farm home, to which they had moved about 2 days previous. The body of the deceased was found in the trunk that defendant had taken out there, and the trunk was tied up with the cord.

After the killing, defendant telephoned for an auto, and after the automobile came blood was seen dripping from the trunk, and, on being asked about it, defendant told the chauffeur that she was carrying some fresh pork to Drumright. On being pressed further, she admitted to the chauffeur that Jesse Roe's body was in the trunk. She endeavored to persuade the chauffeur not to disclose that fact, and wanted the chauffeur to tell her where she could find a stream deep enough to cover the trunk, and also said that, if she could have gotten the trunk to Drumright, she would have had no trouble. She denied killing her husband, but said that he was killed by a man who came to their house after night. She claimed that she had not been well, and was sleeping in the bed in the northwest corner of the west room, and that Roe was sleeping on a cot or pallet in front of the bed; that she awoke about midnight, hearing Roe and some man quarreling, and that the man was shaking his fist at Roe and saying, "Damn you, you will implicate me, will you?" and that Roe replied, "Ed, damn you," or "God damn you, I will shoot you," and reached toward the foot of the bed for a shotgun; that she called out to Roe, "Oh! don't shoot him;" that the man drew a revolver and fired, hitting Roe in the head. Some bloody bed clothes and partly wiped-up blood spots on the floor in the west room were discovered; also a shotgun, two revolvers, the tray of the trunk (in which the body of the deceased had been placed), with some female wearing apparel piled on top of it, were found in the west room.

The defendant pleaded insanity, and there was evidence introduced from a number of lay and expert witnesses to the effect that they believed the defendant insane, the expert witnesses testifying that the defendant is of the type of insane known as dementia præcox of the paranoid type; that she is an hypochondriac, with delusions or hallucinations of pulmonary tuberculosis and cancer; that she also has delusions of persecutions; also the delusion that one of her brothers, who had been kind to her, was very unkind to her; and that she had at times threatened to kill this brother. There were no manifestations of violence on the part of the defendant, testified to by any witness, prior to the alleged commission of this homicide by her. On the part of the state, there was some evidence to the effect that the defendant, shortly prior to and shortly after

the commission of the homicide, appeared to be rational and in a composed state of mind.

[1, 2] On the question of insanity, the court gave the following instructions, to which proper exceptions were taken:

"In addition to her plea of not guilty, the defendant claims that, if she killed the said deceased, Jesse Roe, said act was not criminal, for the reason that her mental condition was such, at that time, that she was not responsible for said act, and therefore was excusable.

"Under her plea of not guilty, she has a right to offer as many defenses as she sees fit, whether such defenses are consistent or inconsistent, and the fact that she may interpose inconsistent defenses raises no presumption against her by reason of any apparent inconsistency.

"You are instructed that the defendant has interposed as one of her defenses in this case the defense of insanity. When that defense is interposed, the burden of proof is upon the defendant, unless the evidence on the part of the state be sufficient for that purpose, to introduce sufficient evidence to raise in your minds a reasonable doubt of her sanity. It is not required that the defendant shall prove her insanity to the satisfaction of the jury by competent evidence beyond a reasonable doubt, or by a preponderance of the evidence. It is sufficient if she introduce sufficient evidence to raise in your minds a reasonable doubt of her sanity, and when this is done you are instructed that the burden of proof is upon the state to prove such a state of sanity on the part of the defendant as would make her criminally liable by competent evidence, beyond a reasonable doubt, before you would be justified in convicting the defendant of the crime charged in the information.

"You are instructed that the law presumes every person to be sane and of sound mind, and able to distinguish right from wrong as applied to any particular act, and to understand the nature and consequences of such act, until a reasonable doubt of his or her sanity is raised by competent evidence, and that it is an essential ingredient of crime that a person, to be guilty of a crime, must have, at the time of its commission, sufficient mental capacity and reason to enable them to distinguish between right and wrong as applied to the particular act that he or she is then about to do. Although one may be in a diseased or unsound condition of mind, brought about by any condition, such as brooding over wrongs done to her, either real or imaginary, or produced by any other cause, if at the time they commit a crime they know and understand the nature and character of such act and its consequences, and at that time know that it is wrong and criminal to commit such act, and have sufficient mind to apply that knowledge to her own acts, and to know that if she does commit such acts she will do wrong, and subject herself to punishment, then and in that event such diseased or unsound condition of mind is not sufficient to exempt or exonerate her from criminal liability. So in this case, although the jury may believe from the evidence beyond a reasonable doubt that at the time of the commission of the crime charged in the information, if they believe and find she did commit it as

charged, still if they further find and believe from the evidence beyond a reasonable doubt that at the time said crime was committed the defendant had sufficient mind and reason to know and distinguish right from wrong, and that if she did commit such crime it would be in violation of the law and subject her to punishment, and to know and realize the consequences of such an act, and had mind sufficient to apply that knowledge to the consequences of her own act, then and in that event she cannot escape criminal liability under her plea of insanity, and the jury should find her guilty as charged in the information and fix her punishment accordingly.

"You are instructed that, if you have a reasonable doubt from the evidence, or lack of evidence, as to whether the defendant or some person other than the defendant committed the homicide charged in the information, then you should give the defendant the benefit of such doubt, and return a verdict of not guilty.

"And you are further instructed that, if you believe from the evidence in this case beyond a reasonable doubt that the defendant committed the crime in the way and manner as charged in the information, and shall further believe from the evidence that at the time she did so she was of unsound mind, sufficient as herein defined to exempt her from criminal liability, by reason of insanity or unsoundness of mind, or the evidence raises a reasonable doubt in your minds as to whether she was sane or insane at the time, then and in that event you should resolve that doubt in favor of the defendant, and acquit her.

"If you find, from the evidence, beyond a reasonable doubt, that the defendant killed the deceased, Jesse Roe, and you should entertain a reasonable doubt, from the evidence, as to her sanity at the time of the homicide, and you acquit her upon that ground, you should so state in your verdict, and in such case, if you further find it dangerous to the public peace or safety to discharge her, you should also state that finding in your verdict."

On this question, the defendant requested the court to give the following instructions, which were refused, and proper exceptions taken to such refusal by counsel for the defendant:

"A homicide committed by a person when in a state of insanity constitutes excusable homicide.

"It is an essential ingredient of crime that a person, to be guilty thereof, must have, at the time of its commission, sufficient capacity and reason to enable her to distinguish between right and wrong as to the particular act she is then doing. Every person is presumed to be sane, or of sound mind, and able to distinguish between right and wrong, as applied to a particular act, and to understand the nature and consequences of such act, until a reasonable doubt of her sanity is raised by competent evidence. Although one may be in a diseased or unsound condition of mind, brought about by brooding over wrongs to herself, either real or imaginary, or produced by disease or other causes, if, at the time she does an act, she understands the nature and character of such act and its consequences, and at that time knows that it is wrong and crimi-

nal, and she has mind sufficient to apply that knowledge to her own case, and to know that, if she does the act, she will do wrong, and be subject to punishment, such diseased or unsound condition of mind is not sufficient to exempt her from responsibility for her said act; but if, at the time she does the act, her mind is in such a diseased and unsound state that for the time being her reason, conscience, and judgment are overthrown, and in committing the said act she does so from an irresistible and uncontrollable impulse, the law excuses her from criminal liability.

"You are instructed that, under the law of this state, the test of criminal responsibility for committing an act, which is a crime under the law, is the mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequence of such act, or knowing its wrongfulness. The defendant is not criminally responsible, if, by reason of insanity, she did not have the will and the mental power to refrain from the committing of such act; and in this regard you are further instructed that, if evidence is introduced tending to prove that the defendant was insane at the time of the commission of the act charged, then the burden of proving the sanity of the defendant devolves upon the prosecution, and the state is bound to establish her sanity like all other elements of the crime beyond a reasonable doubt. Therefore, if after a full consideration of all of the evidence in the case, you have a reasonable doubt that the defendant, at the time of the commission of the act charged, was mentally incompetent to distinguish between right and wrong, as applied to the act charged, or to understand the nature of the act she was committing, or knowing its wrongfulness, by reason of insanity she had not the will and mental power to refrain from committing such act, then and in that event it is your duty to acquit her.

"You are instructed that, if you believe from the evidence in this case that the defendant was suffering from insanity at the time of the commission of the homicide, or if a reasonable doubt is thereby raised of the defendant's sanity, it is your duty to resolve that doubt in favor of the defendant, and acquit her."

The giving of the foregoing instructions by the trial court on his own motion and the refusal to give the instructions requested, form the basis of the main contention relied upon by counsel for defendant as a ground for reversal of this judgment. To state succinctly this contention, it is as follows: The law of insanity in this state is governed by what is known as the new rule, which relieves a person of criminal responsibility if, at the time of the commission of the act, such person although able to distinguish between right and wrong as applied to the act itself is nevertheless excusable on the ground of insanity, if such person had not at the time the will power to refrain from committing the act.

Counsel for defendant admit that the Legislature may place reasonable safeguards around the defense of insanity, so long as the defense itself is not entirely abolished.

This the Legislature of Oklahoma has done. The fourth subdivision of section 2094, Revised Laws 1910, defining those persons capable of committing crime, excepts the following:

"Fourth. Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness."

The Supreme Court of the territory of Oklahoma in the case of *Maas v. Territory*, 10 Okl. 714, 63 Pac. 960, 53 L. R. A. 814, in construing the above statutory provision, held:

"One who has sufficient mental capacity to know the wrongfulness of an act which is by law declared to be a crime is responsible and subject to punishment therefor."

The holding in the *Maas Case* was subsequently approved by the territorial court in the case of *Turner v. Territory*, 15 Okl. 557, 82 Pac. 650.

Counsel for defendant contend, however, that the construction placed upon the foregoing statutory provision by the territorial Supreme Court is evidently incorrect, both from a legal and grammatical standpoint. In support of this contention, counsel assert that the clause, "upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness," only modifies that part of the section, "persons of unsound mind, including persons temporarily or partially deprived of reason," and has no relation whatever to "lunatics" or "insane persons." In other words, before a person of "unsound mind," who is "temporarily or partially deprived of reason," may be acquitted on the ground of such unsoundness of mind at the time of the commission of the alleged crime, such person must be incapable of knowing the wrongfulness of the act at the time of its commission, but entirely otherwise as to "lunatics" and "persons permanently insane."

[8] Counsel for defendant, therefore, request this court, in construing the above statutory provision, to apply a more stringent rule of proof to persons temporarily insane than to "lunatics" or "persons permanently insane." This we cannot do. It is apparent to our minds that the Legislature intended, as it had a right to, to attach criminal responsibility to all persons who are capable of knowing the wrongfulness of the act they are charged to have committed. The terms "lunatics" and "insane persons," incorporated in the above provision, clearly refer to those persons totally deprived of the power of reason, and who would not under any circumstances have mental capacity sufficient to know the wrongfulness of the act. Such persons are relieved of criminal responsibility.

ity, and are distinguished from those of temporary or partial unsoundness of mind at the time of the commission of the act—that is, persons possessing a greater degree of mentality than “lunatics” or “persons permanently insane”; but certainly it cannot be with reason contended that the Legislature apprehended that there could be proof of a class of “lunatics” or “persons permanently insane” with sufficient power of reasoning and mental capacity to know the wrongfulness of the act and yet be excusable for its commission, while those only temporarily or partially insane would be required to offer proof to raise a reasonable doubt of their incapability of knowing the wrongfulness of the act. The Legislature intended to fix the same standard as to all persons designated in the statute; otherwise, great confusion would arise in the application of the law as to the defense of insanity, resulting in the miscarriage of justice, the conviction of persons “temporarily insane” under one standard, and the acquittal of “lunatics” and “insane persons” under the same standard. The statement of this proposition carries with it a sufficient denial of its tenableness.

In *Alberty v. State*, 10 Okl. Cr. 616, 140 Pac. 1025, 52 L. R. A. (N. S.) 248, in construing section 2094, *supra*, this court held:

“Under this provision, the test of criminal responsibility for committing an act which is declared to be a crime is fixed at the point where the accused has mental capacity to distinguish between right and wrong, as applied to the particular act, and to understand the nature and consequences of such act.”

Again, in the case of *Smith v. State*, 12 Okl. Cr. 307, 155 Pac. 699, this court in another opinion, speaking through Doyle, P. J., held:

“The true test of criminal responsibility, where the defense of insanity is interposed, is whether the defendant had sufficient reason to know right from wrong.”

To the same effect is the holding in *Owen v. State*, 13 Okl. Cr. 195, 163 Pac. 548.

These are the later opinions of this court construing the test of criminal responsibility as applied to all classes of persons alleged to have been insane at the time of the commission of the act and if there is any apparent conflict between these decisions, and the earlier decisions of this court upon the same subject, the later opinions are controlling, and must be held and construed to overrule the doctrine announced or the rule laid down to the contrary if any, in *Adair v. State*, 6 Okl. Cr. 284, 118 Pac. 416, 44 L. R. A. (N. S.) 119.

Applying the test formulated by the Legislature in section 2094 *supra*, to the instructions given by the trial court in this case, we find no reversible error. Nor was it er-

ror for the trial court to refuse to give the instructions requested, for the reason that the law applicable to insanity was sufficiently covered in the instructions given, and the instructions requested on this subject contained incorrect statements of the law.

An entire volume might be written on the law of insanity. Some states recognize and apply the doctrine of “irresistible impulse,” otherwise sometimes called the “new rule.” Other states follow strictly the English or old rule. The authorities on this subject, therefore, are in irreconcilable conflict. If the irresistible impulse doctrine is to apply in this state then the Legislature must amend the statute. Until that time persons charged with crime, who interpose the defense of insanity, must be held criminally responsible for their acts if at the time of their commission they were capable of knowing the wrongfulness of their acts and to understand the nature and consequences of them. A person possessing such a degree of mentality cannot be held exempt from criminal responsibility in this state merely because of some alleged irresistible impulse on his part to do the act.

The statute of this state does not recognize the doctrine that one may be so possessed with an uncontrollable impulse as to compel him to do what he knows to be wrong and a crime, and yet be relieved from all criminal responsibility. A condition might be conceived of an uncontrollable insane impulse sufficient to relieve one of criminal responsibility under our statute; but this would only arise when the diseased condition of the accused's mind was such as to destroy the power of the accused to comprehend the nature and consequences of the particular act, and to know that it was wrong at the time of its commission.

[5] It is next contended that counsel for the state made improper and prejudicial remarks during the closing argument. No objection was made to the remarks of counsel at the time the argument was made nor did counsel for defendant request the court to admonish the jury not to consider the same. In *Collins v. State*, 15 Okl. Cr. 96, 175 Pac. 124, it is held:

“Where certain remarks of the county attorney in argument to the jury are not such as are made grounds for reversal by statute, and there was no motion to exclude such remarks from the consideration of the jury, nor any ruling of the trial court adverse to the defendant to which an exception was saved at the time, there is no question presented for this court to consider.”

See, also, *Tucker v. State*, 9 Okl. Cr. 587, 132 Pac. 826; *Johnson v. State*, 5 Okl. Cr. 13, 113 Pac. 552; *Williams v. State*, 4 Okl. Cr. 523, 114 Pac. 1115.

The remarks complained of in this case were not such as are made grounds for re-



versal by statute. We find no question, therefore, presented under this assignment of error for the court to consider.

[3] It is also contended that the trial court erred in permitting the brother of the deceased to testify concerning the value of a tract of land located in Alaska in which the deceased had a one-thirteenth interest at the time of the homicide. The gist of this contention is that the witness was permitted to express a legal conclusion that the deceased owned a one-thirteenth interest in said alleged estate, without any facts disclosing whether the deceased acquired this interest by devise or descent.

We have carefully examined the transcript of the evidence of the witness John Roe, brother of deceased, relating to this assignment of error, and we are convinced that the rulings of the trial court were not prejudicially erroneous to the defendant, when considered in connection with the various grounds of objection interposed to the questions. This evidence was undoubtedly admitted upon the theory that it tended to prove a motive on the part of the defendant in killing the deceased, and as the defendant interposed the defense that she did not commit the crime this evidence was clearly admissible upon the theory that there was a motive on her part for the killing. Counsel have cited no authorities in the brief to support the contention that the admission of this evidence was erroneous. The objections urged are directed rather to the weight of the evidence than to its admissibility and no error is presented in this assignment sufficiently prejudicial to authorize the reversal of the judgment.

[4] Another alleged ground of error, relating to the refusal of the trial court to admit certain proffered evidence by one of the witnesses for the defendant, who was a trained nurse and had attended the defendant in connection with a physician some time in the year 1915, and had attempted to call one Charles Burton, a brother of the defendant, by telephone from Drumright to the residence of the said Charles Burton at Cushing, Okl. for the purpose of informing defendant's brother that she (witness) believed the defendant to be insane at that time and should be placed in an asylum, is urged as a ground for reversal.

This evidence was properly excluded. The

witness, after having detailed certain acts and conduct of the defendant witnessed by her when nursing the defendant in 1915, was permitted to express the opinion that at that time the defendant was insane. The fact, if true, that said witness attempted to call up the brother of the defendant and inform him of her opinion that the defendant was insane was immaterial. She was permitted to express such an opinion to the jury, and no effort was made to show that the witness at any time had made any statement to any other persons outside of court contrary to the opinion expressed in court and until such an attempt had been made on the part of the state the evidence offered was wholly immaterial.

Certain other alleged errors are presented for our consideration, but are not supported in the briefs filed by counsel representing defendant by the citation of authorities, and apparently are not considered as sufficient grounds to authorize a reversal of this judgment. A careful examination of the record in connection with these additional assignments of error convinces this court that such alleged errors are merely technical, and without substantial merit, and were not such as to deprive the defendant of any substantial right to her prejudice.

Counsel representing the defendant in this court has filed two able and lengthy briefs, fully covering the assignments of error chiefly relied upon for a reversal of this judgment. In addition to the briefs filed an extended, careful, and efficient oral argument was presented. The defendant was ably represented in the trial court, and her rights fully protected in every respect throughout the trial and in this court. However, after a careful consideration of the entire record, this court is clearly convinced that the defendant had a fair and impartial trial, and that her conviction is sustained by the evidence and the law.

It is therefore ordered and adjudged that the judgment of the district court of Pawnee county, that the defendant is guilty of the crime of murder and assessing the punishment at imprisonment in the state penitentiary for life, be and the same is hereby affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(97 Or. 611)

**TAYLOR et al. v. TRIPP et al.**

(Supreme Court of Oregon. Sept. 28, 1920.)

**1. Logs and logging — Agreement to furnish logs and advance money held indivisible.**

An agreement by defendants to furnish logs for the operation of plaintiffs' sawmill and to advance the money necessary therefor in return for the ties cut from the logs at a stated price, and which gave defendants a lien on the mill and the side lumber, was indivisible so that defendants' breach of its contract to furnish the logs terminated the entire contract.

**2. Logs and logging — Evidence held to show breach of contract to furnish logs.**

Evidence that during the period of high water, defendants furnished less than half the quantity of logs they agreed to furnish daily for a year held to support the trial court's finding that defendants breached the contract.

**3. Logs and logging — Right to lien under contract lost by breach.**

A lien which is created only by the terms of a contract for furnishing logs and advancing money to plaintiffs does not exist independent of the contract, and is lost by defendants' breach of its promise to furnish the logs.

**4. Contracts — Party can treat contract as terminated by breach and recover profits.**

Though a party cannot rescind a contract and thereafter recover damages for its breach, he can elect to treat a breach by the opposite party as terminating the contract, and thereafter recover the loss he sustained by reason of the other party's failure to perform his agreement.

**Department 2.**

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Action by W. D. Taylor and another, partners as Taylor & Whisman, against F. A. Tripp and another, partners under the name of the Tripp-Powell Lumber Company. Judgment for plaintiffs, and defendants appeal. Affirmed.

On October 26, 1917, the plaintiffs were the owners of a sawmill on Poodle creek, near Notli, in Lane county. They were experienced in that line of business, but were without money to purchase sawlogs or operate the mill. The defendants were in the timber and tie business, but were not engaged in the manufacture of lumber. They had sufficient funds to supply the mill with logs and to finance its operation. Under these conditions, on that date the plaintiffs and the defendants entered into a written contract by which the latter agreed to supply sufficient logs and timber to keep the plaintiffs' mill running at its full capacity, estimated at about 20,000 feet a day, and to make delivery into the millpond at a cost not to exceed \$5 per thousand feet.

The plaintiffs agreed to manufacture the timber into railroad ties and lumber. That portion thereof which was not suitable for ties was to be made into side lumber. The ties were to be the property of the defendants, for which they were to pay the plaintiffs \$8 per thousand feet, less the actual cost of logging and stumpage, which was not to exceed \$5 per thousand feet. The side lumber was to belong to the plaintiffs. The defendants agreed to pay for the logging and stumpage, and to advance to the plaintiffs the money necessary for sawing and manufacturing the ties and lumber. Such advances were to be charged against the \$8 per thousand feet, and if the expenses of operating the mill should exceed the amount to be paid to the plaintiffs, the defendants were to make further advances of amounts equal to 50 per cent. of the market value of the side lumber in the yard. Monthly settlements were to be made. The contract also provided:

"It is further mutually agreed by and between the parties hereto that breakages, strikes, unavoidable accidents, shortage of water for driving purposes, and anything happening beyond the control of either of the parties to this contract, shall operate as a suspension of the strict compliance with the terms of this contract during the time that the operations are necessarily closed by reason of such unavoidable cessation of operations."

A lien upon the sawmill and the side lumber was created in favor of the defendants for the faithful performance of the contract on the part of the plaintiffs, for moneys that might be advanced. Active operations were to commence on or before November 10, 1917, and the contract was to remain in force for the period of one year. On November 26 the parties executed a supplemental agreement, which is not material to this decision.

The plaintiffs' testimony tends to show that the plaintiffs had the mill ready for operation about November 15. The first logs were delivered about December 7, and the mill was started on the following day.

For cause of action it is alleged "that the plaintiffs faithfully performed the agreements on their part agreed to be performed, and entered into the operation of said sawmill upon the logs furnished by the defendants, as soon as the defendants began to furnish logs in sufficient quantity to permit the operation of such sawmill;" that the defendants wrongfully refused and neglected to comply with their contract; that they have furnished not to exceed 700,000 feet of sawlogs, and not any more timber than was required to run the mill 35 days at full capacity; that about March 1, 1918, the defendants ceased to furnish any logs; that by reason thereof the plaintiffs were compelled to shut down the mill; that because of the breach of the contract by the

defendants the plaintiffs were able to operate the mill only about 50 days; that the defendants wholly abandoned any attempt to perform the contract; that the plaintiffs thereby have been deprived of the use and operation of the mill and of the profits to be made under the contract; and that if the defendants had fulfilled their part, the plaintiffs would have been able to saw and make into lumber more than 4,000,000 feet of timber, for which they would have received \$3 per thousand feet and the side lumber, from all of which they would have made a profit of \$9,833.33, for which amount they ask judgment.

Prior to March 31, 1918, the defendants had paid out and advanced to the plaintiffs under the contract \$7,051.88, at which time the amount due for the sawing was only \$4,491.16, leaving an excess of \$2,560.72. Concurrent with the filing of the complaint in plaintiffs' action, the defendants brought a separate suit against them for the balance of such advances, in which they prayed for a lien upon the sawmill and side lumber to secure payment of the same, and for a decree of sale.

In the action the defendants deny damages, admit the execution of the contract, and claim to have made delivery of about 800,000 feet of logs and to have paid the plaintiffs for the sawing of 740,455 feet. They allege that the mill was out of repair and was not ready for operation until December 1, 1917. They rely upon the clause of the contract above quoted, as to breakages, strikes, shortage of water, and "anything happening beyond the control of either of the parties." They allege that Poodle creek is a very small stream, and had not a sufficient flow of water for the driving of logs; that when it appeared that the sawmill would not be ready and there was a shortage of water, the plaintiffs "waived and modified the provision of the said contract that these defendants should deliver into the said millpond of said sawmill the amount of sawlogs per day specified"; and that, pursuant to such waiver, the defendants delivered about 800,000 feet of logs, 350,000 feet of which were hauled by horses, and 450,000 floated on the waters of the creek. The defendants claim to have about 500,000 feet ready for delivery, and that they actually delivered to the plaintiffs 60,000 feet which the latter refused to saw. They further allege that, owing to the demand of the United States for men in the army and navy, they were unable to procure labor, a matter over which they had no control; and that under the contract as modified the plaintiffs agreed to accept such logs as the defendants could deliver, as full performance of the contract in regard to quantity. By way of equitable relief in the action, the defendants pleaded the advances made on the contract, and ask that the action be abated, and that they have a decree for the balance of the amount advanced.

By order of the court the two cases were consolidated and tried in equity. To ascertain the amount of plaintiffs' damages, a jury was called, which found damages for the plaintiffs in the sum of \$500. The court rendered judgment for this amount, refused to foreclose the defendants' lien, and dismissed their suit and the counterclaim in this action, upon the ground that they had violated the contract. The defendants appeal, contending that the provision of the contract relating to the lien for advances is an independent covenant; that the lien should have been foreclosed; that on March 31, 1918, the plaintiffs repudiated and terminated the contract, by refusing to saw the 60,000 feet of logs in the pond; that by reason thereof they were not entitled to any damages; that the evidence showed a waiver of the terms of the contract as to the delivery of the logs; and "that the evidence of the whole case showed that the plaintiffs were not entitled to any damages."

H. E. Slattery, of Eugene (A. C. Woodcock, of Eugene, on the brief), for appellants.

O. H. Foster and C. A. Hardy, both of Eugene, for respondents.

JOHNS, J. (after stating the facts as above). [1] As we analyze the contract, it was not divisible, and there were no independent covenants. It was complete within itself, executed at one time by certain parties, concerning the one subject-matter. The defendants were to furnish the sawlogs and advance the money. The plaintiffs were to manufacture the logs into ties and side lumber. There was a stipulated price for the cost of both the logs and the lumber. In the very nature of things, the mill could not be operated without sawlogs or money. The agreement of the defendants to advance the money for operating expenses was a primary consideration which entered into and was a part of the contract.

[2] The circuit court found that the defendants violated the contract in their refusal, and neglect to deliver logs. It was agreed that the mill had a capacity of 20,000 feet per day. Up to March 31, 1918, not more than 750,000 feet of logs were delivered. It is a matter of common knowledge that in that section of the state the high-water period is during the winter months. If the logs were to be delivered by way of Poodle creek, it would have to be during that season. But the fact remains that the specified amount of timber was not delivered; that it was not ready for delivery; that up to March 31, 1918, under its normal capacity, the mill could have cut about 1,500,000 feet of lumber, but that no more than 750,000 feet of logs were delivered.

We have carefully read the voluminous record in this case, and agree with the trial court that the contract was not modified, that

it was breached by the defendants, and that their failure to perform was not due to any of the exceptions specified in the contract.

[3] The right of the defendants to enforce the lien is not independent. It arises from the provisions of the written contract. On principle, the case of *Burkhart v. Hart*, 36 Or. 586, 589, 60 Pac. 205, 206, is in point here. It was there held that:

"The modern doctrine is that a contract should be construed according to the meaning and intention of the parties."

Quoting with approval from *Clark on Contracts*, 656, the opinion goes on to say:

"It is sufficient to say that, 'In the absence of very clear indications to the contrary, promises, each of which forms the whole consideration for the other, will not be held to be independent of one another, and a failure of one party to perform on his part will excuse the other from liability to perform.'"

The lien here in question is founded upon the contract, and does not exist as a matter of right. Since they breached the contract, the defendants cannot assert and enforce a lien under its terms and provisions.

[4] Counsel for the defendants cite authorities to the effect that a party cannot rescind a contract and then recover damages for its breach. That is the law. But it is not the ground upon which the plaintiffs' cause of action was founded. Where one party to a contract breaches it, the other has the option of treating it as broken, and recovering as damages the profits which he would have realized if it had been fully performed. Legally speaking, that is not a rescission, but constitutes an acceptance of the situation brought about by the party who broke the contract. Here the plaintiffs allege that in good faith they kept and performed their part of the contract, and the evidence is conclusive that they were ready to, and did, saw all of the logs furnished, and as fast as they were delivered. They vigorously protested against the shortage of logs until March 31, 1918, when they were forced finally to close the mill for want of logs. The con-

tract was definite and certain, calling for the delivery of 20,000 feet of lumber per day for the period of one year. The facts show that an average of only 7,000 feet per day was delivered during the time the mill was operated, and no valid excuse is shown for the shortage.

The rule is thus laid down in *Longfellow v. Huffman*, 49 Or. 486, 491, 90 Pac. 907, 909:

"It is well settled," says the Supreme Court of Illinois, "that, where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies; He may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance sue and recover, under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to such recovery, the plaintiff must allege and prove performance upon his part, or a legal excuse for nonperformance." *Lake Shore & M. S. Ry. Co. v. Richards*, 152 Ill. 80, 38 N. E. 777, 30 L. R. A. 33."

In the instant case the plaintiffs have elected to treat the breach by the defendants as an end to the contract, and have brought their action for profits which should have accrued at the time of the breach. The testimony is conclusive, and supports the finding of the circuit court that the plaintiffs were damaged in the sum of \$500. The defendants' legal contentions are sound, but they are not sustained by the facts.

The judgment is affirmed.

MCBRIDE, C. J., and BEAN and BENNETT, JJ., concur.

(17 Okl. Cr. 648)

**WILEY v. STATE. (No. A-3454.)**(Criminal Court of Appeals of Oklahoma.  
Sept. 11, 1920.)*(Syllabus by the Court.)*

1. Criminal law  $\S$  814(3)—Refusal of requested instructions not based on the evidence not error.

Instructions requested must be based upon the evidence; and, where the evidence does not sustain the request, there is no error in refusing to give the instruction.

2. Criminal law  $\S$  742(2), 780(2)—On conflicting evidence as to whether witness was an accomplice, court may charge on accomplices; and leave conflict in evidence to jury.

Where the evidence is conflicting as to whether a certain witness is an accomplice, it is proper for the court to instruct the jury on the law of accomplices, and leave the question of whether or not the witness is an accomplice for the decision of the jury as a matter of fact.

3. Criminal law  $\S$  507(1)—Requested instruction as to corroboration of accomplice testimony held properly refused, as not stating the law.

A requested instruction, in substance to the effect that if the jury believes any witness has been promised immunity, or entertains the hope of immunity, from any prosecution pending against him for some other offense than that upon which the defendant is being tried, he stands in the relation of an accomplice to the defendant, and that the testimony of such a witness should be corroborated in the manner required of accomplices, is properly refused.

4. Criminal law  $\S$  338(6)—Evidence bearing on credibility of witness is admissible.

As the jury is the exclusive judge of the weight of the evidence and of the credibility of each and every witness, anything that properly tends to cast light upon the credit to be given to a witness is a matter that should be permitted to go before the jury for its consideration.

5. Statute forbidding reversal except for substantial and prejudicial error.

By express statutory enactment, this court is precluded from reversing a judgment of conviction because of the exclusion of evidence properly tendered, unless after an examination of the entire record it is apparent to this court that the exclusion of such evidence probably resulted in a miscarriage of justice, or deprived the defendant of some constitutional or statutory right to his prejudice.

6. Criminal law  $\S$  1184—Sentence modified by the Criminal Court of Appeals, as permitted by statute.

The Legislature has seen fit to vest in this court power and authority to modify a judgment of conviction where the ends of justice seem to require it. For reasons given why the judgment of conviction should be modified in this case, see body of opinion.

Appeal from County Court, Oklahoma County; W. R. Taylor, Judge.

John Wiley was convicted of maintaining a public nuisance, and he appeals. Modified and affirmed.

Giddings & Giddings, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. John Wiley was convicted at the May term, 1918, in the county court of Oklahoma county, of the crime of maintaining a public nuisance in a room and building at 501 North Hudson street, Oklahoma City, Okl., in which said room certain spirituous, vinous, fermented, and malt liquors, to wit, whisky, alcohol, and Jamaica ginger, were possessed and kept by the said John Wiley for the purpose of sale, etc., and at which said place numerous persons resorted and congregated for the purpose of drinking said intoxicating liquors, and did drink the same on said premises during a period of time continuously from the 1st day of July, 1917, up to and including the 22d day of October, 1917. A trial by jury resulted in a verdict of guilty, and the punishment assessed at a fine of \$500 and imprisonment in the county jail for a period of six months. The court, after overruling the motion for a new trial, pronounced judgment of conviction against defendant in accordance with the verdict rendered.

Roy Cogswell, a witness for the state, testified in substance as follows: That he was a plain clothes man on the Oklahoma City police force; was acquainted with the defendant, and also acquainted with the premises known as 501 North Hudson street, Oklahoma City. That he had visited said premises about three times between the 1st day of July, 1917, and the 22d of October, said year. That the defendant was keeping a drug store on said premises. That the first trip witness made to the premises, Capt. Slayton and John Heep of the police force accompanied witness. That there were two or three persons in the drug store at the time, one of whom was Doc. Holman. That the defendant was also there. That when the officers went in the building, Doc. Holman ran out of the door and up the street. Witness does not remember if they found anything inside the building at that time. On the second visit, witness found a half pint bottle of whisky in the back part of the prescription case, and a pint bottle was also found behind some bottles on a shelf in the back part of the room. John Heep was with witness on this visit. That Heep found the bottle behind the prescription case, and witness found the bottle along the north wall in the back of the drug store behind some large bottles on the shelf. These bottles of whisky were iden-

tified and introduced in evidence. The third visit witness made to the premises he found Mr. Wiley back of the prescription case and three other men back there drinking, and a whisky glass and a quart bottle were sitting on the back of the prescription case. That the men were drinking. Witness also testified that he lived about 100 feet west of the premises of the defendant, across the street from the same, and was acquainted with the general reputation of the place in that neighborhood between the 1st of July, 1917, and the 22d of October, said year, as to its being a place where alcohol, whisky, and Jamaica ginger were kept for sale, and where people congregated and resorted for the purpose of drinking intoxicating liquors, and that said place had a bad reputation in that respect.

John Heep, on behalf of the state, testified in substance, as follows: That he was a police officer of the Oklahoma City Police Department, was acquainted with the place at 501 North Hudson street. That said place was owned and kept by the defendant, John Wiley, between the 1st of July and the 22d of October, 1917, that witness was at said place twice during said time. That on the first visit there a man by the name of Holman ran out of the place and threw two bottles of whisky out on the sidewalk and broke them. That on another occasion witness went there with Mr. Cogswell, and two bottles of whisky were found in the place; one was found in a little drawer by the prescription case, and the other was sitting on a shelf back of some bottles. Witness testified that he was not acquainted with the general reputation of the place.

H. V. Owens, on behalf of the state, testified, in substance, that he was an automobile salesman for the Chalmers cars; that he had been in said business about two months; that prior to that time he had run a transfer business, and had also railroaded some; that he was acquainted with the defendant, John Wiley, and had visited his place at 501 North Hudson between the 1st of July and October 22, 1917, probably as many as a dozen times; had bought intoxicating liquor from defendant during that time two or three times; that he bought whisky, generally bought a couple of drinks at a time; that he had also bought intoxicating liquor from a fellow whose nickname was "Skeet," who worked at said place; that he bought whisky, alcohol, and Jamaica ginger from Skeet; that he bought the Jamaica ginger at the soda fountain, and the whisky behind the prescription case at the west end of the building. Witness also testified that he was acquainted with the general reputation of the place as to being a place where intoxicating liquors were kept for sale, and that said reputation was bad. Witness also testified he had been convicted of a violation of the prohibitory liquor laws. On cross-examination, witness testified that he had been convicted of boot-

legging three times, that is, for unlawful possession of whisky; that no cases were pending against him at this time; that he was arrested with one Paul Atkins (sometimes called "Skeet") when Skeet hauled a grip full of whisky in witness' automobile, but that no criminal charge was filed against him; that he knew Atkins was selling whisky in defendant's place of business, and knew that before he and Atkins were arrested for hauling whisky in the car.

Paul Atkins, a witness on behalf of the state, testified, in substance, as follows: That he lived in Oklahoma City, and was working for the Fisk Rubber Company, and had been working for said company about 6 months prior to that time. He had worked for defendant, John Wiley, in his drug store at 501 North Hudson as a clerk, began working there a week or so before September, 1917; that he quit working there in the latter part of October; that Wiley was the owner of the drug store, and hired the witness; that witness had seen intoxicating liquor around the drug store, and had sold the same during the time he clerked there; that he could not call the names of all to whom he had sold whisky. When he received money from the sale of whisky, he registered it in the cash register; that Mr. Wiley furnished the whisky; that he had seen Wiley sell whisky in there on numerous occasions; that witness had also sold alcohol and Jamaica ginger; that witness was not there when Heep and Cogswell raided the place. On cross-examination, witness testified that he had been convicted and paid a fine for drunkenness. Witness denied that Mrs. Wiley had fired him for selling whisky in the drug store, or had told him to get out of the store. Witness testified that he and Vick Owens had been arrested for transporting whisky in a suit case; that John Heep and Roy Cogswell were two of the officers that arrested them; that they filed a charge against witness for that offense; and in this connection the following proceedings were had:

"Q. What was that for—did you ever put of a bond in that case?

"By Mr. Callihan: Objected to, not proper impeaching question. The only question he could be asked is if he has ever been convicted; the fact that he was arrested is no evidence of guilt.

"By the Court: The court understands that.

"Mr. Callihan: I move to strike the question and answer with reference to ever being arrested in the county court.

"By the Court: Sustained.

"Q. What has become of that transporting charge in the county court?

"By Mr. Callihan: Objected to as not a proper impeaching question.

"Q. You were arrested for transporting in October; has that case ever been tried yet?

"By Mr. Callihan: Objected to as incompetent, irrelevant, and immaterial.

"By the Court: Sustained.

"By Mr. Giddings: Exception.

"By Mr. Giddings: We offer to prove that the witness Atkins has a case pending against him in this court, for unlawful transportation of liquor, and that it has been pending since October 17th and has never been tried as indicating either a promise of immunity on the part of the prosecution or a hope of immunity on the part of the witness. The evidence being admissible, the weight of it is entitled to the consideration of the jury.

"By the Court: Overruled.

"By Mr. Giddings: Exception."

On behalf of the defendant, Alonzo Barton testified substantially as follows: That he was manager of the Niles-Mosler Cigar Company, and had been in that business a little over two years, and knew defendant, John Wiley, and visited his place at 501 North Hudson about once a week for the purpose of selling cigars; that witness never saw any liquor in there, or never saw anything to indicate while he was there that liquor was sold in said place.

William R. Humphrey, on behalf of the defendant, testified substantially as follows: That he was in the wholesale cigar business; had lived in Oklahoma City 21 months, knew defendant Wiley and his place of business, and would visit said place on an average of one or two times a week, and stayed there probably 10 minutes at each visit. That he never saw any whisky sold there; never saw any crowds carousing around in there, or anything indicating that liquor was sold on said premises during his visits there.

E. H. Dudley, on behalf of the defendant, testified, in substance, as follows: That he was in the wholesale drug sundry business in Oklahoma City, knew defendant, had known him about eight years, and had occasion to visit his place of business on North Hudson for the purpose of selling defendant goods; that he never saw any evidence of defendant selling intoxicating liquor in said place; never saw any crowds assembled there, or any disorder or conditions indicating that intoxicating liquor was sold there, and never saw any people drunk in there. That the general reputation of the drug store between July 1, 1917, and October 1, 1917, as a peaceable, law-abiding place was good. That the general reputation of the defendant in the community in which he lived as a peaceable, law-abiding citizen was good.

Ben Waldrep, on behalf of the defendant, testified, in substance, as follows: That he was a foreman for Towler's Laundry; knew the defendant for about two years; lived in the neighborhood of his drug store for nearly a year, and was in the drug store on the occasion that some officers made a search of the same; had gone there to buy a package of cigarettes. That one of the officers came in about the same time witness did. Witness went in and told Mr. Wiley he wanted some cigarettes, and Wiley threw the cigarettes over to witness, and just then one of the officers said, "What have you got in

here?" and about that time the other two officers stepped in, and witness stood and watched them, and two of them went back to the back end of the store, and the captain, who had on a blue suit and cap, went behind the counter and show case, and reached around and drew a bottle with some whisky in it out of his hip pocket, and reached up on the shelf, and then ordered Mr. Wiley to open the safe, and then the officer said, "What are you doing with this here whisky?" and Wiley said, "It isn't mine." Witness saw the officer take the whisky out of his pocket and reach it up on the shelf. The witness was in the place frequently before that, nearly every evening. That he had never seen any liquor sold there, and had never seen any carousing around or drinking in there. That the general reputation of the defendant in the community as a law-abiding citizen was good.

Mrs. J. D. Wiley testified on behalf of the defendant, in substance, as follows: She was the wife of the defendant. That defendant operated a drug store at 501 North Hudson street, and had several different clerks, one being Paul Atkins, and another Ed Paschel. That witness would go there to the drug store nearly every day about noon, and stay until about 10 o'clock at night. That Paul Atkins commenced to work there in September, 1917. That Atkins was always drinking and bringing liquor in there, and witness told him to get out and stay out. That defendant never kept intoxicating liquors in the drug store, nor sold the same in there. That witness never saw any in there, nor saw any men loitering around or carousing in there. Witness also testified that she had a conversation with Paul Atkins, in which she told him that she had heard that he was selling intoxicating liquor in there, and that he had to get out if he was bringing it in there, and Atkins said it was up to John, and if he wanted him out he could put him out. Witness also testified that she remembered the occasion of Atkins and Owens getting arrested for transporting liquor about two weeks before the officers came to the store and found liquor there. That the witness had heard her husband tell Atkins not to come in there drunk, and not to sell any liquor in there.

Counsel for defendant also offered to introduce in evidence the appearance docket of the county court of Oklahoma county, in case No. 4694, entitled State of Oklahoma v. Paul Atkins, to which counsel for the state objected on the ground that the evidence was incompetent, irrelevant, and immaterial, which objection was sustained by the court, and exception taken by counsel for the defendant, at which time the following proceedings were had:

"By Mr. Giddings: We offer in evidence page 136, Appearance Docket, in the County Court of Oklahoma County, Oklahoma, Criminal No. 12,

the same being the case of the State of Oklahoma v. Paul Atkins, No. 4694, Information filed October 6, 1917. October 12 bond fixed \$500. Defendant ordered released October 12th. October 25th, entry order set for November 6th. November 6th, entry stricken for term on application state. November 27th, case set for December 13th. December 13th, entry order stricken from assignment motion state. No further action taken in said cause since December 13, 1917.

"By Mr. Callihan: Objected to as incompetent, irrelevant, and immaterial for any purpose.

"By the Court: Sustained.

"By Mr. Giddings: Exception.

"By Mr. Giddings: I want to offer in evidence the information in case State v. Paul Atkins, and particularly the names of the witnesses on the information, the same being the same case as shown by the appearance docket.

"By Mr. Callihan: Objected to as incompetent, irrelevant, and immaterial.

"By the Court: Sustained.

"By Mr. Giddings: Exception."

John Wiley, defendant, testified that he was 42 years of age, married; that he ran the drug business at 501 North Hudson between July 1 and October 22, 1917; that he had been in the drug business some 20-odd years; that he was a registered prescription clerk, and had been in business at 501 North Hudson since March, 1917; that he had heard the testimony of Vick Owens, and that he had never sold any whisky to Vick Owens, and if the Atkins boy sold any whisky to said Owens it was without witness' knowledge; that witness had employed Atkins to run the soda fountain; that witness had never sold any liquor in that place. Witness remembers when the officers came there and made a search, and claimed that they found whisky in there; that that was about two weeks after the Atkins and the Owens boys were arrested for transporting liquor; that witness does not remember of any raid having been made on his premises before these boys were arrested for transporting; that witness never permitted people to congregate in his place, or drink intoxicating liquor in there; that his wife assisted him in conducting the store; that he had never been convicted of any crime, had never sold or bootlegged intoxicating liquor; that he fired the Atkins boy when he found out that he was not doing the right thing. On cross-examination, the defendant testified, in substance, that he had come to Oklahoma City from McAlester, and had moved from Lawton to McAlester; that he had run drug stores both in Lawton and McAlester; that Paul Atkins had worked for him in Lawton for about a year; that he had furnished money to Paul Atkins, when in Lawton, and that Paul Atkins had sold whisky from his own home in Lawton; that witness had got interest on the money that he had loaned Atkins to buy whisky with.

In rebuttal, for the state, W. W. Slayton, testified, in substance, as follows: That he was captain of the Oklahoma City Police Force; knew defendant, Wiley, when he saw him; was at defendant's place of business on October 21, 1917, with Cogswell and Heep. That he visited there between 1:30 and 3 o'clock in the afternoon. That witness did not take any bottle of whisky to the drug store with him in his pocket, and put it on a shelf and then ask defendant where he got that whisky. That he had no recollection of seeing any whisky in the drug store, except that he might have seen a small quantity in some bottles, and that he did not find any whisky himself when he was there.

The defendant requested the court to give the following instructions, which were refused and excepted to by counsel for defendant, and exception allowed by the court:

"1. You are instructed that under the law the witness Paul Atkins and Vick Owens are accomplices, and you cannot convict the defendant upon their testimony unless the same is corroborated by other evidence tending to connect the defendant with the offense charged, and the corroboration is not sufficient if it only shows the commission of the offense.

"(2) Defendant is on trial for maintaining a public nuisance, and not for any other offense. If you find that at some other time he committed some other offense, the same can only be considered by you as affecting his credibility.

"(3) If you believe that one witness, or witnesses, in this case has been promised immunity, or entertains the hope of immunity, you may take that fact into consideration in weighing the testimony of any such witness, or witnesses. In such event the testimony of such witness should be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

"By immunity is meant some promise, express or implied, by which such a witness gains some advantage to himself, either in lighter punishment for his crime, by dismissal of a criminal charge against him, and by obtaining further consideration by so testifying, than he would obtain from the prosecution otherwise, or even if he hopes to obtain such immunity, and so hopes when testifying, that fact also may be considered by you in weighing his evidence and fixing his position in this case as an accomplice, or as one who has been promised or hopes for immunity."

[1] It is first contended that the trial court erred in refusing to give defendant's requested instruction No. 2, supra, to which refusal proper exception was taken at the time. Counsel for defendant strenuously contend that the refusal of the court to give this instruction was prejudicial to the substantial rights of the defendant, in that there was evidence introduced upon the cross-examination of the defendant which tended to show that, while the defendant was engaged in the drug business in the city of Lawton, Okl.,



defendant furnished certain money to Paul Atkins, who was afterwards employed by him in his place of business at 501 North Hudson, Oklahoma City, for the purpose of providing funds to said Atkins with which to obtain whisky for illegal sales; that while such evidence tended to establish the guilt of the defendant of an independent crime, it was only admissible for the purpose of affecting the credibility of the defendant, and not for the purpose of establishing his guilt of the crime charged, because the same was not connected in any manner with the keeping of the alleged public nuisance at 501 North Hudson street, in Oklahoma City, which crime, if any, occurred long subsequent to the time defendant furnished money to the said Atkins for this illegal purpose. There is evidence in the record to the effect that the defendant, during the period between July 1, 1917, and October 22, 1917, as alleged in the information, made divers sales of whisky to persons in his said place of business at 501 North Hudson street. This evidence of particular sales by the defendant in said place of business during said period of time was competent and material to the issues in the case, and was relevant, in that it tended to show the intent of the defendant to sell intoxicating liquor in said place; the searching officers having found quantities of whisky in said place of business during that period of time. It is apparent, therefore, that the evidence on the part of the state tended to prove other offenses connected with the one for which he was being tried, which was competent as tending to establish his guilt of the offense charged.

The requested instruction was too general. Counsel should have limited the request to the evidence of the alleged offense of aiding and abetting Paul Atkins in the sale of whisky at Lawton, Okl. This was not done, and the trial court could have with propriety refused to give the requested instruction because it was not restricted, in its terms, to what the defendant considered was proof of an offense not connected with the one for which defendant was being tried. As heretofore stated, the state's evidence tended clearly to connect the defendant with sales of whisky made in his drug store between July 1, 1917, and October 22, 1917, by his clerk, Paul Atkins; and, while the defendant admits that he furnished money to Paul Atkins with which the said Paul Atkins probably purchased intoxicating liquor for the purpose of illegally selling same from Atkins' home in Lawton, the testimony of the defendant on cross-examination was not sufficient to brand him as an accomplice of Atkins in the sale of whisky at Lawton. The defendant denied any interest in the whisky that Atkins sold at Lawton, and denied that he received any profit from any sale made by Atkins at Lawton. He testi-

fied merely that he loaned Atkins money, upon which Atkins paid him interest. Had the defendant objected to this line of cross-examination, the trial court should have excluded the same, but no objection was interposed by counsel representing defendant, and the answers of the defendant were insufficient to brand him as a criminal, in that he aided and abetted Paul Atkins in the illegal traffic in whisky while they both lived at Lawton. Had the instruction, therefore, been in proper form, it is apparent that the refusal of the trial court to give the same would not have been prejudicial to the defendant in this case, because his own testimony does not indicate his guilt of any criminal offense connected with the sale of intoxicating liquors by Atkins at Lawton, as contended for in the brief of counsel for defendant.

Instructions requested must be based upon the evidence, and where the evidence does not sustain the request, there is no error in refusing to give such requested instruction. *Hunter v. State*, 3 Okl. Cr. 533, 107 Pac. 444.

[2] It is also contended that the trial court erred in refusing to give defendant's requested instruction No. 1, *supra*. In this connection, counsel contend that, where the undisputed evidence shows as a matter of law that a witness is an accomplice, it becomes the duty of the court, when specially requested by the defendant so to do, to instruct the jury that such witness is an accomplice, and must be corroborated. Counsel admit, however, that where the evidence is in dispute as to whether a certain witness is an accomplice, it is then the general and accepted rule that the court should instruct the jury on the law of accomplices, and leave the question of whether or not the witness is an accomplice for the decision of the jury as a matter of fact. In this case, counsel for defendant say that there is no dispute in the evidence as to the witness Paul Atkins being an accomplice in the commission of this crime. With this contention we cannot agree. While some evidence on the part of the state, standing alone, would indicate that Atkins was an accomplice of defendant, there is other evidence in the record by defendant and some of his witnesses which directly conflicts with the state's evidence on this question, and which tends to prove, if believed by the jury, that Atkins was not an accomplice of the defendant in maintaining the alleged nuisance at 501 North Hudson street during the period of time alleged in the information. The trial court gave an instruction defining an accomplice, and the necessity of corroborating such a witness by other evidence tending to connect the defendant with the commission of the offense. The instruction given was a correct statement of the law applicable to accomplices' testimony, and was sufficient, where the evidence is in dispute as to whether or not a certain

witness is an accomplice. We think, therefore, that the trial court did not err in refusing to give instruction No. 1, because the law applicable to the evidence in the case was fairly covered by the instruction given on the court's own motion.

[3] It is also contended that the trial court erred in refusing to give requested instruction No. 8. This instruction was properly refused. It does not correctly state the law. In the requested instruction, the court is asked to advise the jury that, if they believe any witness has been promised immunity, or entertains the hope of immunity, from any prosecution pending against him, the testimony of such witness, or witnesses, should be corroborated by such other evidence as tends to connect the defendant with the commission of the offense and the corroboration is not sufficient if it merely shows the commission of the offense and the circumstances thereof. In other words, the request asked the court to instruct the jury that any person who had been promised immunity from prosecution for any other offense for giving testimony in this case was to be treated as an accomplice of the defendant, so far as the necessity of corroboration of such a witness was concerned. There is no statute of this state that requires that extent of corroboration of a witness who has merely been promised immunity from prosecution for some other offense not connected in any way with the offense for which the defendant is being tried.

[4] Further, it is contended that the trial court erred in refusing to permit the defendant to introduce in evidence the appearance docket of the county court of Oklahoma county, in a case against Paul Atkins then pending in said court, for the purpose of proving his interest and hope of immunity by testifying for the state as a witness in this case. We think that evidence that there was a criminal action pending against the witness Paul Atkins in the same court undetermined, controlled by the same prosecuting officers, was proper to be shown, for the purpose of affecting the credibility of the witness. Counsel for defendant offered to show, on the cross-examination of the witness Paul Atkins, that such a case was then pending against him, and upon objection by the state the trial court excluded this evidence. Thereafter counsel for defendant offered to introduce the appearance docket of said court for the purpose of showing these facts, and this evidence was excluded, also over the exception of counsel for defendant. While this court has held that it is not a proper method of impeachment of a witness to show merely that he has been ar-

rested and charged with crime, it is nevertheless proper for the jury to know that at the time the witness is testifying he is in a position to receive some benefit from the same prosecuting officers should his testimony be favorable to the prosecution, even though an express promise of immunity had not been given the witness. As the jury is the exclusive judge of the weight of the evidence and of the credibility of each and every witness, anything that properly tends to cast light upon the credit to be given to a witness is a matter that should be permitted to go before the jury for its consideration. We think, therefore, in this instance, that the trial court should have permitted counsel for defendant to cross-examine the witness Atkins along the lines indicated by the questions asked, and by the offers of proof made by counsel for defendant.

[5] However, this court, by express statutory enactment, is precluded from reversing a judgment of conviction because of the exclusion of evidence, unless after an examination of the entire record it is apparent to this court that the exclusion of such evidence probably resulted in a miscarriage of justice, or deprived the defendant of some constitutional or statutory right to his prejudice. An examination of the record in this case discloses ample evidence, in addition to that given by the witness Atkins, sufficient to have authorized the conviction of the defendant. We cannot say, therefore, that the exclusion of this evidence resulted in a miscarriage of justice.

The punishment imposed by the jury is the maximum fixed by the statute. It is the punishment generally imposed upon those who are confirmed violators of the law, or else in aggravated cases. This is the first time defendant has ever been convicted.

[6] The Legislature has seen fit to vest this court with power and authority to modify a judgment of conviction, where the ends of justice seem to require it. In this instance, after a careful consideration of the evidence in connection with the alleged grounds for reversal, the conclusion is reached that the judgment should be modified to provide a fine of \$250 and imprisonment in the county jail for a period of 30 days; and, for the reasons stated, this judgment is modified to provide a fine of \$250, instead of a fine of \$500, and to provide imprisonment in the county jail for a period of 30 days, instead of 6 months, and, as so modified, the judgment is affirmed.

DOYLE, P. J., and ARMSTRONG, J., concur.

(44 Nev. 179)

## TOBIN v. GARTIEZ et al. (No. 2447.)

(Supreme Court of Nevada. Aug. 17, 1920.)

## 1. Justices of the peace §75(1)—Action involving title to land properly certified to district court, though pleadings not verified.

In an action originally brought in the justice's court for damages for grazing of sheep on plaintiff's land in violation of Rev. Laws, § 2335, where action involved title to land, the court properly certified the cause to the district court, under section 5721, notwithstanding that the pleadings were not verified.

## 2. Estates §1—Term "legal title" defined.

The term "legal title" does not have a strict legal meaning, and in a broad sense signifies title in fee as well as any inferior estate that may be carved out of an estate in fee, including a leasehold estate, and any right of possession as distinguished from the mere actual occupation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legal Title.]

## 3. Animals §93 — Lessee of grazing land is "owner" with "legal title" within statute.

One who has leased land for grazing purposes is owner thereof, and has "legal title" thereto within Rev. Laws, § 2335, making it unlawful to graze live stock on land of another without consent of "owner," provided person claiming to be owner has "legal title" thereto.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Owner.]

## 4. Statutes §192—Nontechnical term in remedial statute to be liberally construed.

A term which is not technical in its meaning should, especially when used in a remedial statute, be liberally construed in favor of those entitled to its protection.

Appeal from District Court, Humboldt County; James A. Callahan, Judge.

Action by C. L. Tobin against Frank Gartiez and others. From judgment for plaintiff, order denying motion for new trial and order denying motion to strike the cost bill, and order denying motion to strike item from cost bill, defendants appeal. Affirmed.

Campbell, Robins & Salter, of Winnemucca, for appellants.

T. A. Brandon, of Winnemucca, for respondent.

DUCKER, J. This action was originally brought in the justice's court of Union township, county of Humboldt, state of Nevada, to recover \$200 damages for grazing sheep upon the lands alleged to be owned by respondent. An attorney fee in the sum of \$250 is demanded in the complaint. In regard to the ownership and possession of the lands it is alleged in the complaint as follows:

"That during all the times hereinafter mentioned the said plaintiff was and now is, the owner, and lawfully in the possession of that certain tract of land situated in the county of Humboldt, state of Nevada."

Then follows a particular description of the land by legal subdivisions. The complaint is not verified, and the answer, which in the main consists of denials as to the ownership and possession of the lands, damage sustained, the right of respondent to recover an attorney fee, and the reasonableness thereof as alleged in the complaint, is also unverified. The justice of the peace, being of the opinion that under the state of the pleadings a question as to the title of real estate was involved, certified the case to the district court for trial. In the district court the trial before a jury resulted in a verdict for respondent in the sum of \$200 damages, and the court thereafter, on motion, fixed respondent's attorney fee in the sum of \$250, and entered judgment against appellants and in favor of respondent for said amounts, together with costs of suit. A motion for a new trial was denied by the court.

This appeal is taken from the judgment and order denying appellants' motion for a new trial, from the order of the court denying their motion to strike the cost bill, and also from the order denying their motion to strike from said cost bill the item "attorney fees," fixed by the court at \$250.

Appellants contend that the district court had no jurisdiction of the subject-matter of the action, for the reason that no verified answer had been filed with the justice of the peace. Section 5721 of the Revised Laws of Nevada, under which this claim of want of jurisdiction is made, reads:

"The parties to an action in a justice's court cannot give evidence upon any question, which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine; nor can any issue presenting such question be tried by such court; and if it appear from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and if any of the proceedings are oral, a transcript of the same, from his docket to the clerk of the district court of the county; and from the time of filing such pleadings or transcript with the clerk, the district court shall have over the action the same jurisdiction as if it had been commenced therein. \* \* \*

This statute received consideration in *In re Dixon*, 40 Nev. 228, 161 Pac. 737, and the jurisdictional question involved here was in

that case determined adversely to appellants' contention. It was there held, in effect, that in an action instituted in a justice's court an unverified pleading of a defendant, raising an issue as to the legality of a tax and the constitutionality of the law imposing the tax, was sufficient to confer jurisdiction on the district court and make it the duty of the justice to suspend all further proceedings and certify the pleading to the district court. This ruling appears to be sound, and we must therefore regard it as controlling.

As declared by the court in *King v. Kuter-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10, in regard to a statute identical in almost every respect to section 5721:

"It must be deemed an elementary principle that the facts, and not the verified answer, constitute the final test of jurisdiction upon any cause of action inaugurated in a justice's court."

[1] The complaint in this case was not verified, and the unverified answer therefore raised an issue as to the respondent's title to the land within the meaning of section 1 of "An Act to prevent trespass upon real estate by live stock," etc., approved February 18, 1893 (St. 1893, c. 31), under the provisions of which this action is prosecuted. Clearly then, by the constitutional reservation of such questions for trial in the district court, and the provisions of said section 5721, the justice's court was, by the pleadings, deprived of jurisdiction in the premises; and its certification of the cause to the district court was, in our judgment, warranted by said section. That the verification of a written answer is not absolutely essential to the authority of the justice to certify the cause, when the fact that the title to real estate is involved, appears by a proper issue made by the pleadings, is fairly deducible from the fact that the section provides for such a transfer in a proper case when the answer is oral. It follows from the views we have expressed that the district court had jurisdiction to try the cause.

Appellants insist that respondent's title to the lands involved is not sufficient in law to enable him to maintain this action. Section 1 defining the character of title contemplated by the act in question, provides as follows:

"It shall be unlawful for any person or persons to herd or graze any live stock upon the lands of another without first having obtained the consent of the owner or owners of the land so to do; provided, that the person claiming to be the owner of said lands has the legal title thereto, or an application to purchase the same, with first payment made thereon." Section 2385, Revised Laws of Nevada.

The record discloses that on the trial of the case respondent proved that the Central

Pacific Railway Company was, on the 18th day of October, 1918, the owner in fee simple of all the lands described in the complaint, and on that date, for a valuable consideration, entered into a lease with respondent, by virtue of which said lands were leased to him from the 1st day of October, 1918, to September 30, 1919, for grazing purposes only. This lease was in force and effect at the time of the trespass. Respondent asserted no title, possession, or right of possession to the lands except under said lease. The lower court in effect instructed the jury that the respondent was the owner of the lands described in the complaint and entitled to recover for any damages sustained. This instruction is as follows:

"You are instructed that the laws of the state of Nevada do not permit a person to herd or graze his sheep upon the land of another without his consent, nor permit his sheep to be so herded or grazed; and if you find from a preponderance of the evidence in this case that, at the time of the alleged trespass, the defendants without the plaintiff's consent did herd or graze their sheep, or permit them to be herded or grazed, upon the lands described in the complaint, such herding or grazing is not permitted by the laws of this state, and your verdict should be for the plaintiff in such sum, not exceeding \$250, as you may find from a preponderance of the evidence he has been actually damaged by such herding or grazing, and in this connection you are instructed that a person may act by his employé or agent as well as in person."

[2, 3] The instruction was objected to by appellants as erroneous, in that it assumes that the respondent, as lessee of the lands, had the legal title thereto within the meaning of said section 1. The term "legal title" does not have a strict legal meaning. A party may have the legal title to property although he is not the absolute owner in fee. In a broad sense it signifies title in fee as well as any inferior estate that may be carved out of an estate in fee. Legal title in a general sense signifies the right of possession as distinguished from the *pedis possessio* or mere actual occupation. *Carroll v. Rigney*, 15 R. I. 81, 23 Atl. 46; *Chapman v. Dougherty*, 87 Mo. 617, 56 Am. Rep. 470. "As applied to real estate, title is generally defined to be the means whereby the owner of lands has the just possession of his property." 28 Am. & Eng. Encyc. 232. The foregoing definition is generally accepted as an accurate definition of the term in its unrestricted signification. In this sense it is broad enough to and does include a leasehold estate. *Campfield v. Johnson*, 21 N. J. Law, 83.

[4] The question then is narrowed down to a determination of what the Legislature meant by the use of the term "legal title": that is, whether meant in the limited sense

as the means whereby one holds real estate as an owner in fee, or in a broader sense as evidence also of the right to the possession and enjoyment of some lesser estate. The word "owner," employed in said section 1, does not necessarily mean owner in fee simple, and may be applied to any defined interest in real estate including a leasehold interest. 28 Am. & Eng. Ency. 234, 235; State v. Wheeler, 23 Nev. 143, 44 Pac. 430. So, if the Legislature intended to give the word "owner" a much stricter meaning than is generally accorded to it in law, it is unlikely that it would have resorted to a term also general in its signification.

On the other hand, having undertaken to define the word "owner," it seems reasonable to suppose that, if it was meant to be taken in the narrow sense of owner in fee, such term, or its equivalent, would have been employed in the definition. We are inclined to the belief that the proviso in section 1, defining the term "owner," was not intended to restrict the meaning of that term, but to enlarge it so as to include such person, or persons, as may have applied to the state for the purchase of lands and made first payment on the application. Strength is given to this conclusion when we consider the great amount of land throughout the state held in leasehold for grazing and agricultural purposes at the time the statute was enacted, and that it is difficult to assign a reason why the Legislature should exclude such lessees from the extraordinary remedy afforded by the statute. In fact none can be given, and if appellants' contention were allowed to prevail it would be conceded that the legislature, in selecting real estate held in fee or under state contracts for the purposes of the act, made a mere arbitrary classification, excluding from its purview great numbers of landholders in this state equally entitled to its benefits. And so far as any subsequent legislation is concerned they are still denied any such remedy. It may be granted that this is a matter exclusively within the province of the Legislature; but, in the absence of clear expression to that effect, an intention to provide a remedy so inequitable as between landowners of this state ought not to be presumed. As the term "legal title" is not technical in its meaning, it should, especially when used in a remedial statute, be construed liberally in favor of the parties obviously entitled to its protection.

That respondent's interest in the land was by the terms of the lease limited to the extent of grazing it with live stock does not alter the legal status of the case. He was nevertheless entitled to the right of exclusive possession for such purposes, and was the only person capable of sustaining ap-

preciable damage by the herding and grazing of appellants' live stock upon the land. We conclude that respondent, as the lessee of the Central Pacific Railway Company, had the legal right to the land described in the lease admitted in evidence, and that the instruction given by the court in this regard is correct. Consequently the court did not err in refusing the instructions offered by appellants, stating, in substance, that there had been a failure of proof as to respondent's ownership of the legal title.

Appellants contend that as respondent's title to the lands is not sufficient in law to enable him to maintain an action under the particular act in question, the court was without authority to enter any judgment for counsel fees. Inasmuch as we hold the title sufficient, and as the act expressly provides that the live stock which is unlawfully herded or grazed upon the lands of another shall be liable for all damages done, together with costs of suit and reasonable counsel fees, there was no error in the action of the court in fixing respondent's counsel fees at the sum of \$250. The reasonableness of the amount is not questioned.

The judgment is affirmed.

COLEMAN, C. J., and SANDERS, J., concur.

(58 Mont. 266)

McINTYRE v. NORTHERN PAC. RY. CO.  
et al. (No. 4160.)

(Supreme Court of Montana. July 6, 1920.)

1. Railroads §359(1)—Duty to persons in yards stated.

A railroad, operating a switch engine at a place in its yards not customarily used by the public, owes no duty other than to avoid injury to persons on the tracks after their presence and peril have actually been discovered.

2. Trial §139(1)—Scintilla of evidence insufficient for jury.

A mere scintilla of evidence is insufficient to make a question for the jury.

3. Judges §30—Only matters authorized by statute or agreement may be done outside district.

A judge cannot, after leaving a district in which he has presided at a trial, render judgment therein, or make any order, other than as authorized by statute or agreement of the parties.

4. Judges §27—Only matters authorized by statute may be done at chambers.

Even while a judge is in his own district, he has no jurisdiction to do anything at chambers in relation to case pending there other than the statute authorizes.

**3. Judgment ¶10—Rendition in open court necessary.**

The rendition of a judgment is a judicial act which, to be valid, must be done in open court.

**6. Judgment ¶271—Entry on general verdict is ministerial duty of clerk.**

Under Rev. Codes, § 6800, providing that on trial by jury judgment must be entered by the clerk, unless the court orders the case reserved or grants a stay, the return and recording of a general verdict makes it the ministerial duty of the clerk to enter judgment.

**7. Judgment ¶215, 282—Recording of general verdict constitutes "rendition of judgment," and place of signing is immaterial.**

Under Rev. Codes, § 6800, the recording of a general verdict under the direction of the court constitutes the "rendition of judgment," and the drawing and signing of a formal judgment is unnecessary, and hence the fact that it was signed by the judge at chambers after he had left the district did not render the judgment invalid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rendition of Judgment.]

**8. Judgment ¶215—Judge has no function to perform with reference to judgment after the recording of general verdict.**

Under Rev. Codes, § 6800, the court, after the recording of a general verdict under his direction, has no other function to perform with reference to the judgment, unless he has ordered the case reserved for argument for further consideration, or granted a stay of proceedings, and, though the drawing and signing of a formal judgment is customary, it is not essential.

**9. Judgment ¶210—Court must render judgment on special verdict or findings in open court.**

When a special verdict or findings are returned, it is the duty of the court to render the proper judgment, and, this being a judicial act, must be performed in open court.

**10. Judgment ¶215—Announcement and entry of decision constitutes "rendition of judgment" on special verdict or findings.**

When a special verdict or findings are returned, the announcement by the judge of his decision in open court and its entry in the minutes constitute the rendition of the judgment.

**11. Judgment ¶271—Clerk without authority to enter in equity cases if decision general.**

In equity cases, if the decision is general or the findings are not accompanied by conclusion of law embodying specific directions as to the adjustment of the rights of the parties, the clerk has no authority to enter judgment, as in assuming to do so he assumed judicial functions.

**12. Judgment ¶215, 282—Judgment entered in conformity with court's direction is judgment of court, though not written out and signed.**

When entered in conformity with the direction of the court, a judgment is the judgment

of the court, though not written out and signed by the judge.

Cooper, J., dissenting.

**Appeal from District Court, Silver Bow County; Theodore Lentz, Judge.**

Action by Muriel McIntyre against the Northern Pacific Railway Company, William T. Finnegan, and others. From a judgment in favor of the defendants named, and an order denying a new trial, plaintiff appeals. Affirmed.

N. A. Rotering, of Butte, for appellant.  
Walker & Walker, of Butte, and Gunn, Rasch & Hall, of Helena, for respondents.

BRANTLY, C. J. In this action the plaintiff seeks to recover damages for the loss she sustained by reason of the death of her son, Freddie Lautwe, which is alleged to have been caused by negligence in the operation of a switch engine of the railway company by its employes in its yard at Butte. Defendants Lawrence and Williams, respectively the engineer and fireman in charge of the engine, were not served with summons, and therefore were not parties to the trial. At the conclusion of the evidence the court, on motion of the railway company and defendant Finnegan, directed a verdict in their favor. Plaintiff has appealed from the judgment entered thereon, and from an order denying her a new trial. Counsel contend that the court erred in withdrawing the case from the jury.

McIntyre v. Northern Pacific Railway Co. et al., 56 Mont. 43, 180 Pac. 971, was an action by the plaintiff herein as administratrix of her son, to recover damages for the benefit of his estate. The complaint in that case was drawn, and the trial was had upon the theory that recovery could be had, if at all, under the rule of the last clear chance. The complaint in this case is identical with that in the other, and the trial was had upon the same theory. The plaintiff undertook to establish her right to recover in this case, by evidence which was the same in all substantial particulars as that introduced by her in the other case, with this exception: At the trial in the other case she testified that she was present in the yard at the time of the accident and witnessed it. She pointed out the place where she was standing. She also pointed out where her son was standing on the track when the engineer started to move the engine toward him, giving the distance before it reached him and ran him down. At the trial of this case she changed her testimony as given on the other trial, by putting herself at a point where she was much nearer the engine when it began to move, and fixing the point at which her son stood much farther from the engine, thus bringing herself

(191 P.)

relatively nearer to the engineer, in order to increase by her testimony the probability that the engineer saw her son in ample time to stop the engine before it reached him. She explained this change in her testimony by saying that at the other trial she had not measured these distances, but had only estimated them, whereas after the trial she had procured the services of a competent engineer and had them accurately measured. Reference to the epitome and analysis of the evidence made in the opinion in the other case will make it clear that the change in her testimony did not add materially to the evidentiary value of her narrative as then made. The discussion in that opinion fully covers and disposes of every phase of the evidence in this, under the rules of law applicable, and we are satisfied with the result reached. It is conclusive of this case.

It may be added that the defendants introduced several witnesses whose testimony was not introduced at the trial of the other case. Their testimony strongly impeached that of the plaintiff, in that it tended to show that she was not at the point where she said she was standing at the time of the accident, and that she was either mistaken in important particulars of her narrative, or that her statement that she was present in the yard and witnessed the accident was a fabrication. Conceding for the moment that her statement furnished the basis for an inference that the engineer actually saw the boy, in view of the change in her testimony, the positive statement of the engineer that he did not see the boy and the undisputed evidence, positive and circumstantial, of other witnesses introduced by the defendants, impeaching her testimony throughout, as pointed out in the opinion in the other case, the evidence as a whole was insufficient to justify a recovery.

[1] If the pleadings had been formulated on the theory that because of the situation of the yard and customary use of it by those who lived in the vicinity and other members of the public by acquiescence of the railway company, its duty to take knowledge of their probable presence and to keep a lookout for them during the movement of its train would have been made apparent, and a different case would have been presented. The evidence might then have made a case calling for the judgment of the jury. The rules by which cases of that character are determined have no application here. In that class of cases it is the duty of the company to keep a lookout in order to avoid injury to persons who may be in the way of its trains. *Dahmer v. Northern Pac. Ry. Co.*, 48 Mont. 152, 136 Pac. 1059, 142 Pac. 209; *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323. In cases of the class of the instant case, the company is under no duty other than to avoid injury to persons who may be in the way of its trains after their presence and peril have

actually been discovered. *Dahmer v. Northern Pac. Ry. Co.*, *supra*, and cases cited.

[2] Construing the evidence from the aspect of it most favorable to the plaintiff, it presents nothing more than a scintilla tending to show that the engineer actually observed the boy on the track. In *Escallier v. Great Northern Ry. Co.*, 46 Mont. 238, 127 Pac. 458, Ann. Cas. 1914B, 468, it was pointed out that it requires more than this to call for the judgment of a jury. The principle of that case applies here.

[3-8] Hon. Theodore Lentz, of the Fourth judicial district, presided at the trial, having been requested to do so by Hon. John B. McClernan, the resident judge, in whose department the case was pending. After the verdict was rendered, but before judgment had been entered, Judge Lentz returned to his own district. A few days later a formal judgment was presented to him by counsel for defendants at Missoula for his signature. After he had signed it, it was transmitted to the clerk of the district court in Silver Bow county, and by him duly entered. Counsel for plaintiff contend that, since Judge Lentz did not formally render judgment in open court in Silver Bow county, the judgment is void. It is true that a judge cannot at chambers, after leaving the district in which he has presided at a trial, render judgment therein or make any order other than he is authorized by statute or by agreement of the parties. *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753. Indeed, he is without jurisdiction while he is in his own district to do anything at chambers, in relation to cases pending there, other than what the statute authorizes. *State ex rel. Mannix v. District Court*, *supra*; 23 Cyc. 550. The rendition of a judgment is a judicial act which, to be valid, must be rendered in open court. Section 6800 of the Revised Codes declares:

"When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."

Under this provision, the return and recording of a general verdict makes it the ministerial duty of the clerk to enter judgment. In other words, the recording of the verdict under the direction of the court is the rendition of judgment. Thereafter the court has no other function to perform with reference to it, unless it has ordered the case to be reserved for argument or further consideration, or granted a stay of proceedings. The custom of drawing a formal judgment and having the judge to sign it is usually observed; but this is not required by the

statute. The signature of the judge is not essential to its validity. *State ex rel. Dolenty v. District Court*, 42 Mont. 171, 111 Pac. 731; *State ex rel. Anderson v. District Court*, 56 Mont. 244, 184 Pac. 218; *Spelling, New Tr. & App. Prac.* § 485.

[9-12] It is otherwise when the court directs the jury to return a special verdict or special findings. When the special verdict or findings are returned, it is the duty of the court to render the proper judgment. *McDonald v. Klenze*, 52 Mont. 142, 157 Pac. 175. "There is this difference between a general and a special verdict: The former includes, or rather unmistakably implies, the conclusion of law constituting a judgment, while the latter answers the purpose of findings by the court, but lacks the conclusion of law which accompanies findings made by the court. Therefore, in cases of special verdicts, the clerk has no guide for entering the judgment until the court has declared the conclusion of law; that is, directed what judgment shall be entered." *Spelling, New Tr. & App. Prac.* § 485. When this is the situation, the rendition of judgment, being a judicial act which remains to be done, must be performed by the judge in open court. The announcement of his decision by the judge in open court and the entry of it in the minutes constitute the rendition of the judgment. In equity cases, if the decision is general or the findings are not accompanied by conclusions of law embodying specific directions as to the adjustment of the rights of the parties, the clerk has no authority to enter the judgment. In assuming to do so, he assumes to perform judicial functions, whereas his duty in this respect is ministerial. He may not act at all until the terms of the judgment have been finally fixed by the court. *State ex rel. Reser v. District Court*, 53 Mont. 235, 163 Pac. 1149. When this has been done, however, the clerk's duty is clear. When entered in conformity with the direction of the court, the judgment is the judgment of the court, though not written out and signed by the judge. The signing of the judgment in this case by Judge Lentz at Missoula was therefore not necessary to authorize the clerk to enter the judgment. The contention of counsel is without merit.

The judgment and order are affirmed.  
Affirmed.

HOLLOWAY, HURLY, and MATTHEWS, JJ., concur.

COOPER, J. The evidence in this case not differing materially from that presented in *McIntyre v. Northern Pac. Ry. Co.*, 56 Mont. 43, 180 Pac. 971, I feel compelled to dissent upon the ground that in my judgment the evidence was sufficient to call for a submission of it to the jury.

(27 Wyo. 62)

In re FAULKNER'S ESTATE.

FAULKNER v. FAULKNER et al.

(No. 1000.)

(Supreme Court of Wyoming. Sept. 1, 1920.)

1. Appeal and error ⇨612(2)—Record should have been certified by judge.

A record on appeal, prepared by the clerk and certified by him January 28, 1919, will be stricken from the files of the court, under *Sess. Laws 1919, c. 82, § 6*, where not certified to by the judge.

2. Appeal and error ⇨635(1)—Record must contain journal entry of judgment.

Where record contains no journal entry of the judgment or decree, but simply a form of decree signed by the judge without any transcript of the journal showing that it was ever entered, or, if in fact a decree was entered, when it was entered, or what it was, the appeal must be dismissed.

Error to District Court, Uinta County; V. J. Tidball, Judge.

In the matter of the estate of Sarah A. Faulkner, deceased. Proceeding by Stephen Faulkner against Charles Faulkner, William Faulkner, Albert Faulkner, and Sarah Ann Goodman, to contest a will. Decree for contestees, and contestant appeals. Appeal dismissed.

P. W. Spaulding and Louis Kabell, Jr., both of Evanston, for appellant.

Reuel Walton, of Evanston, and S. T. Corn, of Ogden, Utah, for respondents.

BEARD, C. J. [1] In this case the respondents have filed and submitted a motion to strike from the files of this court the record for appeal and the transcript of testimony, and to dismiss the appeal upon a number of grounds, only a few of which need be considered. One of the grounds for the motion to strike the record on appeal from the files is that it is not certified by the judge of the district court as true and correct. The record on appeal as prepared by the clerk was certified by him January 28, 1919. At that time the statute (section 6, chapter 82, S. L. 1917) required the record on appeal to be certified to by the judge and clerk of the district court as true and correct. The record as filed in this court is not in any manner certified by the judge; and for that reason is not such a record as the statute then required, and should be stricken from the files of this court.

[2] Respondent moves to dismiss the appeal for the reason, among others, that the record fails to show that at the time the appeal was taken any judgment or final order had been entered in the cause. In that respect the record here is in the same condi-



tion as the record in *Hahn v. Citizens' State Bank*, 25 Wyo. 467, 171 Pac. 889. In the opinion in that case the question is fully considered and discussed; and it would serve no good purpose to repeat here what was there said. That decision was adhered to on a petition for rehearing (172 Pac. 705), and was cited and followed in *Goodrich v. Big Horn County Bank*, 174 Pac. 191. The record in the present case, like those in the cases cited, contains no journal entry of the judgment or decree but simply a form of decree signed by the judge, without any transcript of the journal showing that it was ever entered, or, if a decree was in fact entered, when it was entered, or what it was. Even if the record in the present case had been properly certified so that it could be considered by this court, the fact that it contains no transcript of any journal entry, showing the entry of any judgment or decree, requires the dismissal of the appeal. Following the decisions in the cases above cited, the appeal is dismissed. Appeal dismissed.

POTTER, J., and KIMBALL, District Judge, concur.

BLYDENBURGH, J., being unable to sit in this case, Hon. Ralph KIMBALL, Judge of the Sixth Judicial District, was called in as a member of the court, and sat in his stead.

(27 Wyo. 520)

MITTER v. BLACK DIAMOND COAL CO.

BLACK DIAMOND COAL CO. v. MITTER.

(Nos. 998, 1005.)

(Supreme Court of Wyoming. Sept. 1, 1920.)

1. Appeal and error  $\S$  425—Notice of direct appeal must be served within 10 days, irrespective of motion for new trial.

Sess. Laws 1917, c. 32, relating to direct appeals, makes no provision for motion for new trial, and the filing of such a motion does not have the effect of extending the time for serving the notice of appeal beyond the 10 days from the entry of the judgment.

2. Appeal and error  $\S$  12—Direct appeal and proceedings in error independent and separate methods.

A direct appeal, under Sess. Laws 1917, c. 32, and proceedings in error, are entirely separate and independent methods of obtaining a review, either of which a party may elect to pursue; but in either case the statute and rules of court applicable to that particular method must be followed.

3. Appeal and error  $\S$  544(1)—Matters not reviewable, in absence of bill of exceptions.

Assignments that rulings of the trial court on motions were erroneous, and assignments that findings of the trial court are against the law and the evidence, cannot be reviewed in

proceedings in error, in the absence of a bill of exceptions, in view of rule 13 (104 Pac. xiii).

4. Appeal and error  $\S$  11—Both error and appeal cannot be maintained at the same time.

While a party may bring a cause to the Supreme Court for review by either a direct appeal, under Sess. Laws 1917, c. 32, or by proceedings in error, if he has preserved the proper record, he cannot maintain both at the same time.

Error to District Court, Sweetwater County; John R. Arnold, Judge.

Action by M. Mitter against the Black Diamond Coal Company. Judgment for plaintiff, and defendant appeals and brings error. Appeal and proceedings in error dismissed.

Fred W. Johnson, of Rock Springs, and Harry O. Riddle, of Denver, Colo., for plaintiff.

Louis Kabell, Jr., of Evanston, and Edwin J. Stason, of Sioux City, Iowa, for defendant.

BEARD, C. J. [1] In each of these cases the Black Diamond Coal Company, a corporation, seeks a reversal of the same judgment of the district court of Sweetwater county, in the case of M. Mitter against said company, and for that reason will be considered in one opinion. No. 998 is a proceeding brought under the direct appeal act (chapter 32, S. L. 1917), in which case the record on appeal was filed in this court December 1, 1919; and No. 1005 is a proceeding in error, in which the petition in error and praecipe for summons in error was filed February 7, 1920. In No. 998, the respondent filed a motion to dismiss the appeal upon the ground, with others, that this court is without jurisdiction to entertain the appeal.

An examination of the record on appeal certified to this court discloses that the judgment or decree appealed from was entered in the district court March 2, 1918, and the last order or ruling in the cause, except the ruling on a motion for a new trial, was entered March 23, 1918, and the notice of appeal was not served until February 19, 1919, and was filed February 24, 1919. The statute governing direct appeals (section 2, chapter 32, S. L. 1917) provides:

"An appeal must be taken by serving a notice in writing to such effect, signed by the appellant, or his attorney, upon the opposite party, or his attorney, within ten days from the entry of the order or judgment appealed from, and said notice of appeal shall be filed with the clerk of the district court where the order or judgment appealed from is entered, within said ten days."

The statute providing for direct appeals makes no provision for a motion for a new trial, and the filing of such motion does not have the effect of extending the time for

serving and filing the notice of appeal beyond the 10 days from the entry of the judgment. No doubt a party may, within 10 days from the entry of the judgment, serve and file a notice of appeal, in order to preserve his right to bring the case to this court by direct appeal, and may also file a motion for a new trial, where such motion is necessary to preserve a proper record for bringing the cause to this court by proceedings in error; but, unless the notice of appeal is served and filed within the time required by the statute, the remedy by direct appeal is lost. As the notice of appeal in the present case was not served and filed within the time allowed therefor, this court acquired no jurisdiction by the filing therein of the record on appeal. For that reason the appeal will have to be dismissed; and it is so ordered.

[2-4] The two methods provided by our statutes to be pursued to obtain a reversal, modification, or vacation of a judgment of the district court by the Supreme Court are entirely separate and independent methods, either of which a party may elect to pursue; but whether or not, after bringing the cause to this court by one method, and while that case is still pending, he can also commence proceedings in this court by the other method, we entertain grave doubts. But as that question has not been raised, we do not decide it. In either case the statute and rules of court applicable to that particular method must be followed. In the case now being considered, No. 1005, the defendant in error has filed a motion to dismiss the proceedings in error. One of the grounds for such motion is that the record contains no bill of exceptions. Rule 13 of this court (104 Pac. xlii) provides:

"Nothing which could have been properly assigned as a ground for a new trial in the court below will be considered in this court, unless it shall appear that the cause was properly presented to the court below by a motion for a new trial, and that such motion was overruled and exception was at the time reserved to such ruling; all of which shall be embraced in the bill of exceptions."

Assuming that the record on appeal in case No. 998 can be considered in this case, neither that record nor the record in this case contains any bill of exceptions. The rulings of the trial court here complained of relate to the rulings on divers motions, and that the findings of the trial court are against the law and the evidence. "It is well settled that motions are not in the record on proceedings in error, unless embraced in a bill" (Harden v. Card, 14 Wyo. 479, 85 Pac. 246; Bank of Chadron v. Anderson, 7 Wyo. 441, 53 Pac. 280); and when it is contended that the findings are against the law or the evidence the exceptions must be reduced to writing and presented to the court or judge for

allowance (section 4598, Comp. St. 1910). No brief in resistance of the motion to dismiss the proceedings in error has been filed by counsel for plaintiff in error, and we do not understand them to claim that a bill is not necessary in this case. Indeed, they seem to have abandoned this proceeding, as they state in their brief resisting the motion to dismiss the appeal in No. 998 that—

"The appellant is seeking to have the action of the trial court reversed, not on error, but by trial de novo on direct appeal, as provided by the new law relating to that method of review."

Counsel seem to entertain the erroneous impression that under chapter 32, S. L. 1917, they can have a trial de novo in this court. While a party may bring the cause to this court by either of the two methods at his election, if he has preserved the proper record, he cannot maintain both at the same time, and, whether or not this proceeding is to be regarded as abandoned, it is clear that, in the absence of a bill of exceptions, there is nothing for this court to consider, and the motion to dismiss the proceedings in error will have to be granted; and it is so ordered.

Appeal and proceedings in error dismissed.

POTTER, J., and TIDBALL, District Judge, concur.

BLYDENBURGH, J., being unable to sit in these cases, Hon. V. J. TIDBALL, Judge of the Second Judicial District, was called in as a member of the court and sat in his stead.

(56 Utah, 583)

#### KELLY v. BOARD OF EDUCATION OF MILLARD COUNTY et al. (No. 3504.)

(Supreme Court of Utah. July 27, 1920.)

Schools and school districts §97(4)—Consolidated district, without election, could not issue and sell bonds to pay indebtedness created in violation of Constitution prior to consolidation.

A consolidated school district has not the power, under Comp. Laws 1917, § 4619, and Laws 1919, c. 91, § 1, to issue and sell bonds of the consolidated school district to pay an indebtedness created by one of the school districts prior to consolidation, in violation of Const. art. 14, § 3, providing that an indebtedness cannot be created in excess of the taxes of the current year unless an election shall be held and a majority of the voters shall favor such a debt.

Proceeding by James A. Kelly to prohibit the Board of Education of Millard County and others from issuing and selling bonds. Peremptory prohibition awarded.

Grover A. Giles and J. S. Giles, both of Fillmore, for plaintiff.

James A. Melville, Jr., of Salt Lake City, for defendants.

THURMAN, J. Plaintiff instituted this proceeding to prohibit defendants from issuing and selling certain district school bonds and paying the indebtedness referred to in the application. The material facts are not in dispute.

On the 2d day of May, 1916, the county commissioners of Millard county, by appropriate resolution, consolidated all of the school districts in said county into one school district of first class, under the name and style of "the board of education of Millard county school district, in Millard county, state of Utah." By said consolidation the defendant board became liable for all the outstanding debts and obligations of the school districts existing in the county at the time of the consolidation. Comp. Laws Utah 1917, § 4619. Among the districts so consolidated were the Central school district No. 5 and the Holden school district No. 8, each of which was burdened with an indebtedness created in excess of the taxes of the current year, in violation of section 3, art. 14 of the state Constitution. The debts of the two districts aggregated a sum in excess of \$20,000.

On the 12th day of August, 1919, after notice duly published and in pursuance of the provisions of chapter 91, Sess. Laws Utah 1919, providing for the redemption, cancellation, and refunding of school bonds and issuance of funding bonds, the defendant board, composed of the other defendants as members thereof, adopted a resolution for the issuance and sale of bonds of the defendant school district in the sum of \$20,000 for the purpose of paying the aforesaid indebtedness. The plaintiff is a resident and taxpayer of the said county and school district, and as such makes this application for relief.

The complaint of plaintiff with great particularity details the various steps taken by the county commissioners and defendant board from the date of the consolidation of the school districts down to the commencement of this action. Every necessary step, under the laws of this state, seems to have been taken by the board, and the provisions of the law carefully followed in every respect, prior to the adoption of the resolution providing for the issuance and sale of the bonds. Plaintiff, in his brief, charges various irregularities and omissions on the part of the defendants in regard to the proceedings prior to the adoption of the resolution, but after a careful investigation of the proceedings and the law applicable thereto we are of the opinion that the law was substantially complied with in every essential particular. The only question to be determined, therefore, is:

Does the defendant board have the power, under the law to which we have referred, to issue and sell bonds of the school district to pay an indebtedness created in violation of the Constitution? The section of the Constitution above referred to reads as follows:

"No debt in excess of the taxes for the current year shall be created by any county or subdivision thereof, or by any school district therein, or by any city, town or village, or any subdivision thereof in this state; unless the proposition to create such debt, shall have been submitted to a vote of such qualified electors as shall have paid a property tax therein, in the year preceding such election, and a majority of those voting thereon shall have voted in favor of incurring such debt."

Chapter 91, Sess. Laws Utah 1919, upon which defendants rely, after stating the necessary steps to be taken by the board and the requisites to be observed in refunding bonds previously issued, has the following provision on page 282:

"Bonds may also be issued by a consolidated school district without an election, for the funding, purchase or redemption of the outstanding indebtedness of any such consolidated school district, provided such debt was contracted prior to consolidation and was assumed by such consolidated school district pursuant to law. The legality, regularity, and validity of any such outstanding indebtedness may be determined in the manner hereinbefore set forth for determining the validity of bonds to be refunded by any board of education."

It is assumed by the defendants that the board of education of the consolidated districts has the power to refund the indebtedness of a school district incurred prior to its consolidation with other districts in the county, whenever it is made to appear that such district has received the consideration for such indebtedness and been the beneficiary thereof. There is no question but that in the present case the debt created by each of the districts before consolidation was created in good faith for the benefit of the schools therein. The detailed account of the various items constituting such indebtedness in each of the two districts mentioned shows conclusively that it was incurred strictly for school purposes.

In our view of the Constitution, however, the purpose for which the debt was created or obligation incurred is in no sense a controlling factor. The primary question is: Was the indebtedness a binding obligation upon the district creating it? Could the district itself before consolidation have been forced to pay the obligation as against a defense interposed that it was in excess of the debt limit provided by the Constitution? If the district itself could not have been compelled to pay it for the reasons stated it must be because it was not a binding obligation, and therefore, in contemplation of law, was no

debt at all. If it was no debt at all, it clearly does not come within the meaning of the term "indebtedness" as used in the excerpt last above quoted. This proposition seems to me to be unassailable. The language of the constitutional provision above quoted is plain and cannot be misunderstood. It is admitted by the demurrer in the present case that the so-called indebtedness in question was all in excess of the debt-limit fixed by the Constitution. It is admitted, also, that the question of indebtedness was not submitted to a vote of the electors of the districts in any manner, or at all. The question presented is so elementary as to preclude the necessity of entering upon an extended review of the authorities. In 28 Cyc. at pages 1560, 1561, it is said:

"A contract made by a municipality in excess of its debt limit fixed by the Constitution or by statute is void, at least as to the excess; and every one dealing with a municipality is charged with notice of a limitation upon the amount of its indebtedness."

Again, at page 1538 of the same volume, it is said:

"Constitutional limitations upon the amount of municipal indebtedness are mandatory."

In 35 Cyc. at page 951, speaking of the power of school districts, the author says:

"All persons dealing with district boards, committees, or officers are bound to ascertain the limits of their authority as fixed by statutory or organic law, and are therefore chargeable with notice of any limitations thereon, as in respect to the amount they are authorized to expend."

The doctrine is stated in 24 R. C. L. at page 609, thus:

"The power of school districts to incur indebtedness is very generally limited by the state Constitutions or statutes. The limitation is absolute, and after it has been reached the officers and agents of a district are powerless, and cannot in any manner or for any purpose burden it with any greater amount. A contract which increases the indebtedness of a school district beyond the constitutional limit is therefore void, and the fact that the district has received the benefits thereof does not ren-

der it liable on an implied contract to pay a quantum meruit therefor."

This proposition is incontrovertible upon any rational or consistent theory. It cannot be presumed that the Legislature of 1919, in the law to which we have referred, intended anything more than that the school board should have power to issue its bonds for the refunding of obligations that were lawful and binding when created.

Plaintiff contends that the law of 1919 is unconstitutional. If it is susceptible of being applied as attempted by defendants in the present case, plaintiff's contention is undoubtedly correct. We do not believe it is reasonably susceptible of any such construction. If an apparent obligation incurred in violation of the plain provision of the Constitution is in fact not an indebtedness at all, as we have before suggested, then the act of 1919, relied on by defendants, affords no justification in the present case for the contemplated issue and sale of bonds. Plaintiff, in the prayer of his complaint, prays that the defendants be peremptorily prohibited and restrained from issuing or selling said bonds, or any of them, or from paying such indebtedness, or any part of the same.

We are not inclined in this proceeding to grant relief to the full extent prayed for in the complaint. The so-called indebtedness, as hereinbefore stated, was incurred in good faith. The schools received the benefit thereof. The taxpayers of the district were relieved to that extent. The business institutions that furnished the supplies and kept the schools running have not been paid. If the defendant board and taxpayers of the county feel that the obligation is at least a moral one, and can provide some lawful means by which it can be paid, it will be a commendable thing to do. This court is not disposed to go further in this decision than to hold that the method proposed in this proceeding is unconstitutional and for that reason should be prohibited.

For the reasons stated the defendants are hereby peremptorily prohibited from issuing or selling the school bonds herein referred to as prayed for in the complaint.

CORFMAN, C. J., and FRICK, WEBER, and GIDEON, JJ., concur.

(191 F.)

(27 Wyo. 54)

**STATE ex rel. FITCH v. STATE BOARD OF  
SCHOOL LAND COM'RS OF WYOMING  
et al. (No. 970.)**

(Supreme Court of Wyoming. Sept. 1, 1920.)

**1. Public lands §54(1)—Sale of lands to  
applicant who made written guaranty to bid  
valid without verbal bid.**

Where school land was offered for sale at public auction at time and place advertised, and in absence of verbal bid was declared sold to applicant, who applied to have land selected as state or indemnity school lands and sold as such, and who guaranteed in writing, to bid specified amount, and deposited a portion of such amount, the sale was valid, notwithstanding applicant's failure to make a verbal bid; the written guaranty constituting a bid.

**2. Auctions and auctioneers §7—How bids  
may be made.**

A bid may be made orally or in writing, by a wink or nod, or by any mode by which the bidder signifies his willingness and intention to bid a particular price.

**3. Estoppel §62(2)—Officer bound by con-  
struction of guaranty as a bid for public  
lands.**

State officers, having construed written guaranty to bid specified amount at public sale of school lands as a bid, will not be heard to insist upon a different construction in action involving validity of sale to applicant, who had, in writing, guaranteed to bid a specified amount, but who had made no verbal bid at sale.

**4. Auctions and auctioneers §7—How bid  
may be accepted.**

Acceptance of a bid is to be denoted by the fall of the hammer, or any other audible or visible means signifying to bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale.

**5. Public lands §54(1)—Bidder at second  
sale of land held not to have waived rights  
under first sale.**

Where school land being sold at public auction was declared sold to applicant, who had made written bid prior to sale, applicant, by bidding at second attempted sale of same lands without knowledge of first sale, did not waive rights under first sale.

Original proceeding in mandamus by the State of Wyoming, on the relation of E. L. Fitch, against the State Board of School Land Commissioners of the state of Wyoming and another. Writ granted.

R. R. Ryan, of Gillette, and Don L. Wake-man, of Sheridan, for relator.

W. L. Walls, Atty. Gen., for respondents.

BEARD, C. J. In this case, on the petition of the relator, an alternative writ of mandamus was issued to the respondents, requiring them to issue to the relator a cer-

tificate of purchase for the east half of section 1, township 52, north of range 76, situated in Campbell county, state of Wyoming, at the sale price therefor of \$10 per acre, or to show cause why they refuse to do so. The respondents filed their answer to said petition, to which relator filed a reply. On the issues thus joined, written stipulations as to certain facts were entered into by the parties, and the balance of the evidence was taken in writing by a commissioner appointed for that purpose.

There are but few controverted questions of fact in the case. About February 1, 1915, the relator applied in writing to the commissioner of public lands to have the lands above described selected as state or indemnity school lands, and for the sale of the same, and at the same time the relator agreed in said application to bid at a public sale of said lands the sum of \$10 per acre therefor, and, as a guaranty that he would do so, deposited with the state land commissioner \$1 per acre, or a total of \$323.47; said written guaranty being in the words and figures following:

"I inclose herewith a deposit of \$1.00 upon each acre of said land, said deposit to be held as a guaranty that I will bid \$10.00 an acre for the land when same is offered for sale."

On August 22, 1918, the relator was advised that the state had become the owner of said lands, and that it would offer the same for sale at public auction to the highest bidder; and at the same time the relator was requested by the state land commissioner to deposit with him the further sum of \$20 to cover the cost of advertising said lands, providing he, the relator, still desired said lands sold under his application of February 1, 1915. The land was, on September 9, 1918, ordered sold by the state board of land commissioners, and thereupon, on September 10, 1918, the relator informed the state land commissioner, by letter, that he still desired the land sold under said application, and then deposited with said commissioner the said sum of \$20. The said lands, together with numerous other tracts of land, were duly advertised for sale, said notice containing the following, to wit:

"Notice is hereby given that pursuant to law and at the order of the state board of school land commissioners, the commissioner of public lands will, on the 6th day of December, 1918, at 9 o'clock a. m. at the front door of the courthouse in the city of Gillette, county of Campbell, state of Wyoming, offer for sale at public auction and sell to the highest and best bidder, the following described school lands. [Here follows a description of the various parcels of land including the tract involved in this action.]"

Said notice also contained the following:

"The State Board of School Land Commissioners reserves the right to reject any and all bids offered at the said sale."

The sale was held and conducted, at the time and place designated in the notice, by the deputy commissioner of public lands who acted as auctioneer. Thus far there is no dispute between the parties. The deputy commissioner who conducted the sale testified that—

Prior to the commencement of the sale, "having been requested to put up a number of pieces out of order in the notice of sale, in order that some of the parties might get away from town, I took the sales out of their regular order. There would be two bidders that I knew of on the east half of section 1, township 52, range 76, an agent of Mr. Johnson, of Sheridan, having spoken to me regarding the procedure of receiving bids, prior to the hour of sale. Both Mr. Fitch and the agent of Mr. Johnson were present at the sale, but inadvertently I took the sale of Mr. Fitch and offered it while both parties were absent from the room, and, receiving no bids, and supposing both parties to be present, I declared the land sold to Mr. Fitch, subject to the approval of the State Board of School Land Commissioners."

She further testified on cross-examination: That she did not know Mr. Johnson, or whether or not he was present at that time. That the land was sold to relator for \$10 per acre on his application and deposit without any verbal bid at the time. That at the same sale another tract of land was sold to him in his absence in the same manner. That a large portion of the land sales throughout the state are made on the application to purchase and a guaranty deposit, without the receipt of any other bid at the sale, and that the written application and deposit is considered a bid, and a sale made on that if there are no other bids. That later during the sale, Mr. Fitch and the agent of Mr. Johnson being present, she again offered this land for sale, and, as we understand the evidence, Johnson's agent and relator were competitive bidders until the land was again struck off to relator at \$30 per acre. That she did not at the time she offered the land the second time, or prior thereto, inform the relator that the land had been earlier in the day declared sold to him for \$10 per acre. That she made a full report of all the facts to the board. The relator testified that he was not present at the time of the first sale, and did not learn of it until after the second sale; that he then claimed under the first sale, but on the demand of the deputy commissioner, and, under protest, paid to her the initial payment of 10 per cent. of the bid of \$30 per acre; that he told her he did not think it was right, and she said he would have to pay

it; that she had sold it for that much money, and she would have to require him to make that payment, and that if he had any recourse it would be from the board. Another witness testified that he was present when the land was first sold, and that relator was not then present, and that the land was then sold to relator at \$10 per acre; that he was present when relator asked the auctioneer about the double sale, and that she admitted the second sale was a mistake; that the Mr. Johnson, above mentioned, was present at the first sale. Another witness testified: That he was present during the entire course of the sale; that this land was sold twice. The first time early, about the third tract; and the last time it was sold in the regular order of the advertisement. There were no bids the first time, and the auctioneer declared it sold to the applicant at \$10 per acre. That relator was not present at the time of the first sale. That Johnson was present during the entire sale. That when there were no bids, other than the guaranteed bid, the lands were declared sold to applicant.

The only controversy in the case is whether or not the first transaction constituted a valid sale of the land to the relator. If it did, the second attempted sale was without authority and void.

[1, 2] It is contended by the Attorney General, for respondents, that relator failed to make good his guaranty to bid \$10 per acre for the land at the first sale, and hence there was no bid at that time, and could be no sale. But we do not agree with that contention. A bid may be made orally, or in writing, by a wink or a nod, or by any mode by which the bidder signifies his willingness and intention to give a particular price (2 R. C. L. 1125), or by words spoken privately to the auctioneer (Millingar v. Daly, 56 Pa. 245), or by letter (Tyree v. Williams, 3 Bibb [Ky.] 365, 6 Am. Dec. 663; 6 C. J. 829). In the last-cited case the sale was by executors under the terms of a will; and a few days before the sale Jordan (the bidder) informed the executors by letter the price he would give for the property. His bid being the highest, the property was sold to him. The court said:

"It is not necessary that a person should be present at an auction to become a purchaser; he may, as Jordan did in this case, make his bid by letter. As his bid was the highest, and the lot was in fact exposed to public sale, he may well be considered the purchaser at the sale."

[3, 4] In the present case, the relator not only had expressed in writing his willingness to pay \$10 per acre for the land, but also guaranteed to bid that amount at the sale, and had actually deposited the percentage of that amount required in such cases with the commissioner. It further appears

by the respondent's own evidence that not only in this instance, but also in such sales throughout the state generally, the state officers have regarded and acted upon the guaranty of the applicant as a bid. Having placed that construction upon the language contained in the guaranty, they should not be heard to here insist upon a different construction of it. The land was offered at public auction at the time and place advertised, the bid was accepted, there were no other bids, and the land was declared by the auctioneer sold to relator for \$10 per acre. "Acceptance of a bid is denoted by the fall of the hammer, or by any other audible or visible means signifying to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale. Once a bid has been accepted, the parties occupy the same relation toward each other as exists between promisor and promisee in an executory contract of sale conventionally made. Thereafter, as a rule, the seller has no right to accept a higher bid, nor may the buyer withdraw his bid." 2 R. C. L. 1126; Coker v. Dawkins, 20 Fla. 141, 153; State v. Hoboken Bank, 84 Md. 325-331, 35 Atl. 889; Sherwood v. Reade, 7 Hill (N. Y.) 439.

[5] We are clearly of the opinion that the first sale was valid, and that the relator is entitled to a certificate of purchase of the land at \$10 per acre upon complying with the terms and conditions contained in the advertisement. The second sale being unauthorized, and relator having had no knowledge of the first when he bid at the second attempted sale, he did not waive his rights under the first and only valid sale. A peremptory writ of mandamus will issue, requiring the respondents to issue and deliver to the relator a certificate of purchase for said lands in accordance with the views herein expressed.

Writ granted.

POTTER and BLYDENBURGH, JJ., concur.

(27 Wyo. 46)

# STATE v. JONES. (No. 971.)

(Supreme Court of Wyoming. Sept. 1, 1920.)

1. Jury  $\S$  138(3)—State should not be permitted peremptory challenge after waiver of last challenge.

Court committed reversible error in allowing the prosecution an additional peremptory challenge after it had waived its fourth and last challenge, and after the defendant had exercised all his peremptory challenges, in view of Comp. St.  $\S$  6205.

2. Criminal law  $\S$  374—Evidence as to other similar crimes must appear prima facie in order to be admissible.

Where it is competent for the prosecution to prove other crimes similar to the one charged, the evidence as to the other similar crimes must at least make out a prima facie case that such other crimes were committed by the defendant.

3. Criminal law  $\S$  374—Evidence as to other alleged crimes held inadmissible.

In a prosecution for grand larceny, evidence as to articles found with those charged to have been stolen should not have been admitted, where there was no evidence that such other articles were ever stolen.

Appeal from District Court, Natrona County; Charles E. Winter, Judge.

John Jones was convicted of grand larceny, and appeals. Reversed and remanded.

Hagens & Murane, of Casper, for appellant.

W. L. Walls, Atty. Gen., for the State.

TIDBALL, District Judge. The defendant, John Jones, was convicted by the verdict of a jury of grand larceny, and sentenced to a term of years in the state penitentiary. From this judgment and sentence defendant appeals to this court. The alleged errors, while numerous, may all be considered under two heads:

1. That the trial court erred in allowing the state to exercise a peremptory challenge after the state had waived its fourth and last peremptory challenge, and after the defendant had exhausted his peremptory challenges.

2. That the trial court erred in the admission of evidence relating to the taking by defendant of other articles, at different times, than those charged to have been stolen in the information. At the time of the argument of the case in this court, the Attorney General stated that in his opinion the trial court erred in both particulars above stated, and that the defendant should be granted a new trial, but requested that this court fully consider the matter before rendering a decision. That this court has done, and has arrived at the same conclusion as did the Attorney General.

1. It appears from the record that after the defendant had exercised his sixth peremptory challenge in the impaneling of the jury, the state waived its fourth and last peremptory challenge. Thereupon the defendant exercised his seventh peremptory challenge, excusing Juror Henry. Juror Howland was then called in Henry's place. Both the state and the defendant passed Howland for cause. Defendant then exercised his eighth and last peremptory challenge, excusing Juror Mahoney. Juror Fan-

ning was then called and excused for cause. Juror Wagner was then called in Fanning's place, and was passed for cause by both sides. The state then, over the objection and exception of defendant, was permitted to exercise a peremptory challenge, excusing Howland. Juror Kraus was then called in place of Howland, and passed for cause by both sides; and the court then announced that all challenges having been exhausted, the jury should be sworn to try the case.

The statutes of Wyoming provide (Wyo. C. S. 1910, § 6205):

"Sec. 6205. The defendant may challenge peremptorily, in capital cases, twelve jurors, in other felonies eight jurors, and in misdemeanors four jurors. The prosecution may challenge peremptorily, in capital cases, six jurors, in other felonies four jurors, and in misdemeanors two jurors; and the number of peremptory challenges so allowed to the prosecution shall be multiplied by the number of defendants on trial in each case. Each defendant shall be allowed his separate peremptory challenges. The peremptory challenges shall be made alternately in the following order: The prosecution may challenge one juror for each defendant then on trial; then each defendant may challenge two jurors, then the prosecution may challenge one juror for each defendant then on trial; then each defendant may challenge two jurors, and the same shall continue in this order as near as may be until the challenges shall all be exhausted or the jury accepted."

[1] It will thus be seen that the trial court did not follow the requirements of the statute either as to the number or the order of peremptory challenges allowed to the prosecution, in that the trial court allowed the prosecution to exercise a peremptory challenge after it had waived its fourth and last peremptory challenge, and after the defendant had exercised all his peremptory challenges. The waiver of a challenge exhausts that challenge the same as though it had been used. Some cases hold that such a waiver waives only as to those jurors then in the box, but that such challenge may be exercised as to jurors called after the challenge is waived. Those cases, however, are decided, so far as we are able to discover, under statutes different from ours, or under facts different from those presented in the case at bar. See *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *State v. Sloan*, 22 Mont. 293, 58 Pac. 364; *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529; *People v. Montgomery*, 53 Cal. 576. In criminal cases especially, a statute prescribing the manner in which challenges shall be exercised is mandatory. 24 Cyc. 365, 367; 16 R. C. L. 250. We are of the opinion that the trial court committed reversible error in allowing the prosecution an additional peremptory challenge after it had waived its fourth and last challenge and after the defendant had exercised all his peremptory challenges.

2. The information charges the defendant with the theft of one sewing machine, and one lot of harness of the personal goods and chattels of the Chicago, Burlington & Quincy Railroad Company. It appears from the evidence on the part of the state that a large quantity of household goods belonging to one C. S. Ingles were delivered by him to the defendant, who was then acting in the capacity of receiving and delivery clerk of the above-named railroad company, for shipment by freight from Casper, Wyo., to Scottsbluff, Neb. Ingles was in a hurry to catch the passenger train, and did not have time to "mark" the goods. The defendant agreed with Ingles to "mark" the goods and ship them out. The larger part of the goods were shipped and received by Ingles at Scottsbluff, but the goods mentioned in the information, which were a part of the shipment, together with a bedstead, failed to arrive. The next day after the goods were left by Ingles on the depot platform in charge of defendant, defendant called up one Frank Hie, who was in the drayage business in Casper, and said he had a job for him, and to come down to the depot. Hie arrived about 10 o'clock in the morning, when defendant helped him load some sacked harness, a sewing machine, and a bedstead, and directed Hie to take the articles to the Ross house and place them in the basement, where Hie put other property for the defendant; the defendant at the time saying that there would be no one at home at the Ross house. At the time of the arrest of the defendant, the Ross house was searched, and the sewing machine, harness and bedstead, were found in that house, and taken into court at the time of the trial and there identified by Ingles and one Fred Colby as belonging to Ingles and as being a part of the shipment to Scottsbluff. Fred Colby also testified that he had crated the goods for Ingles, and was present at the time of delivery to the defendant at the depot, and corroborated Ingles as to what took place at the depot at the time of delivery, except that he was not positive the defendant was the one to whom the goods were delivered. One George Colby testified that he received a letter from Ingles as to the missing goods, and took the letter to defendant and made complaint that the goods mentioned in the information were not with the shipment when it arrived in Scottsbluff. At that time defendant told the witness that all the Ingles goods had been shipped and had gone out the same day they were left with defendant. This is substantially the evidence of the state as to the property charged to have been stolen in the information, except some testimony as to value.

[2, 3] In addition to the above evidence, the state, over the objection and exception



of the defendant; was allowed to go into great detail and to great length as to other property hauled by Hie for defendant at subsequent times and to other places in Casper than the Ross house, and also was allowed to show by several witnesses that some automobile tires and quart bottles of whisky were found in the Ross house at the time of the search for and discovery of the Ingles property. The witness Hie testified that after the Ingles transaction he, at the request of defendant, hauled a cookstove from the depot to a secondhand store, and that the defendant told him to have the boy sell it for defendant for \$18; that he at another subsequent time hauled a tool box for defendant from the depot down to the Star Rooms, that the tool box was painted red at the time; that he afterwards saw the tool box at the Star Rooms, and it was freshly painted white, and was much lighter in weight than when he first hauled it. This tool box was admitted in evidence at the trial. Hie was permitted also to testify as to some sacks of cigarettes that he delivered, at the defendant's request, to a negro named Ford. Hie also testified that he had hauled many loads for defendant from the depot. A special agent for the railroad company and a police officer were both permitted to testify as to six automobile tires and several quarts of whisky found in the Ross house at the time of the search for the Ingles goods. These two witnesses were also permitted to testify as to the finding of the tool box in the Star Rooms and as to its being freshly painted white. All this testimony was introduced over the objection and exception of the defendant. Indeed the larger part of the testimony in the case relates to these articles. There is no evidence in the record, so far as we are able to discover (and the Attorney General so states in his brief and so stated in oral argument) which tends to prove that the stove, tool box, whisky, or cigarettes were stolen from the railroad company or from any one else; in fact, the record is silent as to any like articles ever having been in the possession of the railroad company or ever having been stolen from any one; except the general statement of some of the railroad officials that both before and after the defendant had begun working for the railroad company many articles of freight had been stolen from the depot or had disappeared from the depot and buildings of the company. It appears from the evidence that the railroad company had been having a great deal of trouble with thefts of freight and other property, and doubtless the prosecution, knowing of this systematic looting, and having found a part of the loot in a house where defendant had it placed, was resolved to show to the jury the com-

plete details of the many thefts, on the theory, perhaps, of showing that the crime charged was part of a common scheme or plan which included numerous offenses. Doubtless in a proper case such evidence is competent (16 C. J. 591; *State v. Gillies et al.*, 40 Utah, 541, 123 Pac. 93; 43 L. R. A. [N. S.] 776, note, page 780), but even in such a case the evidence of other offenses must at least establish with a reasonable degree of certainty that the other transactions about which evidence is given were in fact crimes; in other words, where it is competent for the prosecution to prove other crimes similar to the one charged, the evidence as to the other similar crimes must at least make out a prima facie case that such other crimes have been committed by the defendant. 16 C. J. 592, § 1142. This the evidence in the case before us utterly fails to do; as there is no evidence that the other articles testified about were ever stolen. We are of the opinion that the mass of testimony as to the articles other than those charged in the information to have been stolen could have served no other purpose than to have prejudiced the jury against the defendant, and that its admission was prejudicial error, requiring the reversal of this case.

The judgment will be reversed, with directions to the lower court to grant the defendant a new trial.

Reversed and remanded.

BEARD, C. J., and POTTER, J., concur.

BLYDENBURGH, J., being unable to sit in this case, Hon. V. J. TIDBALL, Judge of the Second Judicial District, was called in as a member of the court, and sat in his stead.

(27 Wyo. 689)

HANKS v. HANKS. (No. 1001.) \*

(Supreme Court of Wyoming. Sept. 1, 1920.)

Pleading  $\S$  362(1), 368—Motions to separately state and strike properly refused, where petition stated only one cause.

Under Comp. St. 1910, § 3924, subds. 5, 6, 8, stating as separate grounds for divorce, habitual drunkenness, cruelty, and indignities rendering the condition of the other intolerable, a petition alleging indignities to the plaintiff, consisting in habitual drunkenness, with wanton and extreme cruelty, and that these indignities rendered plaintiff's condition intolerable, stated only one cause of action, that for indignities, and motions for the separate numbering of separate causes, and for striking matter from the pleading, were properly refused.

Appeal from District Court, Sweetwater County; John R. Arnold, Judge.

Action by Laura A. Hanks against Walter Hanks, Sr. Judgment for plaintiff, and defendant appeals. Affirmed.

Brown & De Nise, of Rock Springs, for appellant.

T. S. Tallafiero, Jr., and Walter A. Muir, both of Rock Springs, for respondent.

**TIDBALL**, District Judge. This is an appeal from the judgment of the district court of Sweetwater county, granting a divorce to respondent, who was plaintiff below. It is claimed that the court below erred in two particulars, namely, in denying the motion of defendant to require plaintiff to separately state and number her separate causes of action set forth in her petition, and in denying the motion of defendant to strike certain words and clauses from plaintiff's petition. That portion of plaintiff's petition to which the motions of defendant were directed is as follows:

"The defendant has offered such indignities to the plaintiff as to render her condition intolerable as the wife of the defendant; that such indignities consist in habitual drunkenness, extending over a period of more than five years, accompanied with wanton and extreme cruelty to the plaintiff, in quarreling with and nagging at the plaintiff whenever they are together, or an opportunity arises so to do, so that the last five years have been ones of constant irritation, neglect, indifference, quarreling, abuse, contempt, exhibited by the defendant toward the plaintiff, which with the drunkenness of the defendant, and the lack of consideration, love, or affection exhibited towards the plaintiff, has rendered the plaintiff's condition intolerable."

To this petition the defendant filed a motion to require the plaintiff to separately state and number her causes of action; the defendant claiming that in the petition were joined an alleged cause of action for indignities, an alleged cause of action for habitual drunkenness, and an alleged cause of action for extreme cruelty. This motion of defendant was denied by the trial court, and the defendant was given an exception to the court's ruling. This is the first error assigned by the defendant in this court.

After the above motion of defendant was denied by the trial court, the defendant filed another motion, praying that the court strike from plaintiff's petition the following matter: "That such indignities consist in habitual drunkenness, extending over a period of more than five years," and also the words "wanton and extreme cruelty," for the alleged reason that such matter constituted no part of the plaintiff's cause of action. This motion was also denied by the trial court, and, after the trial court had denied the second of defendant's motions, defendant refused to plead further, and the case proceeded to final judgment upon the evidence of the plaintiff alone. Such denial is the second error assigned by appellant in this court.

The Wyoming Compiled Statutes (section 3924) provide as follows:

"A divorce from the bonds of matrimony may be decreed by the district court \* \* \* in either of the following cases: \* \* \*

"Fifth—When the husband or wife shall have become an habitual drunkard.

"Sixth—When one of the parties has been guilty of extreme cruelty to the other. \* \* \*

"Eighth—When either party shall offer such indignities to the other, as shall render his or her condition intolerable."

The first error assigned in this court is, as above stated, the denial by the trial court of defendant's motion to compel plaintiff to separately state and number her several causes of action. The defendant contends that each separate cause for divorce provided for in the above statute constitutes a separate cause of action, and that plaintiff's petition alleges three separate causes for divorce, namely, indignities, habitual drunkenness, and extreme cruelty.

We are of the opinion that the petition of plaintiff attempts to allege, and in fact does allege, but one cause of action for divorce, namely indignities rendering the condition of plaintiff intolerable. The fact that the acts constituting indignities may have occurred while the defendant was in a state of intoxication, or were perpetrated because of such intoxication, would not render them any the less indignities; and this would be true, even though the intoxication had become habitual; and even though the pleader may have characterized the acts constituting indignities as "accompanied with wanton and extreme cruelty," such characterization would not render the petition bad for duplicity. It may well be that the words "accompanied with wanton and extreme cruelty" could have been omitted from the petition without impairing its force or validity; but certainly the characterization of acts constituting indignities as cruel would not change the legal effect of the acts pleaded. 9 Ruling Case Law, p. 420, says:

"It has also been held that, in a suit for divorce on the ground of extreme cruelty, the plaintiff may allege instances of voluntary intoxication in connection with other matters as constituting acts of cruelty, and in so doing does not plead two separate causes for divorce, though habitual drunkenness is also a specific ground for divorce."

Corpus Juris, Divorce, § 266, lays down the rule as follows:

"If several acts, each constituting a separate ground for divorce, constitute collectively an additional ground for divorce, the injured party may proceed upon the latter alone."

The case of *McCann v. McCann*, 91 Mo. App. 1, holds that, where "indignities" are a ground for divorce, if a spouse has been guilty of several acts of misconduct which would warrant a divorce on the ground of adultery or habitual drunkenness, and they have been brought to the knowledge of the

innocent party, they need not be set out as ground for divorce in the statutory words: for, if the acts are numerous and of a sort to render the condition of the injured spouse intolerable, they may be charged as indignities. In the case of *Sedgwick v. Sedgwick*, 50 Colo. 164, 114 Pac. 488, Ann. Cas. 1912C, 653, the court in the course of its opinion uses this language:

"If drinking or being drunk is interwoven with acts of cruelty, or even is the cause of them, it cannot be used to defeat a divorce action based on cruelty, because habitual drunkenness for a space of one year is a distinct ground of divorce."

In our opinion, the petition in question states but one cause of action, namely, indignities rendering the condition of plaintiff intolerable. This evidently was the view taken by the trial court, as that court, in its decree granting plaintiff a divorce from defendant, found that the defendant had offered such indignities to the plaintiff as to render her condition intolerable as the wife of the defendant.

In view of what is said above in disposing of the matter of defendant's motion to require the plaintiff to separately state and number her several causes of action, it follows that the trial court did not err in refusing to strike from plaintiff's petition the references to habitual drunkenness and cruelty of conduct. The judgment of the district court is affirmed.

Affirmed.

BEARD, C. J., and POTTER, J., concur.

BLYDENBURGH, J., being unable to sit in this case, Hon. V. J. TIDBALL, Judge of the Second Judicial District, was called in as a member of the court, and sat in his stead.

(26 N. M. 318)

# STATE v. CROSBY. (No. 2281.)

(Supreme Court of New Mexico. April 23, 1920.)

(Syllabus by the Court.)

1. Homicide  $\Leftrightarrow$  309(4)—Where evidence would show manslaughter, the court properly charged thereon.

In a case where the indictment charges murder in the first degree, and the defendant pleads self-defense, if there is evidence in the case which would make the crime manslaughter, the court properly instructed upon manslaughter.

2. Criminal law  $\Leftrightarrow$  823(1) — Erroneous instruction not rendered harmless by correct instruction.

Error committed by giving an incorrect instruction is not cured or rendered harmless

by the giving of a correct instruction on the same subject.

Appeal from District Court, Chaves County; Richardson, Judge.

Stephen Crosby was convicted of manslaughter, and he appeals. Reversed, and a new trial ordered.

O. O. Askren, of Santa Fé, and L. O. Fulen, of Roswell, for appellant.

Robert C. Dow, of Carlsbad, for the State.

RAYNOLDS, J. The defendant, Stephen Crosby, was indicted in Chaves county for the murder of one Julian Shafer on October 14, 1917. At the November term of the district court for said county he was found guilty of manslaughter and sentenced. From the verdict and sentence defendant appealed to this court.

The facts out of which this case arose are substantially as follows:

At the time of the killing the deceased, Julian Shafer, was occupying and using school section 36, the section on which the killing occurred. Said section had a fence on the south line and a fence on the west, but the fence on the west was not on the true line, but was about 20 feet further west than the true line between sections 35 and 36. There was no fence on the north and east of the section. The defendant had leased land, and was entitled to graze and use the same, to the north and east of said section 36, and had leased water from one Graves, who owned the section adjoining 36 on the south.

On Friday afternoon prior to the killing on Sunday, the defendant moved approximately 500 head of cattle from his home to a point north and west of section 36. The cattle remained there until late Saturday afternoon, when his employé, "Doc" Roberts, started the cattle south for water in the direction of the Graves house. On the following morning, Sunday, the defendant and Roberts left the defendant's home to look after the cattle and to ascertain if they had gone to water. They rode north and west of section 36 about a mile and a half in the vicinity of a schoolhouse, where they separated, and began to gather what cattle had not gone to water, intending to drive them south to the water. In the meantime the deceased, Shafer, came from his home, about a mile northeast of section 36, and began rounding up defendant's cattle—that is, those cattle that had been to the water and were coming out—and began driving them through a gate in the south fence; it being his purpose to keep them below the south fence of the school section 36, and prevent them from going on said section or across it, or up the road along the fence running north to the lands which Crosby had north of the said section. When the defendant learned that Shafer was driving

his cattle out, he and Roberts galloped south down the road until near the gate at the southwest corner of the section, where Shafer, according to the testimony of the defendant and Roberts, intercepted them and began cursing and abusing the defendant, calling him vile names, and stating he would "do him up." The defendant, according to his testimony, tried to reason with the deceased, and he and Roberts continued in the direction they were going, intending to go around the cattle to drive them along the west fence toward the north. According to defendant's testimony, Shafer said that he would not allow this to be done, and that he was going to kill defendant and do it right then. At this time, according to defendant's testimony, he made a move as though to get a pistol, whereupon the defendant shot him three times and killed him.

There was evidence in the case of threats by the deceased having been made against the defendant, some of which were communicated to him, and some of which were not. The only eyewitness of the killing other than the defendant was Roberts, who corroborated the defendant as to the circumstances of the killing. The plea of the defendant was self-defense, and the case was tried for the state on the theory of deliberate, premeditated murder. The testimony showed that no weapon was found upon Shafer, nor was any found in the vicinity of his body after the killing, nor did the defendant, or the witness Roberts, at any time see a weapon in the hands of Shafer.

The appellant contends that he was not guilty of the crime of manslaughter, of which he was convicted; that under the circumstances he was either guilty of murder in the first degree, or not guilty, having killed the deceased in self-defense.

[1] The appellant assigns numerous errors, relying principally upon the assignment that the court erred in the instruction to the jury in regard to manslaughter for the reason that there was no evidence of this offense, the evidence supporting only a verdict of murder in the first or second degree or in self-defense. Manslaughter is defined by our statute (section 1460, Code 1915) as an unlawful killing of a human being without malice, and being of two kinds—voluntary, upon a sudden quarrel or in the heat of passion; and involuntary, in the commission of an unlawful act which amounts to felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection. It seems to us that the instruction in this case was proper and justified by the evidence as shown by the above statement of facts. The defendant testified that the deceased cursed and abused him, and the jury was certainly justified in assuming that the homicide was the result of a sudden quarrel, or the act of killing was

done in the heat of passion. As shown by their verdict, they did not believe the state's case in its entirety, nor the defendant's. The state attempted to make out a case of murder in the first degree; the defendant pleaded self-defense, and introduced evidence to that effect. The jury, however, did not take either the state's view of the case nor the defendant's, but apparently believed, as shown by their verdict, that the homicide was committed in the manner which constitutes manslaughter, as defined by the statute and the instructions of the court. The verdict is supported by the evidence, as shown by the record and the foregoing statement therefrom.

The appellant cites the case of *Territory v. Fewel*, 5 N. M. 34, 17 Pac. 569, where an instruction in murder in the third degree was held to be error because there was no evidence in that case to sustain such instruction. The statute law of murder at the time the *Fewel* Case was tried defined murder in the third degree as killing in a cruel and unusual manner, and the court held there was no evidence of this element of murder in the case. It is distinguishable from the present case, where the charge included manslaughter, and the evidence justified the instruction.

The case of *Faulkner v. Territory*, 6 N. M. 464, 30 Pac. 905, cited by appellant, is also distinguishable from the present one on the ground that in the *Faulkner* Case it is specifically held that there was evidence only of murder in the first degree, and the court properly instructed in that degree and no other.

This same distinction is true of *Sandoval v. Territory*, 8 N. M. 573, 45 Pac. 1125, cited by appellant, where an instruction in a lower degree than the first was asked and refused, the court saying it would be error to give such an instruction because there was no evidence tending to show the lower degree of crime.

Again, in the case of *Territory v. Archuleta*, 16 N. M. 219, 114 Pac. 285, where the error alleged was the omission to charge on manslaughter, the court on appeal holding that such an instruction would have been improper and erroneous, as the evidence did not warrant this requested instruction.

In the case of *Territory v. Hendricks*, 13 N. M. 300, 84 Pac. 523, an instruction in third degree murder was given and held to be error because not justified by the evidence. See, also, *State v. O. W. Smith*, 194 Pac. 869 (decided at this term of court, where the authorities are reviewed).

As shown by the above authorities, it is undoubtedly erroneous to instruct upon a degree of crime where the evidence does not tend to sustain such a degree; but in this case the instruction was proper because there was evidence in the case tending to sustain it and upon which the verdict could be upheld.

The appellant also assigns as error the in-

struction of the court upon self-defense, which was as follows:

"The defense interposed in this case by the defendant is that he killed the deceased in his necessary self-defense. Upon this subject the court charges you that a person may repel force by force in the defense of his person against one who manifestly intends and endeavors by violence to take his life, or do him great bodily harm, and if a conflict ensues under such circumstances and life is taken, the killing is justifiable. To justify the killing there must be an apparent design on the part of the assailant either to take the life of the person assailed, or to inflict some great personal injury upon him, and, in addition, there must be then and there imminent danger of such apparent design being accomplished."

Standing alone and unexplained, this instruction is undoubtedly erroneous, as it is capable of the interpretation that the killing, to be justifiable, must have been done by the defendant in his necessary self-defense, or necessarily. *State v. Miller*, 43 Or. 325, 74 Pac. 658, 660; *Steinmeyer v. People*, 95 Ill. 383, 384. If this instruction were ambiguous and incomplete, and also capable of another, different, and correct interpretation—that is, that necessary self-defense meant what was apparently necessary to the defendant at the time, as a reasonable man, it might then be cured by the subsequent instruction, which the court gave as follows:

"And if, as a reasonable man, he believes that he is then and there in danger of death or great bodily harm, he is entitled to act in proportion to such appearance to him as a reasonable man, even though afterwards, when the whole matter is over, it may develop that there was no such danger as he then and there, as a reasonable man, supposed to exist."

[2] The territorial Supreme Court has held that an erroneous instruction cannot be cured by a subsequent correct one. *Territory v. Pridemore*, 4 N. M. (Gild.) 275, 281, 13 Pac. 96. It has also held that instructions must be considered as a whole, and not singly.

"Possibly, if these instructions singled out stood alone, some of them might have been erroneous, but this is not the way in which the instructions given by the trial court should be looked at. The instructions must be looked at as a whole, and their bearing upon all of the evidence introduced in the case must be considered." *U. S. v. Densmore*, 12 N. M. 90, at page 106, 75 Pac. 81, 82.

"If this instruction stood alone, unconnected with anything else, there would be some plausibility in this argument; but the preceding paragraph describes the assault and the violent breaking, and this instruction refers

to what immediately precedes and includes the whole of it. The offense had been therefore clearly defined by the court, and the jury could not have been misled by this paragraph, when considered with the other instructions given in connection with it." *Territory v. Gallegos*, 17 N. M. 409, at page 413, 130 Pac. 245, 247.

See, also, *Territory v. Kimmick*, 15 N. M. 178, 106 Pac. 381; *Territory v. Cheney*, 16 N. M. 476, 120 Pac. 335.

"Instructions must be taken as an entirety—that is, each must be considered in connection with others of the series referring to the same subject and connected therewith—and if, when taken together, they properly express the law as applicable to the particular case, no just ground of complaint exists, even though an isolated and detached clause is, in itself, inaccurate or incomplete, and although some of them, taken separately, may be subject to criticism." 14 R. C. L. "Instructions," par. 76.

See, also, *Branson's Instructions to Juries*, par. 94, and cases cited; *Brickwood's Sackett, Instructions*, vol. 1, par. 175.

We believe the proper rule to be that error committed in giving an incorrect instruction is not cured or rendered harmless by the giving of a correct instruction on the same subject, and this rule should be applied in the present case, in which the erroneous instruction was complete, unambiguous, and certain. As is said in *Steinmeyer v. People*, 95 Ill. 383, at page 390:

"It is true the instructions on the same subject, given on behalf of the defendants, laid down the law correctly. But that is not enough. The jury may have disregarded the instructions for the defendants, and followed those given for the people. They had as much right to follow the one as the other, and it is impossible for the court to say which instructions controlled the deliberations of the jury. If the jury followed the sixth instruction given for the people, as we may presume from their verdict they did, then they were misled, and defendants were denied the right of self-defense, which was secured to them by the law. We are, therefore, of opinion that the instruction was calculated to deprive the defendants of a fair trial before the jury, and for this reason the judgment will have to be reversed."

See, also, *Clay v. State*, 15 Wyo. 42, 86 Pac. 17, at page 21; *Blashfield on Instructions to Juries*, vol. 1, par. 24A, and cases cited.

For the reasons above stated, the case is reversed and a new trial ordered.

PARKER, C. J., and ROBERTS, J., concur.

(44 Nev. 174)

**GREINSTEIN v. GREINSTEIN.** (No. 2440.)

(Supreme Court of Nevada. Aug. 14, 1920.)

**1. Appeal and error**  $\Rightarrow$  719(1)—Assignment of errors unnecessary on appeal on judgment roll.

On appeal upon the judgment roll alone on which only errors appearing on the face of the judgment roll can be considered under 3 Rev. Laws, p. 3344, no assignment of errors is necessary.

**2. Divorce**  $\Rightarrow$  249(1)—Court can require defendant husband to convey part of his separate estate to wife.

Under Rev. Laws, § 5843, authorizing the court to set apart such portion of the husband's property as may be necessary to support the wife, to whom a divorce is granted, the court had authority to require the husband to convey a life interest in the home, which was his separate property, and was to convey his remainder in escrow to secure a cash payment which the husband was ordered to make.

**3. Divorce**  $\Rightarrow$  286 — In absence of evidence, Supreme Court cannot review justice of property division.

On appeal from a divorce decree on the judgment roll alone, where the evidence is not before the Supreme Court, that court cannot consider whether the judgment and orders dividing the property are just and equitable.

Appeal from District Court, Humboldt County; James A. Callahan, Judge.

Action for divorce by Pearl Greinstein against Mose Greinstein. Judgment decreeing divorce to plaintiff, and requiring defendant to pay alimony and convey certain property to plaintiff, and defendant appeals from that part of the judgment requiring the conveyance of the property. Affirmed.

Warren & Hawkins, of Winnemucca, for appellant.

Thomas A. Brandon, of Winnemucca, for respondent.

**SANDERS, J.** This is an appeal upon the judgment roll alone. The judgment roll consists of the pleadings, the findings, and the judgment. No bill of exceptions was taken and filed. One was assigned against the findings, but the court declined to allow the same because it was not tendered within the time required by law. 3 Rev. Laws Nev. p. 3342.

[1] It will not be denied that on appeal upon the judgment roll alone only such errors can be considered as appear upon the face of the judgment roll. 3 Rev. Laws Nev. p. 3344. Upon such an appeal, no assignment of errors is necessary. *Miller v. Walser*, 42 Nev. 497, 181 Pac. 437.

This was an action of divorce, brought by the wife upon the ground of the extreme cruelty of the husband. As incident to her right to a divorce, she asked that she be

awarded \$75 per month as permanent alimony; that she be decreed one-half of the community estate, and such portion of the separate estate of the defendant as shall be deemed just and equitable. The issue of fact, extreme cruelty, was tried with a jury. Its verdict was:

"We, the jury in the above-entitled action, do hereby find that the plaintiff is entitled to a divorce from the defendant on the ground of extreme cruelty in the defendant."

The court adopted and incorporated the verdict as a part of its findings, and made full and explicit findings, and drew therefrom its conclusions of law, and rendered judgment in favor of the wife.

It appears from the findings that there was no community estate, but the defendant was the owner of separate property to the amount or value of between \$5,000 and \$6,000; that he had a "going business" of a fluctuating value. The lot and home in which the parties resided was the separate property of the defendant, and is referred to as lot No. 4, block 2, Haviland and Hoskins addition to the town of Winnemucca, Nev., of the value of about \$2,000, and the furniture therein of the value of about \$100. The court found that the wife was without sufficient means, and unable physically to maintain and support herself, and that the husband was financially able to pay to her \$65 per month as permanent alimony, and that the wife was entitled to the use and occupation of the home and lot, improvements thereon, and the furniture in the home, during the term of her natural life, or until she should have married again, and that she was entitled to receive from the defendant the sum of \$250 cash, and the further sum of \$250 on or before six months from the date of the judgment. Thereupon the court adjudged and ordered the husband to pay to the wife the sum of \$65 per month as permanent alimony, until the further order of the court, and adjudged and ordered him to pay the said sum of \$500 upon the terms mentioned in the judgment, and that he convey to the wife a life estate in lot No. 4, block 2, Haviland and Hoskins addition, upon condition that, upon the termination of the life estate or the remarriage of the grantee, the title to the property be in the husband, his heirs or assigns. The husband was further adjudged and ordered to convey his remainder interest in the property by an escrow deed, upon condition that, if the deferred sum of \$250 was not paid, the entire fee to the property should vest in the grantee. This appeal is not taken from the decree of divorce, but from that specific portion of the judgment and orders commanding the defendant husband to convey the premises as provided in the judgment.

It is the contention of counsel for appellant that the court exceeded its jurisdiction and

was without power or authority to divest the appellant of his title to his separate property, or any part thereof, conditionally or otherwise, and vest it in the wife, and that if this court should be of the opinion that it was competent for the court to make such order, it be canceled and annulled, for the reason that it is not just and equitable.

[2] Upon the authority of section 27 of the Civil Practice Act (section 5843, Rev. Laws) as construed by this court in the cases of *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; *Powell v. Campbell*, 20 Nev. 232, 20 Pac. 156, 2 L. R. A. 615, 19 Am. St. Rep. 354, we are of the opinion that the court did not exceed its jurisdiction, power, or authority to make the orders complained of.

[3] There being no bill of exceptions, and the evidence not being before us, we are in no position to consider or to determine whether the judgment and orders therein are just and equitable.

No error appearing upon the face of the judgment roll, the judgment is affirmed.

COLEMAN, C. J., and DUCKER, J., concur.

(44 Nev. 188)

O'BANION et al. v. SIMPSON. (No. 2352.)

(Supreme Court of Nevada. Aug. 25, 1920.)

1. Jury §28(2) — Legislature can regulate manner of enforcing right to jury trial.

Under Const. art. 1, § 3, guaranteeing right of trial by jury, but providing that it may be waived by the parties in the manner to be prescribed by law, the Legislature can regulate the manner in which the constitutional right may be secured and enforced.

2. Jury §25(6)—Statute, making failure to demand jury before settling for trial a waiver, is reasonable.

The provision of Rev. Laws, § 5226, that right to jury trial is waived by failing to demand it before the cause is set for trial is a reasonable regulation of the right to trial by jury, and is therefore valid under Const. art. 1, § 3.

3. Tenancy in common §14—Conveyance by cotenant and exclusive possession by grantee is ouster.

Where one cotenant executes a deed purporting to convey entire interest in the property described by metes and bounds, and the grantee takes exclusive possession of the property under the deed, there is an ouster of the other tenants, which at the expiration of the statutory period will ripen into title to the entire premises.

4. Adverse possession §47—Possession by either party after the controversy arose will be disregarded.

In a suit to quiet title under claim by adverse possession, evidence of acts of possession

of the premises by either party, after the controversy regarding the ownership thereof arose, will be disregarded.

5. Tenancy in common §15(10)—Possession by grantee of entire interest from cotenant is not possession of other cotenants.

There is no presumption that a grantee, under a grant from a cotenant purporting to convey the entire interest, held possession as a cotenant, but such possession, if exclusive of the other tenants, is presumed to be coextensive with the deed and adverse to them.

6. Appeal and error §1054(1)—Judgment after trial to court not reversed for evidence admitted conditionally.

A judgment in an action to quiet title will not be reversed for the admission of evidence relating to the possession of another tract of land not in controversy, but used in connection with the tract in controversy, where the court stated he had admitted such evidence merely for what it might be worth in considering the ultimate conclusions of the case.

7. Adverse possession §22 — Possession of grazing land held not constructive.

Where the land in controversy was useful only for grazing purposes, and was part of an inclosed tract owned by several owners who grazed their cattle indiscriminately thereon, possession by a grantee of the tract in controversy by grazing his cattle on such tract under care of a herder to confine them to that tract was not constructive possession merely, but was actual.

8. Adverse possession §106(4)—Need not be possession during period preceding commencement of action.

To sustain a title by five years' adverse possession under Rev. Laws, § 4953, the five-year period of possession need not be the five years immediately preceding the commencement of the action.

9. Adverse possession §13—Need not consist of statutory element, where they are not suited to land.

Though Rev. Laws, § 4957, makes cultivation, improvements, inclosure, or residence upon the land possession thereof, it is not necessary for a claimant to land under claim founded on written instrument to prove any of those elements to establish adverse possession, where the land was suitable only for grazing land, so that its inclosure, cultivation, or improvement would not be profitable.

10. Adverse possession §36—Grazing of cattle held not to defeat exclusive possession by plaintiffs.

Where plaintiffs claimed the land under a deed, and were grazing their cattle thereon under care of a herder, whose duty it was to prevent the cattle from straying off from the land, the fact that plaintiffs did not prevent the grazing of cattle of other owners upon the land does not prevent their possession from being exclusive.

**11. Adverse possession**  $\Rightarrow$  29—Actual possession is constructive notice to all of claim of title.

The actual possession of land and the exercise of the usual acts of ownership over it is constructive notice to all the world of the claim of title under which the possessor holds.

**12. Tenancy in common**  $\Rightarrow$  15(4)—Permitting cattle of grantee of former co-owner to graze held not to interrupt adverse possession.

Where the grantees of entire interest in grazing lands from a tenant in common had taken exclusive possession of the land under their deed, the fact that thereafter they did not prevent cattle belonging to a grantee from the other original cotenant from grazing on the land did not interrupt the adverse character of their possession.

**13. Appeal and error**  $\Rightarrow$  1011(1)—Trial court finally determines controverted questions of fact.

The determination of the controverted questions of fact raised by the evidence is for the trial court, not for the Supreme Court on appeal.

**14. Tenancy in common**  $\Rightarrow$  15(4)—Offer of settlement with adverse claimant held attempt to buy peace, not recognition of title.

An offer of settlement, made by grantees from one cotenant who had had exclusive possession of the land for more than five years to a grantee of the other cotenant after the land had been in litigation for some time, was an offer to buy peace, and not a recognition of the title of the other party.

Coleman, C. J., dissenting.

Appeal from Eighth Judicial District Court, Lyon County; T. C. Hart, Judge.

Action to quiet title by John W. O'Banion and another against Daniel C. Simpson. Judgment for plaintiffs, and defendant appeals from the judgment and from the order denying his motion for new trial. Affirmed.

Mack & Green, of Reno, for appellant.

Platt & Sanford, of Carson City, for respondents.

**SANDERS, J.** This appeal is taken from a judgment in favor of plaintiffs and against the defendant, and also from an order denying the defendant's motion for a new trial.

Counsel for appellant insist that the trial court erred in denying appellant's demand for a jury trial and in holding that the appellant by his failure to demand a jury at or before the time the case was set for trial waived his right to demand a jury. The exceptions to this ruling are: First, that the defendant was deprived of his inviolate constitutional right to a jury trial; second, that the defendant was not represented in court when the cause was set for trial, and had no knowledge or information that the cause would be set on the date it was set for trial; third, that when a party demands a jury be-

fore the trial takes place and the case is a proper one for a jury, the court is without power or authority to deny the demand.

[1] Section 3, art. 1, of the Constitution of this state provides, *inter alia*:

"The right of trial by jury shall be secured to all and remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

The language that a "jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law" leaves the exercise of the right to a trial by jury to be regulated by legislation. Without some legislative regulation of it or provision for it the right cannot be enjoyed at all. The Constitution merely guarantees the right, and leaves to the Legislature the duty of providing the means and methods by which the right is to be enforced. *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194, 16 Standard Ency. Pr. 862.

The Legislature of this state, in prescribing a general system of practice for the trial of civil cases, has provided by section 284 of the Civil Practice Act (section 5228, Rev. Laws) that:

"Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court, in other actions, in the manner following:

"1. By failing to demand the same at or before the time the cause is set for trial or to appear at the trial.

"2. By written consent, in person or by attorney, filed with the clerk.

"3. By oral consent in open court, entered in the minutes."

It is conceded that the cause was set for trial upon the application of plaintiffs' counsel without notice to defendant or his counsel; that the defendant did not demand a jury at or before the time the cause was set for trial, but made a formal demand for a jury at the time the cause was called for trial; and it appears from a colloquy which took place between court and counsel that the presiding judge was not informed that the defendant desired a jury until 2 days before the cause was called for trial, which had been set 30 days prior thereto.

[2] The question for determination is whether the Legislature has the power to say that the failure to demand a jury at or before the time the cause is set for trial constitutes a waiver of the right. Though the right to trial by jury is declared by the Constitution to be inviolate, still it is a privilege that may be waived, and it is therefore competent to the Legislature to provide the mode in which it may be done, as it may regulate the exercise of any other right. *Springfield Ry. Co. v. Western Ry. Const. Co.*, 49 Ohio St. 681, 32 N. E. 961. We are of the



opinion that subdivision 1 of the statute just quoted is a reasonable regulation, and not a penalty; that it neither impairs nor limits the constitutional right to a trial by jury in a proper case. It requires a party to use reasonable diligence in the exercise of his right to have a jury trial. It is not designed for the convenience of the parties or for the advantage of either, but was incorporated into the law to lessen the expense and facilitate the business of courts, and to enable the court to have a jury in attendance when a case comes on for trial. It is not necessary for us to determine whether the provision is mandatory or not. The hardships suggested, that the leading counsel for appellant was unavoidably absent from attendance on court at the date the case was set, and that he had no knowledge that it would be set, or had been set, on the particular date, is without weight. Any general law that regulates rights operates with severity in particular cases. The leading counsel for the defendant is an experienced and able practitioner in the jurisdiction where the case was tried. He undoubtedly knew that the case had been at issue since 1916. Although he may have been unavoidably prevented from being in attendance upon the court at the date of setting, he certainly had ample time before the cause was set to demand a jury. And it is fair to assume that the Legislature intended to meet just such situation as is here presented by allowing the party to make his election at any time before the cause is set for trial. Being of the opinion that the provision in question is "clearly a reasonable regulation, with a view to the public interest, of the right of trial by jury, not a violation of any right and within the competency of the Legislature," we conclude that the court did not err in refusing the defendant's demand for a jury.

This is an action to quiet title to 200 acres of land situated in Smith Valley, Lyon county. The controversy first arose over the ownership of the property in 1907, when A. W. Gander brought an action in the district court of said county against John W. O'Banion, Jacob E. Cohn, and Daniel C. Simpson, which resulted, in 1914, in said Gander being adjudged, by this court, to be the owner, by adverse possession, of 80 acres of the 280 acres of land involved in that controversy, and in remanding the cause with direction to the lower court that the action as to the "other land" (meaning the 200 acres here involved) be dismissed or a new trial granted. *Gander v. Simpson*, 87 Nev. 1, 134 Pac. 514. The cause was dismissed on motion of Gander. The present action was thereafter commenced in 1914 by said A. W. Gander and John W. O'Banion, as plaintiffs, against Daniel C. Simpson, defendant, to quiet title to the land, described in their complaint as being the S. E.  $\frac{1}{4}$  of section 36, township

11 north, range 23 east, also lot 1 of section 1, township 10 north, range 23 east, all M. D. B. & M., together with the water, water rights, and privileges thereunto belonging.

The appellant, Daniel C. Simpson, as adverse claimant to an equal, undivided one-half interest in the land described in the complaint, appeals to this court from a judgment adjudging and decreeing plaintiffs to be the owners of the entire property, and perpetually enjoining defendant from asserting or claiming an interest therein, and from an order denying and overruling his motion for a new trial.

The history of the land is that the Occidental Colony Company, a corporation, was the owner in fee of 5,300 acres of land situated in the counties of Douglas and Lyon, derived through mesne conveyances from the original patentees of the United States and the state of Nevada. In the year 1890 said corporation conveyed the entire acreage, described according to its legal subdivisions, it being surveyed land, to Joseph Neudelman and Ephraim Friedman.

The plaintiffs at the trial deraigned title from Joseph Neudelman, and founded their claim of ownership upon a deed of Joseph Neudelman and Fannie Neudelman, his wife, to John W. O'Banion and Zadoc Pierce, bearing date on the 12th day of November, 1901, purporting to convey, with covenants of seisin and warranty against the claim of all persons, a specific portion of the 5,300 acres as conveyed by said corporation, consisting of 280 acres, described by metes and bounds, excepting, of course, the 80 acres thereof adjudged to Gander in the prior litigation.

The defendant at the trial deraigned title through mesne conveyances from Ephraim Friedman, and founded his claim of ownership to an undivided half of the property in dispute upon a deed of Jacob E. Cohn to Daniel C. Simpson, bearing date of September 3, 1906, purporting to convey an equal undivided one-half of the 5,300 acres of land conveyed by the Occidental Colony Company to Joseph Neudelman and Ephraim Friedman.

[3] Under the statute law concerning conveyances in this state, the deed of the Occidental Colony Company, a corporation, to Joseph Neudelman and Ephraim Friedman created in the grantees a tenancy in common. Section 1055, Rev. Laws.

The law is well settled here, and elsewhere, that a conveyance to a stranger to the title, by one cotenant, by an instrument purporting to pass the entire title in severalty, or a specific part thereof, by metes and bounds, followed by an entry into the actual, open, and exclusive possession by such stranger under a claim of ownership in severalty is deemed to amount to an ouster of the other cotenant, which if continued for the statutory period (five years) will ripen into good ti-

tle by adverse possession. *Abernathie v. Con. Virginia M. Co.*, 16 Nev. 260; 7 R. C. L. § 48, p. 84; 1 Cyc. 1078; 38 Cyc. 34; Ann. Cas. 1915C (note) p. 1232.

All of the authorities point to the conclusion that a conveyance of one cotenant, purporting to convey the entire property, coupled with possession by the grantee and notice to the cotenant, actual or presumed, or open, hostile, exclusive, and notorious acts of ownership, constitutes adverse possession, which may ripen into a valid title by prescription. 38 Cyc. 34.

The complaint in this case is a short-form complaint as in an ordinary action to quiet title. Much to be regretted, the only finding in the record is a general one, in the language of the complaint. In the absence of any finding to the contrary, we, from the facts developed at the trial, are warranted in the conclusion that the principles of law above stated govern and control this case, and it will be considered in the light of the law applicable to the subject.

The facts developed at the trial are in substance as follows:

The land in controversy was located within a boundary of approximately 2,000 acres of fenced land in private ownership. Just what proportion of the acreage of the original common estate of 5,300 acres is located within the inclosure, other than the land in controversy, does not clearly appear. The land within the large inclosure was grazing land. It was, by reason of its particular locality and quality, unfit for cultivation or improvement, except in few instances. It appears that by usage, apparently permissive in its origin, all owners of land within the inclosure, who so desired, were allowed to graze the lands in common during the grazing season of the year. During the remainder of the year, with but few exceptions, the lands were entirely unoccupied. It is fair to conclude from the testimony of the witnesses that because of the shortness of the grazing season, the locality and quality of the lands, it was not practicable for one owner to fence against another, and their live stock was allowed to roam and graze at large the entire area, unrestrained and unconfined, without reference to ownership or title. The boundaries of the holdings within the inclosure were not marked or defined in any manner upon the ground. In 1901 the lands were not in the open, adverse possession of any person. The evidence tends to show that John W. O'Banion and Zadoc Pierce, well knowing the situation, quality, and condition of the land and the possible use of it by others for grazing purposes during the grazing season, purchased, for value, in 1901, a small segment of the common estate (280 acres) from Joseph Neudelman, for a purpose different from that for which the lands within the inclosure was occupied and used.

They, as evidenced by their subsequent acts and conduct, visioned the possible reclamation of the particular land. It is fair to assume, from the small acreage and use made of the land, it was not purchased with intent to be used for general grazing purposes in common with owners of lands within the inclosure. The evidence is undisputed that when they entered into possession under their conveyance in 1901, they immediately inclosed 80 acres of their holding, then susceptible of immediate cultivation and improvement. The remainder (200 acres) was not inclosed. It was not susceptible of cultivation or improvement at that time. It was situated approximately a mile away from the 80 acres. It was adaptable at that time only for grazing purposes during the grazing season of the year. O'Banion and Pierce upon entry established a dairy business and erected a dwelling upon the 80 acres, which was occupied by O'Banion.

[4] Long after the controversy over the ownership arose over the identical land here involved between A. W. Gander and Daniel C. Simpson in 1907, the plaintiff Gander constructed a ditch, at least nine miles in length, to convey water upon the premises, and in the year 1912 began its cultivation. We disregard this or any evidence of either party relating to possession of the particular land after the controversy over the ownership arose. Possession after that date could not be adverse. *Turner v. Bush* (Cal. App.) 185 Pac. 190. Adverse possession dated from 1901.

From 1901 to 1907 O'Banion continued to reside upon and operate the dairy on the 80 acres, and occupied and used the uninclosed portion, now in dispute, openly and notoriously, as pasturage for at least 200 head of dairy animals, employed in his dairy business, during the grazing season of each year. It is conceded that during the rest of each year, from 1901 to 1907, the particular land was entirely unoccupied. The evidence tends to show that while pasturing the dairy animals were at all times kept in charge of a herder, whose duty it was to confine them, while pasturing, to and upon the land in controversy. A small house was erected upon the premises for the herder's accommodation. It appears that Zadoc Pierce sold his interest in the entire property to A. W. Gander in 1903. The latter mortgaged back to Pierce the land to secure the purchase price, which has not been satisfied. Some confusion exists as to the exact relation between plaintiffs as to how the land is held between them. Counsel complain that the court refused to permit on cross-examination a full disclosure of that relation. The court evidently regarded the matter as immaterial; and, as no prejudicial effect of the ruling is pointed out, we pass the contention without comment.

Plaintiffs subjected the land to their will

and dominion by dealing with the property as their individual estate, paid the taxes thereon, and protected their possession of the unclosed land as far as possible for them to do in its then condition, but did not prevent the defendant's grantor, or the defendant's or others' live stock from roaming and grazing thereon while being pastured by them in the manner stated.

The evidence in rebuttal is that Jacob E. Cohn, defendant's grantor, and others not disclosed, owning lands within the large inclosure, grazed the particular land, in connection with other lands owned by them, during the grazing season of each year. It is admitted that the lands within the inclosure were so used without protest or interference during the grazing season of each year from 1902 to 1907, and that during the rest of each year the lands were entirely unoccupied.

The evidence tends to show that O'Banion offered Simpson, in 1914, \$1,000 for his alleged claim or interest in the property, which was refused. It appears that when plaintiffs entered in 1901 the land was not in the open, adverse possession of any person or persons. It is not denied that Jacob E. Cohn, defendant's grantor, had actual knowledge that Joseph Nendelman, prior to his conveyance to O'Banion of the particular land, had dealt with the entire common estate as his individual estate, and the evidence tends to show that he knew that O'Banion and Pierce occupied the land in dispute as their individual estate. The instruments constituting plaintiffs' chain of title were duly recorded. Daniel C. Simpson resided in the vicinity of the land for a period of more than 30 years. He was a brother-in-law of his grantor, and his own testimony tends to show that he was familiar with plaintiffs' acts of ownership and the common usage of the lands within the large inclosure for grazing purposes during the grazing season.

From the foregoing statement of facts counsel for appellant draw several assignments of error:

[5] First. That owing to the relation existing between cotenants, that the possession of each is the possession of all, respondents, as grantees under their conveyance, knew, or should have known, the true state of the title; that appellant, claiming under a grant from a cotenant, had the right to assume that respondents' possession under their conveyance was in accordance with his title, and not coextensive with the pretensions of their deed. Mr. Freeman, in his work on Cotenancy, at section 225, commenting upon the authorities supporting this position, states:

"That this argument, to whatever cause attributable, could not have resulted from an examination of the reported adjudications on the subject."

We do not evince surprise that learned counsel for appellant have failed to cite any authorities in support of the proposition. We, therefore, pass the assignment without further notice.

[6] Second. The court erred in permitting evidence of the occupancy, cultivation, and improvement of the inclosed noncontiguous 80 acres, adjudged to Gander in the prior litigation, and not involved herein, as tending to establish constructive possession of the unclosed tracts or parcels, though included in the same conveyance. We do not understand the evidence to have been admitted or considered by the court for any such purpose. In ruling upon this line of testimony, the court in each instance safeguarded itself with the statement that the evidence would be admitted for whatever it might be worth when it came to consider of its ultimate conclusion upon the whole case.

[7] As far as respondents' possession is concerned, it is not necessary to invoke or discuss the rule of constructive possession. Constructive possession was not an issue in the case. We are of the opinion that from the facts developed at the trial the trial court may have properly considered the special use made of the land for pasturage by respondents in connection with the inclosed portion upon which they conducted a dairy business as tending to show that claimants, relying upon a title derived from such a source, actually claimed possession in themselves and exercised acts of ownership and dominion over the land as to inform the cotenant and those claiming under him of the claim of title under which they held, and of the nature and purpose of the possession to which the land was subjected. *Foulke v. Bond*, 41 N. J. Law, 545.

[8] Third. Respondents failed to establish a prescriptive title, in that the evidence of adverse possession, as pointed out by the statute, is not shown to exist. Section 4957, Rev. Laws. And, also, it is not shown that respondents possessed the land within five years next preceding the commencement of the action. Section 4953, Rev. Laws. We are of the opinion that the five years of possession required by the statute (section 4953, Rev. Laws) before an action for the recovery of real property or its possession can be maintained, does not mean the five years next preceding the commencement of the action. A party who has been in the continued, exclusive, adverse possession of the land for five years is entitled to the benefit of the statute of limitations, although the five years are not "next preceding" the commencement of the action. *Cannon v. Stockmon*, 36 Cal. 541, 95 Am. Dec. 205.

[9] Neither does the exhaustive argument of counsel convince us that, for the purpose of constituting adverse possession, where persons (as here) claim title to land, founded

upon a written instrument, it is incumbent upon such persons to adduce proof to show that the land had been cultivated, improved, or protected by a substantial inclosure. Section 4957, Rev. Laws.

Since the early cases of *Ellicott v. Pearl*, 10 Pet. 442, 9 L. Ed. 475, and *Ewing v. Burnett*, 11 Pet. 41, 9 L. Ed. 624, it has been uniformly held that, in the absence of statute, neither residence, cultivation, improvement, nor inclosure of land is necessary to support actual possession, where neither the situation of the land nor the use to which it is adapted or applied admits of or requires such evidence of ownership. The cultivation, improvement, inclosure, and the pasturage of land not inclosed is, by the distinct affirmation of the statute, evidence of adverse possession, but the statute does not exclude evidence of possession, manifested in some other appropriate manner. What the consequence would be of a failure of persons claiming title, not founded upon a written instrument, to inclose, cultivate, or improve the land, we are not called upon to inquire. Section 4959, Rev. Laws.

The argument that respondents' occupancy and possession of the property is not shown to be hostile to appellant's title is clearly against the weight of the evidence. Entry by a grantee holding under a deed of conveyance for the entire estate, or a specific portion thereof, by metes and bounds, containing covenants of seisin and warranty, made by one of the cotenants and duly placed on record, has all the constituent elements of a disseisin at common law. Co. Litt. b. n. l.

Such a conveyance as that here in question determines the *quo animo* with which entry is made under it, and gives character to the possession after entry made. *Foulke v. Bond*, supra. The entry of such grantee cannot be presumed to be that of a cotenant, nor in subordination to the rights of the cotenancy. Every act of ownership on the part of such grantee after entry must necessarily be adverse to any other part owner. His possession under such circumstances is adverse from its inception. *Abernathie v. Con. Virginia M. Co.*, 16 Nev. 270; *Freeman on Cotenancy*, § 224.

It will not be denied that one of the most effective means of proving ouster is by showing the exercise of dominion over the land by the adverse claimant. 1 R. C. L. § 15, p. 763.

[10] But it is insisted that respondents' occupancy and possession of the particular land for the pasturage of their dairy animals during the grazing season of each year, in charge of a herder, was not exclusive of those claiming under the cotenancy, and therefore there is not sufficient evidence of an ouster and of an adverse possession to support a claim of title by adverse possession. We concede that the proof on which title by adverse possession rests applies in this as in every case in which

title acquired by such means is relied on. It will not be denied that exclusive possession is a necessary and constituent element of adverse possession. But all the authorities agree that "exclusive possession" means that the claimant must hold possession of the land for himself, as his own, and not for another. 1 R. C. L. § 14, p. 701. The evidence on the part of respondents in this respect is full and complete. Furthermore, it is supplemented by the undisputed fact that Jacob E. Cohn, appellant's grantor, had actual notice that respondents' possession was adverse and exclusive of him, and the appellant Simpson had constructive notice.

[11] That the actual possession of land, with the exercise of the usual acts of ownership and dominion over it, operates in law as constructive notice to all the world of the claim of title under which the possessor holds is too well settled to merit discussion. *Talbert v. Singleton*, 42 Cal. 395.

The evidence shows that respondents at all times exercised open acts of ownership and dominion over the land as was calculated to inform the appellant and him under whom he claims of the true nature and purpose of the possession to which the land was openly subjected by respondents. The appellant had resided in the vicinity of the land for a period of more than 30 years. He was closely connected by marriage to Jacob E. Cohn, and his father, Isadore Cohn, who had dealt with the entire common estate as his individual property, and it is fair to assume from Mr. Simpson's own testimony that he knew, or, as a man of ordinary prudence must or should have known, the true character of respondents' possession and the exclusive use made by them of the land in accordance with the terms and pretensions of their conveyance.

[12] The only possible, plausible pretext upon which it might reasonably be asserted that respondents' failure to establish title by prescription is to assume from the circumstances of the pasturage of the land by respondents and the grazing of the land by appellant and others that its common use during the running of the statute of limitations was evidence, when considered with other evidence, tending to establish the fact that respondents' occupancy and use of the land was in itself a recognition, admission, or acknowledgment of appellant's title, and thereby the continuity of their adverse possession was destroyed. We have given this feature of the case such close and prolonged attention that it may be said to account for the delay in this decision. Our conclusion upon this most important branch of the evidence is that there is substantial evidence from which a rational inference may have been drawn by the trial court that respondents did not pasture the uninclosed portion of their holding under their deed in recognition of appellant's

title or in subordination to the rights of the cotenancy. In arriving at this conclusion, we have borne in mind that upon authority and good reason it is generally held that the mere grazing of uninclosed grazing land is not sufficient in itself to set in motion the running of the statute of limitations as against a true owner. This for the reason that the possession is not such as is calculated to give notice that the land is occupied and claimed by another. The appellant's knowledge and notice of the true character of respondents' use and occupancy of the particular land distinguishes this case from that line of decisions.

The point is made that the grazing of the land by appellant in common with other owners of lands within the large inclosure destroyed the continuity of respondents' possession. We are not in accord with this position. Respondents planted their flag of ownership on the ground in 1901. Its dominion waved over the entire area embraced by their conveyance uninterruptedly from 1901 to 1907. Taking into consideration the nature, character, and location of the property, and the use to which it was openly and notoriously put for pasturage during the pasturage season of the year, it being entirely unoccupied during the remainder of the year, the evidence tends to show that respondents protected their possession as far as it was practicable or profitable for them to do. It is true that they did not openly protest against the enjoyment of the property by appellant and others during the grazing season, but the open and uninclosed condition of the land is accounted for, and the participation by appellant and others in the enjoyment of the property during the grazing season is explained.

[13] If the evidence tends to show, as contended, that appellant's permitted and continued grazing of the land during the grazing season was intended as and to be a substantial interruption of respondents' possession, it was a controverted question of fact for the trial court to determine, and not this court.

Our ultimate conclusion on this branch of the evidence is that the appellant and Jacob E. Cohn, his grantor, were bound to take notice of respondents' deed and entry under it into open, hostile, exclusive, and notorious possession under claim of right and in severalty, known to them at all times, and that, having failed to enforce a recognition of their legal rights, if such they had, within the time prescribed by the statute of limitations, appellant's interest was lost, and is no longer susceptible of enforcement. His interest, by operation of said statute, vested in respondents in possession under their deed. *Abernathie v. Con. Virginia M. Co.*, supra; *Freeman on Cotenancy*, § 197.

[14] It is the further contention of counsel

for appellant that the offer made by John W. O'Banion, in the year 1914, to Daniel C. Simpson, to purchase his interest in the land in controversy for a cash consideration of \$1,000, amounts to a direct, positive admission or recognition of Simpson's interest in the land. It is clear that the land, when this offer was made, had been in litigation since 1907, and it is not denied that when the offer was refused by Simpson, O'Banion at the time stated to Simpson that he would law him until he was broke. Under these circumstances it is fair to assume that such an offer was made to purchase peace, and not in recognition of a hostile title.

The judgment and order appealed from are affirmed.

DUCKER, J., concurs.

COLEMAN, C. J., dissents.

(56 Utah, 342)

**McVICAR v. INDUSTRIAL COMMISSION  
OF UTAH. (No. 2498.)**

(Supreme Court of Utah. June 15, 1920.)

1. Master and servant  $\S$  417(7)—Compensation claimant's dependency question of fact, on which commission's findings are conclusive.

The issue of dependency being one of fact, the Industrial Commission's conclusions are like the verdict of a jury, and will not be interfered with, when supported by some substantial evidence, and if the commission erred in its findings of fact and conclusions, the Supreme Court cannot correct the error.<sup>1</sup>

2. Master and servant  $\S$  417(5) — Commission's decision on claim for compensation final, unless abuse of discretion clearly appears.

Where it does not clearly and indubitably appear that the discretion of the Industrial Commission has been abused, its decision is final and unassailable.

3. Master and servant  $\S$  415—Compensation claimant's counsel, relying on stipulation to take testimony, need not state to commission what he expects to prove.

The attorney for the applicant was entitled to rely on a stipulation to take further testimony, and for that reason was not required to make a statement to the Industrial Commission of what he proposed to prove by witnesses he desired to produce, and his request wrongly denied.

Proceeding by Minnie R. McVicar under the Workmen's Compensation Act for compensation for the death of her son, James Allen McVicar, opposed by the Imperial Lead Mining Company, employer. Award for claimant by the Industrial Commission, and claim-

<sup>1</sup> *Geo. A. Lowe Co. v. Industrial Commission of Utah*, 190 Pac. 334.

ant applies for writ of review to determine its lawfulness. Award set aside, and Commission directed to give applicant an opportunity to introduce further testimony.

George R. Freeman, of Corona, Cal., for plaintiff.

James H. Wolfe, Asst. Atty. Gen., and De Vine, Stine & Gurlliam, of Ogden, for defendants.

WEBER, J. Plaintiff applies to this court for a writ of review to determine the lawfulness of an award by the Industrial Commission. A synoptical statement of the salient facts as found by the commission is:

Applicant (hereinafter referred to as plaintiff) is a widow, the mother of James Allen McVicar, who was killed on September 12, 1919, while employed by the Imperial Lead Mining Company, in what is known as Death Canyon, Utah. The husband of the applicant died about two months following the demise of the son. For approximately one year prior to the death of the husband he had not been able to earn anything, and had made no contribution toward the support of the applicant, his wife. The deceased son had been discharged from service in the United States navy during the latter part of 1918. He lived with his parents and contributed to their support after he was discharged from the navy and until he went to work in Utah about June 12, 1919. During the time he had been so employed he had contributed to the support of his father and mother the sum of \$90. The applicant had no idea, according to her testimony, of what her household expenses were. She had no systematic method of buying supplies for the household, and no way in which to estimate what her receipts from the deceased son were, other than that he contributed everything. The evidence very clearly shows that the deceased son did not contribute everything at any time toward the support of the applicant or her husband.

During the time the son was in the navy he made an allotment for the support of his father and mother of \$15 per month, which was increased by an allowance from the government of \$10. The amount of any support contributed by the deceased son prior to his entry into the service was not ascertained. His contribution after his return from the navy was not ascertained with any degree of certainty. During the first part of 1919 he was employed by the Riverside Portland Cement Company, living in Riverside with his parents, who had apartments there. The rent for the apartment was paid by the applicant. In all probability, during that period the deceased son contributed the entire support of the applicant other than this \$25 per month; but it does not appear that the contribution toward the sup-

port of applicant at any time amounted to more than \$25 per month.

The commission ordered that compensation be awarded, to be paid by the Imperial Lead Mining Company, to the applicant at the rate of \$16 per week for a period of 112 weeks and 3 days, but not to exceed \$1,800, and that the undertaker be paid the sum of \$150.

[1, 2] The record is not without evidence to support the findings and conclusions of the commission. The issue of dependency being one of fact, the commission's conclusions are like the verdict of a jury, and will not be interfered with by this court, when supported by some substantial evidence. If the commission erred in its findings of fact and conclusions, we cannot correct the error. It has the power to determine the degree of dependency. Since it does not clearly and indubitably appear that the discretion of the commission has been abused, its decision is final and unassailable. The principles enunciated in *Geo. A. Lowe Co. v. Industrial Commission of Utah*, 190 Pac. 934, are applicable here.

[3] If the applicant had been given an opportunity to present all her testimony, the award would be affirmed. The depositions of certain witnesses on behalf of applicant were taken February 6, 1920, and at that time it was stipulated between the attorneys for the parties that a further hearing might be held at the desire of either party. On February 18, 1920, applicant's attorney informed the commission by letter that he desired to take the testimony of several witnesses, and that their testimony would relate to the amount of compensation received by James Allen McVicar immediately prior to his death, and also the amount of money he sent to his mother; also as to statements made by the son relative to his mother being dependent upon him. On March 13, 1920, counsel for applicant again wrote to the commission, calling attention to his former letter, and saying that he desired to take the deposition of a certain witness. Neither of these letters was answered by the commission. On March 25, 1920, the award herein was rendered. In an application for rehearing, filed in due time, the refusal to permit applicant to introduce further testimony was given as one of the grounds for rehearing; the stipulation and letters being made a part of the application. The application for rehearing was denied May 20, 1920.

In his letters to the commission counsel for applicant did not state what he expected to prove by the witnesses whose testimony he desired to produce. He relied upon the stipulation to take further testimony, and for that reason he was not required to make a statement of what he proposed to prove. He was justified in relying upon the stipu-

lation, and his request to introduce further testimony should have been granted.

The award is therefore set aside, and the commission is directed to give applicant an opportunity to introduce further testimony.

CORFMAN C. J., and FRICK, GIDEON, and THURMAN, JJ., concur.

(58 Utah, 574)

**VAROUKAS v. INDUSTRIAL COMMISSION OF UTAH et al. (No. 3490.)**

(Supreme Court of Utah. July 21, 1920.)

**1. Master and servant §397 — Industrial Commission may adopt reasonable rules conforming to Compensation Act.**

The Industrial Commission has power to promulgate rules and regulations to protect the injured employé, the employer, and insurance carrier, and to safeguard the state insurance fund, provided such rules are reasonable and conform to the spirit of the Workmen's Compensation Act.

**2. Master and servant §397 — Industrial Commission's rule held unreasonable and contrary to Compensation Act.**

Industrial Commission's rule No. 19, requiring injured employé to procure the commission's consent to leaving the locality of employment, and providing for forfeiture of full compensation accruing after employé has left locality without such consent, without any hearing and regardless of whether absence in any way affected his disability, is unreasonable, the commission having no right to forfeit any part of the compensation allowed by Workmen's Compensation Act, except after notice and hearing and for good cause.

**3. Master and servant §403—Compensation claimant violating commission's rule has burden of proof.**

Injured employé entitled to compensation under Workmen's Compensation Act, who has left locality of employment without Industrial Commission's consent, in violation of its rules, has burden of showing that he had good cause for failure to procure consent, and that absence has not prejudiced employer or insurance carrier or state insurance fund, and did not prolong period of disability.

**4. Master and servant §385(1)—Compensation to employé violating rules or disobeying physician's orders limited to disability ordinarily resulting from injury.**

Where employé violates a rule of Industrial Commission or disobeys the orders of the attending physician, or otherwise arbitrarily refuses to co-operate with those in attendance upon him, the award of compensation under Workmen's Compensation Act should cover only such a period of incapacity or disability as would usually and ordinarily result from the character of the injury received by the employé.

**5. Master and servant §397—Compensation claimant must take notice of Industrial Commission's rules.**

Injured employé, on making application to Industrial Commission for compensation under Workmen's Compensation Act, is bound to take notice of the rules and regulations of the commission affecting the application.

Proceedings under Workmen's Compensation Act by Louis Varoukas for compensation for injuries, opposed by the Standard Coal Company, employer. Award by Industrial Commission of Utah for claimant, and on denial of his application for additional compensation, he presents the record to the Supreme Court for review. Decision of Commission annulled, and cause remanded, with directions.

Stewart, Alexander & Cannon, of Price, for plaintiff.

Dan B. Shields, Atty. Gen., James H. Wolfe, Asst. Atty. Gen., and A. R. Barnes, of Salt Lake City, for defendants.

FRICK, J. Plaintiff, in due time and in due form, made application to the Industrial Commission of Utah, hereinafter styled commission, for compensation under our statute for a disability caused by injuries which he sustained in the course of his employment while in the employment of the Standard Coal Company of Utah. The commission, after a hearing, awarded plaintiff "compensation for the disability period, January 10, 1919, to February 20, 1919, less the 10 days waiting period," amounting to \$54.81. The plaintiff was dissatisfied with the award of the commission, for the reason, as he contends, that the disability period fixed by the commission was for a shorter time than the disability continued, and he asked for a rehearing. In the petition for a rehearing he asked for additional compensation, which additional compensation, however, was denied for the reasons hereinafter appearing. The majority of the commission on the first hearing, after reciting the facts, closed its decision as follows:

"From the evidence, therefore, the commission finds that the applicant met with an accident and sustained injuries arising out of and in the course of his employment, and that there followed a total disability period from January 10, 1919, to February 20, 1919, for which compensation should be allowed. The commission finds that the disability period extended beyond the 20th of February, 1919, but that compensation may not be allowed for this period on account of the violation of rule 19. The commission feels that this is a reasonable rule which must be respected. In this case the evidence shows that the defendant furnished, and was willing to furnish, all necessary medical attention, and it is conceded that where the defendant is willing to do this it should have the right to so do, and this right should not

be interfered with by the employé without reason and without notification to any one taking his departure from the locality.

"Wherefore it is ordered, adjudged, and decreed that the applicant be, and he is hereby, awarded compensation for the disability period, January 10, 1919, to February 20, 1919, less the 10 days' waiting period, or 31 days, or \$54.81."

In denying the application for additional compensation the commission merely adhered to the reasons originally given, and the plaintiff presents the record to this court for review.

Rule 19 which is referred to in the decision of the commission, and pursuant to which it refused to allow plaintiff additional compensation, reads as follows:

"An injured employé who desires to leave the locality in which he or she has been employed during the treatment of his or her injury or desires to leave the state, shall report to his or her attending physician for examination, notifying the commission in writing of such intention to leave, accompanying such notice with a certificate from the attending physician, setting forth the exact nature of the injury, the condition of the employé, together with a statement of the probable length of time disability will continue. After complying with the requirements herein set forth and upon written consent of the commission, the employé may leave the locality in which he or she has been employed, otherwise no compensation will be allowed during such absence from the locality in which he or she has been employed."

[1] Plaintiff's counsel vigorously assail the findings and conclusions of the commission, and further insist that it was without power or authority to adopt rule 19. They contend, however, that if it be conceded that the commission possessed such power, yet said rule is unreasonable, and for that reason the rule is without force or effect. Without pausing now to point out the particular powers that are conferred on the commission with regard to adopting and promulgating rules and regulations, we are clearly of the opinion that the commission has ample power to promulgate all reasonable rules and regulations for the protection of those who are injured, and also to protect the rights of the employer, and that of the insurance carrier, and may safeguard the state insurance fund. The rules that are promulgated, however, must be reasonable, and must conform to the spirit of the Compensation Act (Laws 1917, c. 100, as amended by Laws 1919, c. 63).

In view of its decision and the evidence, which is certified to this court by the commission, the only question we can consider here is the reasonableness of rule 19.

[2] It will be observed that according to the provisions of rule 19 the employé is permitted to leave the locality in which he was employed only after he has complied with

those requirements, "and upon the written consent of the commission, \* \* \* otherwise no compensation will be allowed during \* \* \* the absence of the employé from the locality in which he has been employed." The rule is absolute and inflexible to the effect that if the employé leave the locality of his employment without complying with its requirements and without the written consent of the commission "no compensation will be allowed during" such absence. The employé thus forfeits all compensation regardless of the cause which may have induced or required him to leave the locality of his employment. It will also be observed that the forfeiture is imposed without giving him a hearing so far as the rule is concerned. As a matter of course, if the commission may forfeit all compensation merely because the rule is disregarded, no hearing is necessary. We are of the opinion, however, that the commission may not forfeit any part of the compensation which it allowed by our statute, except after notice and hearing and for good cause. No doubt the rule in its general tenor and effect is proper and salutary. In view that the employer under the statute is required to compensate the injured employé during his entire disability and the commission in all cases is required to determine and fix the period of disability, it is but just and fair, even necessary, that the employé shall comply with all reasonable rules and regulations which are intended to protect the employer, the insurance carrier, and the state insurance fund against spurious or fanciful claims on the part of the employé and that the employé remain within the reach of the commission at all times during his disability. It is a matter known to all, however, that an employé, like many other persons, may suddenly be called on to leave the locality of his employment upon a call from his home in case of serious illness or death of one of his family or kinsman, or for some other unavoidable reason, and in order to respond to the call effectually it may be utterly impossible to first obtain the written consent of the commission, or even make a report to the attending physician on account of his absence or for some other reason. Under the rule as it is written, however, and as it is applied in this case, a forfeiture would result whether the employé had left the locality with or without cause. Such a rule, in our judgment, is contrary to the spirit of the Compensation Act, for the reason that its enforcement under certain circumstances must result in forfeiting compensation which may be justly due to the employé.

[3] We also unhesitatingly state that in case the employé leaves the locality of his employment the burden should be cast upon him to show why his absence has not prejudiced his employer, or the insurance car-



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rier, or the state insurance fund, as the case may be, and that such absence did not prolong the period of his disability. In case he has violated the rule, the burden of proof and the duty to explain should be on him, and unless he satisfies the commission that his absence without its consent has in no way resulted in prejudicing the employer, insurance carrier, or the state insurance fund, the commission should deny him compensation for such period as may be just and proper in view of the established facts. A forfeiture should, however, not be declared without giving the employé a hearing if he desires to be heard. Upon such a hearing he may produce the most cogent reasons, as before suggested, why he did not and could not comply with the rule. If the commission is convinced that by his absence the period of disability was not materially increased and the final recovery of the employé retarded, justice demands that no part of his compensation be forfeited.

[4] Neither do we dispute the contention of counsel for the coal company that in case an employé violates a rule or disobeys the orders of the attending physician, or otherwise arbitrarily refuses to co-operate with those in attendance upon him the award or compensation should cover only such a period of incapacity or disability as would usually and ordinarily result from the character of the injury received by the employé. These things are discussed in 1 Honnold, Workmen's Compensation, § 134, under the heading of "Aggravation of Injury after Accidents." What we contend for here is not that the employé shall not comply with the rules of the commission, or that he may refuse to obey the orders of the attending physician, or that he may be guilty of such conduct as will tend to increase or prolong his period of disability, but what we insist upon and what we hold is that rule 19, if literally enforced, must necessarily result in forfeiting compensation without giving the injured employé an opportunity to explain or to prove that his conduct was not willful or contumacious or that he willfully violated any rule, or that it did not prolong his disability. In 1 Honnold, Workmen's Compensation, § 188, at page 680, the author, in discussing the duties of injured employes, says:

*"Compensation is not payable for such portion of the illness as is due to the injured employé's own actions aggravating his disability. But, in justice to the patient, the commission will require the fact of insubordination, lack of co-operation with the physician, or reprehensible conduct to be clearly established before it will sanction the cutting off of the treatment and the compensation payments allowed by law."* (Italics ours.)

That is precisely what we insist upon here. If rule 19 made provision for a hearing in which the employé would be permit-

ted to explain the cause of his absence or to prove that it in no way increased the period of disability, and the commission should find against him, and there were any substantial evidence in support of the finding, we should not interfere. That is not the question here, however. Under rule 19 as written the commission may forfeit all compensation which accrues after the employé has left the locality of his employment without any hearing whatever, and for the sole reason that he has left the locality, whether for good cause or for no cause, or whether it has affected in any way his disability or not. That is the precise construction that the commission has placed upon the rule, as is manifest from its decision. A rule having such an effect is, in our judgment, clearly and necessarily, not only unreasonable, but is contrary to the spirit of the Compensation Act, since it may be applied so as to cause the employé to forfeit a substantial part of his compensation without an adequate or any cause.

By what we have said we do not wish to be understood as holding that the commission in this case, in denying plaintiff additional compensation, when the facts are ascertained, may not be correct. It may well be that the plaintiff is not entitled to additional compensation both because his disability did not extend beyond that time and because he, without cause, has refused to obey the orders of the attending physician and the rules of the commission, and has thereby either increased or prolonged his disability, or has brought about conditions such that the fact cannot be established to the satisfaction of the commission. The commission should, however, hear the evidence, and then find the facts, so that in case the employé contends that there is no substantial evidence justifying the findings of the commission, he may have the same reviewed as in other cases.

[5] There is nothing in plaintiff's contention that in view that he had no knowledge of rule 19 therefore he is not bound thereby. It would be strange doctrine indeed if it were held that one may invoke the aid of a court, board, tribunal, or commission, and yet need not take notice of the rules and regulations governing the subject-matter of his application, and that he is not required to conform thereto, and is not bound thereby. When plaintiff made application for compensation to the commission he was bound to take notice of its rules and regulations affecting that application. In view, however, that pursuant to the provision of rule 19 the commission, without cause, other than the naked fact that plaintiff had left the locality of his employment, has forfeited all compensation accruing after he so left such locality without the written consent of the commission, that portion of rule 19 is

held unreasonable and contrary to the spirit of the Compensation Act, and hence not enforceable.

The decision of the commission, denying plaintiff compensation after he left the locality of his employment, is therefore set aside and annulled, and the cause is remanded to the commission, with directions to hear evidence, if any is offered upon that subject, and make findings in accordance with the evidence, and upon such findings base its conclusion whether under the evidence the plaintiff is or is not entitled to additional compensation; and to amend rule 19 so as to make it conform to the views herein expressed. Plaintiff to recover costs.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

(79 Okl. 133)

**HAM et al. v. VEASEY.** (No. 11538.)

(Supreme Court of Oklahoma. Aug. 31, 1920.)

*(Syllabus by the Court.)*

**Appeal and error** ~~§~~356—No jurisdiction of appeal not taken within statutory term after judgment.

This court is without jurisdiction to entertain an appeal commenced in this court more than six months after the rendition of the judgment or final order of which complaint is made.

Error from Superior Court, Okfuskee County; John L. Norman, Judge.

Action by P. H. Veasey against W. T. Ham and others. Judgment for plaintiff, and defendants bring error. Appeal dismissed.

Phillips & Douglas, of Okemah, for plaintiffs in error.

Wright, Wilhoit & Becknell, of Okemah, for defendant in error.

**BAILEY, J.** This action was instituted by defendant in error for the cancellation of certain agricultural leases and assignments, and to enjoin plaintiff in error from setting up any claim to the lands involved. Plaintiff in error interposed a demurrer to the petition, which on December 22, 1919, was overruled by the court, and judgment rendered against plaintiff in error. Appeal from this judgment and order of the court was filed in this court on June 24, 1920, more than six months having elapsed since the rendition of said judgment. The case is now before this court on motion of defendant in error to dismiss the appeal on the ground that the same was not filed within the time al-

lowed by statute. The case is here on a transcript, the only error alleged in the petition in error being the order overruling plaintiff in error's demurrer and the rendition of a judgment against plaintiff in error. No response to the motion to dismiss has been filed.

It is essential, in order to have a judgment reviewed in this court, that the proceeding should be commenced here within six months from the date of the final order or the rendition of the judgment appealed from. Section 4452, St. 1893 (section 5255, Rev. L. 1910), as amended by Act Feb. 14, 1911 (Session Laws 1910-11, c. 18, p. 35); *Dickerson v. Moore*, 76 Okl. 249, 185 Pac. 101; *First State Bank of Warner v. Porter* (Okl.) 182 Pac. 672; *Dawson & Schreiner v. Davis Bros. Cheese Co.*, 53 Okl. 313, 156 Pac. 204; *Powell et al. v. Johnson-Larimer Dry Goods Co. et al.*, 35 Okl. 644, 130 Pac. 945; *Schollmeyer v. Van Buskirk*, 35 Okl. 439, 130 Pac. 138.

This appeal not having been commenced within the six-month period allowed by statute, the motion must be sustained, and the appeal is dismissed.

RAINEY, C. J., and HARRISON, KANE, HIGGINS, and JOHNSON, JJ., concur.

(79 Okl. 135)

**MILLER v. OIL WELL SUPPLY CO.**  
(No. 9781.)

(Supreme Court of Oklahoma. Aug. 31, 1920.)

*(Syllabus by the Court.)*

1. **Contracts** ~~§~~88—Want of consideration for written instrument must be shown by party seeking to avoid it.

A written instrument is presumptive evidence of a consideration, and the burden of showing a want of consideration lies with the party seeking to invalidate or avoid it.

2. **Guaranty** ~~§~~7(1) — Delivery of guaranty completes contract and notice of its acceptance is unnecessary.

Where a guaranty is made in response to an offer by the guarantee, its delivery to the guarantee completes the contract, and notice of its acceptance by the guarantee or an intention to act thereunder is not necessary.

Error from District Court, Custer County; T. P. Clay, Judge.

Action by the Oil Well Supply Company against the Custer Petroleum Company, as principal, and John E. Miller and another, as guarantors. Judgment for plaintiff, and defendant John E. Miller brings error. Affirmed.

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Henry Bulow, of Clinton, for plaintiff in error.

Randolph, Haver & Shirk, of Tulsa, Phillips & Mills, of Clinton, and H. M. Gray, of Oklahoma City, for defendant in error.

BAILEY, J. This action was commenced in the district court of Custer county to recover of the Custer Petroleum Company as principal, and H. J. Rice and John E. Miller, as guarantors, the sum of \$2,890.41, the purchase price of certain goods, wares, and merchandise furnished the Custer Petroleum Company by defendant in error.

The liability of plaintiff in error John E. Miller, who is the only party appealing to this court, arises by reason of and under the terms and conditions of a certain guaranty agreement which is as follows:

"Oil Well Supply Company, Pittsburgh, Pa.—Gentlemen: In consideration of your having extended or extending credit at our request to Custer Petroleum Company, being interested with them and for value received, we hereby jointly and severally guarantee the full payment to you when due of all their indebtedness. Notes or other evidence of indebtedness or securities may be received by you on account, or in adjustment of said indebtedness and may be renewed and extended as you think advisable, without notice and without impairing the liability under this guarantee and are hereby expressly included hereunder until finally paid. Notice of acceptance of this guarantee and of sales made or of any default is waived. This guarantee is to be a continuing one, and remain in full force until written revocation is received by you.

H. J. Rice. [Seal.]

"John E. Miller. [Seal.]"

It is disclosed by the record that plaintiff in error, John E. Miller, was one of the directors and president of the Custer Petroleum Company, and apparently the managing director of the company. The evidence further discloses that arrangements were made by plaintiff in error and others of his associates with the defendant in error to secure the materials furnished, and that at the time of the application for such materials plaintiff in error and his associates were advised that it would be necessary to execute a guaranty. The plaintiff in error admits that at the time of the purchase of the materials such guaranty agreement was required, and that he signed and executed an instrument, guaranteeing the payment of certain obligations, but denied that he signed and executed the instrument upon which he is sought to be held in this action. The issue as to whether or not the instrument now sued upon was the one actually signed by plaintiff in error was properly submitted to a jury under instructions to which no exceptions were saved, and a verdict returned in favor of defendant in error in the amount sued for.

[1] Apparently abandoning the contentions made in the trial court, plaintiff in error in this court first contends that the judgment

of the trial court is not supported by sufficient evidence, for the reason that defendant in error failed to affirmatively prove a good and valid consideration for the alleged guaranty agreement, but aside from the facts that the evidence does affirmatively show that plaintiff in error was interested in the Custer Petroleum Company and its president and one of its directors, which raises the legal presumption that he was a stockholder, and the facts show that the guaranty was executed contemporaneously with the agreement to extend credit, and therefore under the provisions of section 1028, Revised Laws 1910, no other consideration need exist.

Counsel has overlooked the provisions of sections 934 and 935, Revised Laws 1910, which provide:

"A written instrument is presumptive evidence of consideration," and "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to \* \* \* avoid it."

It has been frequently held by this court that—

"A written instrument is presumptive evidence of consideration, and the burden of showing want of consideration, lies with the party seeking to invalidate or avoid it." *Missouri, K. & T. Ry. Co. v. Hancock & Goodbar*, 26 Okl. 268, 109 Pac. 223; *St. Louis & S. F. R. Co. v. Bruner*, 52 Okl. 349, 152 Pac. 1103; *Reeves & Co. v. Dyer et al.*, 52 Okl. 750, 153 Pac. 850.

And in *Marshall et al. v. State ex rel. Lankford*, *State Bank Com'r*, 59 Okl. 245, 158 Pac. 1163, it is held:

"Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guaranty, and forms, with that obligation, a part of the consideration to him, no other consideration need exist."

[2] The second proposition urged by plaintiff in error is that there is no evidence that the Oil Well Supply Company gave notice to Miller of the acceptance of the guaranty. As suggested above, however, the evidence is apparently uncontradicted that defendant in error required this guaranty before it would extend credit to the Custer Petroleum Company, and the requirement of the guaranty and the arrangements for the same was contemporaneous with and a part of the same transaction by which the petroleum company obtained the credit and the materials which formed the basis of this action. The verdict of the jury under the evidence submitted sustained the contention that the instrument offered by defendant in error as the guaranty signed by plaintiff in error was the identical one executed by him.

Section 1031, Revised Laws 1910, provides:

"A mere offer to guaranty is not binding, until notice of its acceptance is communicated

by the guarantee or the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance"

—and this court in *Oklahoma City National Bank v. Ezzard*, 58 Okl. 251, 159 Pac. 267, L. R. A. 1918A, 411, held:

"Where a guaranty is made in response to an offer by the guarantee, its delivery to the guarantee completes the contract, and notice of its acceptance by the guarantee and of an intention to act thereunder is not necessary."

The Supreme Court of the United States in *Davis Sewing Machine Co. v. Richards et al.*, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480, and which case is cited with apparent approval in *T. & H. Smith & Co. v. Thesmann*, 20 Okl. 133, 93 Pac. 977, 15 Ann. Cas. 1161, announced the rules of law governing that court as follows:

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract."

We do not think that the record warrants any contention that the instrument quoted constitutes a mere offer or proposal of guaranty, but, having been executed, as we think the record clearly shows, at the request of the creditor, such guaranty is deemed the answer of the guarantor to a proposal made to him and constitutes a contract of actual warranty. We have not thought it necessary to notice that provision of the agreement which provides that "notice of acceptance or of any default is waived," or the recitation of "value received" contained in such agreement.

We think the evidence fully sustains the judgment rendered, and the same is therefore affirmed.

RAINEY, C. J., and HARRISON, KANE, HIGGINS, and JOHNSON, JJ., concur.

(17 Okl. Cr. 665)

THOMASON v. STATE. (No. A-3415.)

(Criminal Court of Appeals of Oklahoma.  
Sept. 18, 1920.)

(Syllabus by the Court.)

1. Assault and battery ⇨82—Evidence insufficient as matter of law to sustain conviction for assault to do bodily harm.

In a prosecution for assault with a dangerous weapon with intent to do bodily harm, the

evidence considered, and held as a matter of law insufficient to support the verdict and judgment of conviction.

(Additional Syllabus by Editorial Staff.)

2. Assault and battery ⇨69—One using abusive language in presence of another's family might be expelled from premises as trespasser.

If complaining witness used profane and abusive language at defendant's home and in the presence of his family, defendant had the legal right to expel him from the premises as a trespasser, and, if necessary, to use reasonable force, short of endangering life or causing bodily harm.

Appeal from District Court, Pontotoc County; J. W. Bolin, Judge.

George Thomason was convicted of assault with a dangerous weapon, and he appeals. Reversed.

J. W. Dean, of Ada, for plaintiff in error.  
S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of conviction rendered on the 26th day of January, 1918, and sentence in pursuance of the verdict of the jury finding the defendant, George Thomason, guilty of assault with a dangerous weapon, and assessing his punishment at imprisonment in the penitentiary for one year and one day.

Several specifications of error go to the insufficiency of the evidence to support the verdict and judgment of conviction. Claud Hooper testified:

"The defendant is my neighbor; lives about a quarter of a mile from me. He had some geese in the back part of his field. They got out, and were eating my corn; so I went over to his place Sunday morning to see if he would not do something with them. His wife or girl said he was at the well. I met him half way between the house and the well, coming back with a bucket of water. He was barefooted, and we laughed and talked a little, and I asked him, 'What are you going to do with those geese?' He said, 'I don't know.' I said, 'You will have to do something with them; they are eating my corn up.' He said, 'I did not know that they were bothering your field at all.' I said, 'If you do not, it is because you did not look.' He said, 'You are a God damn lying son of a bitch.' I said, 'I don't take that off of anybody.' He hit me with his fist and knocked me down, and as I got up I hit at him. He dodged my lick, and walked back 5 or 6 steps, and got a home-made singletree 2½ feet long and 2 inches in diameter, and, when he started back to me with the singletree, his wife caught him, and said, 'George, you are not going to hit Claud with that singletree'; and she said to me, 'Claud, you have no business coming up here and raising a racket; you get out and go home.' I went to the gate, and went outside, and Mrs.

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Thomason tried to get him in the house, and he said, 'Turn me loose; I am going to knock the son of a bitch in the head.' He came out and started to strike me across the fence. I saw I was too close to the fence, and I backed back; then he went to the gate and came out. I found me a stick 3 feet long, and came up a step or two. I made a motion with my stick, and he struck me across the hand and broke my stick. I made another lick then, and threw this hand up to guard the lick off, and he struck me across the side of the head with the single-tree, and that is the last I know of it until I was going towards home. My wife and Mr. Berch had me by the arms. Blood was running out of my ear."

On cross-examination, he was asked if he did not take his knife out of his pocket and call the defendant a liar, when he said he did not know the geese were in his field. His answer was, "Not any more than that;" and "I had my knife after he got the single-tree."

G. W. Berch testified:

"It is 100 yards from my house out to the section line. I was shaving, standing outside the door. I saw Claud make a lick with a stick, and then saw Thomason knock him down. Thomason had a singletree in his hand, and hit him somewhere about the head. I went over, and Claud had a knot raised up behind his ear as big as a quail egg. Mr. Thomason handed me Claud's knife, but it was shut."

For the defense, Mrs. George Thomason testified:

That Claud Hooper came to the front door and said, "Where is Mr. Thomason?" Her daughter said, "He has gone to the well;" then he turned and went around the house. "I was in the house, dressing the baby, and I heard Mr. Hooper say, 'I will kill them God damn geese if they get in again.' Mr. Thomason said, 'No; don't kill the geese; take them up and sell them.' They had got out of the pen, and our little boy was out hunting for the geese at that time. I walked out and said, 'Don't have any trouble about these geese; we will sell them.' They were both mad. He struck at Mr. Thomason there in our yard. My husband dodged the lick, and Mr. Hooper took his knife out of his pocket, and opened it, and said, 'I will cut your God damn guts out.' My husband stepped back and picked up this singletree. I said, 'Don't do that George;' and he said, 'What do you take me to be, to let a man come in my own yard and run me under my floor.' I said, 'Claud, give me your knife, and go back home; I will see that he don't hurt you.' He said, 'I will give you nothing; I will attend to my part of this fight.' Then he said, 'You got it on me, Mr. Thomason; let's go to the section line.' My husband said, 'Put your weapon down and let's fight it fair.' Mr. Hooper walked out to the gate and went out. I saw Mr. Berch in his door, and I called, 'Come over here and help keep these two fellows from fighting.' I heard Mr. Hooper call my husband a God damn son of a bitch, and dare him to come out, and he would cut his guts out, and I turned and started to the house. I didn't see the lick.

Mr. Thomason called for me to bring some water, and he was holding Claud on his arm."

The testimony of Nona Ruth Thomason was in substance the same.

The defendant testified in his own behalf:

"I live 11 miles north and 2 miles west of Ada. I am a justice of the peace in Maxwell township. I was coming from the well, and I said, 'Good morning, Claud.' He said, 'Good morning,' and followed it up by asking me what I was going to do with those damn geese of mine. I had 40 head in my alfalfa hog pasture. I asked him, 'Was my geese bothering him?' and he said they were, and I told him that I would take the geese off and sell them the next day. He said I knew the geese were out. I told him he was a liar when he said I knew they were out. He struck at me with his fist, and I dodged his lick, and he ran his hand in his pocket, and pulled out his knife, and held it open in his hand. I jumped back and picked up this singletree. I told him, if he had to have a fight, we could fight fair, and not lay one another out. My wife tried to get him to go, and promised him that she would take care of the geese. He said, 'By God, he would handle his part of the fight;' then he told me that I had the edge on him there in my own yard, and invited me out in the section line. When I got to the gate, I stopped on the inside; of course, curse words were used on both sides, but I never called him a son of a bitch. He stopped outside the gate, and dared me out, and called me a God damn coward, and said he would cut on me, and picked up the club. He met me in the gate, and struck at me with the club, and hit my arm right here. The club broke. He drew back with his knife, and I hit him with this singletree. I picked him up, and hallooed to the folks to bring some cold water. I put his head on my arm and washed him, and done as much for him as his father. I saw his wife coming, and he was conscious by the time she got there. He walked home with his wife and Mr. Berch. The last word he said to me, as he walked away, was, 'I will kill you before this is over with.' The knife looked to be about a 4-inch handle and a 3-inch blade, and he had the large blade open."

The foregoing is the substance of the material testimony upon which the verdict and judgment were based.

[1, 2] Under the provisions of the act of Criminal Procedure, if at any time, after the evidence on either side is closed, if the court deem it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. Section 5896, Rev. Laws. Carefully considering the whole testimony in this case, we are convinced that the court should have advised the jury to acquit the defendant when the state rested, because as a matter of law, the evidence was insufficient to sustain a conviction. If the complaining witness used profane and abusive language at the defendant's home, in the presence of his family, the defendant had the legal right to expel him from the premises as a trespasser, if necessary by the use of reasonable force short

of endangering life or bodily harm. The testimony of the complaining witness shows that he was advancing on the defendant with a club when the defendant struck him with a singletree. The testimony of the only other witness for the state shows that the complaining witness struck at the defendant with a stick just before the defendant struck him with the singletree.

In our opinion, the evidence fails so far to support the verdict that the necessary inference is that the jury, in reaching their verdict, must have acted from passion, prejudice, or undue influence. Reaching this conclusion, it is unnecessary to notice other errors assigned. However it is apparent that the instructions on self-defense, which were duly excepted to, are erroneous.

Because the evidence is insufficient to warrant a conviction, or to sustain the verdict, the judgment is reversed.

ARMSTRONG and MATSON, JJ., concur.

(113 Wash. 121)

DAVIS et al. v. BROWN et al. (No. 15893.)

(Supreme Court of Washington. Aug. 9, 1920.)

1. Wills §440 — Intent gathered from language.

Intention of testator which controls the construction of a will is that which is manifest from the language of the will as viewed, in the case of ambiguity, in the light of the situation of the testator.

2. Wills §441—Construed in light of circumstances.

In construing a will the court should place itself in the situation of the testator as nearly as possible, and construe it in the light of circumstances surrounding him when the will was executed, including its writing by testator, the condition of his family, the character of his property, its relation to the beneficiaries, and his mode of life.

3. Wills §684(7)—Income payable from date of testator's death.

As a general rule, a bequest in trust of income is payable from the time of testator's death, and a will, disposing of the income for 15 years from and after testator's death, manifests a clear intention to begin payments from the date of the death.

4. Wills §684(5)—Mortgage against real estate for which testator was not personally liable held not payable from income.

Where a portion of testator's real estate was subject, when he executed the will, to a mortgage for a large amount not yet due, and for which he was not personally liable, the mortgage cannot be paid from the income from testator's estate, which he bequeathed to trustees to be distributed to certain beneficiaries

for a period of 15 years after his death, the property to be delivered to trustees when his debts were paid.

Department 2.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by Margaret Smith Davis and others against Mrs. Abner Brown and others, for the construction of the will of John Davis, deceased. From a decree construing the will adversely to their contentions, the plaintiffs appeal. Affirmed.

Weter & Roberts, of Seattle, for appellants.

Edgar L. Crider, of Seattle, for respondents.

TOLMAN, J. Appellants, plaintiffs below, as executors and trustees under the will of John Davis, deceased, brought this action for the purpose of obtaining a construction of the will, and directions as to their duties thereunder, making all persons interested parties defendant.

The facts, which are not in dispute, are as follows: John Davis died in King county in November, 1917, leaving a last will and testament, which was admitted to probate by the Superior Court for King county on December 6, following. The will reads:

"In the name of God amen:

"I, John Davis, of the city of Seattle, state of Washington, being over the age of twenty-one years, and of sound mind, do hereby make, publish and declare this my last will and testament, hereby revoking all former wills heretofore by me at any time made.

"First. I hereby declare that my wife, Margaret Smith Davis, and I have entered into a written agreement, and have executed, acknowledged and delivered conveyances each to the other, whereby all property, real, mixed and personal, now standing in my name, and all which may hereinafter stand in my name, together with all incomes, rents, issues and profits therefrom, is and shall be my sole and separate property, and all property, real, mixed and personal now standing in the name of my wife, Margaret Smith Davis, and all which may hereafter stand in her name, together with all income, rents, issues and profits therefrom, is and shall be her sole and separate property.

"Second. To my wife, Margaret Smith Davis, I give and devise an undivided one-half interest to the forty-acre tract in section twenty-five (25) township twenty-six (26) north range three (3) east, which forty-acre tract was owned by my wife's father and myself as tenants in common.

"I also give and bequeath to my wife all household furniture, pictures, silverware and housefurnishings of every character and description whatsoever, for her sole and separate use and benefit, absolutely and forever.

"Third. For a period of fifteen (15) years from and after my death I give, devise and be-

queath the income from all of the rest, residue and remainder of the property now owned by me, and all which I may at any time hereafter acquire, to my trustees hereinafter named, and their successors in trust, for the following uses and purposes, and for the benefit of the following named persons:

"1. In trust to receive such income and to pay therefrom the sum of one hundred dollars (\$100.00) per month to my mother, Mary Ryan, of Oakland, California, during the full term of her natural life;

"2. From the monthly income remaining after the monthly payment to my mother of one hundred dollars, I will and direct my trustees to pay to Mrs. Blanche Smith and to Miss Marjorie Thomas, both of Seattle, monthly, the sum of fifty dollars (\$50.00) each, for the period of ten years from and after my death;

"3. The income remaining after the payments hereinbefore mentioned shall be equally divided between my son John Davis, Junior, and my sisters, Mrs. Abner Brown of Seattle, and Mrs. Jennie Quiner of Richland, Washington, and upon the expiration of such ten years the income from my estate, after paying to my mother the monthly sum of one hundred dollars, as hereinbefore provided, shall be equally divided between and paid monthly to my son John Davis, Junior, and my two sisters hereinbefore named, and their survivors or survivor, until the expiration of fifteen years from my death; at which time the principal and income of my estate, subject to the monthly payment of one hundred dollars to my mother, if she be then living, shall be equally divided between and paid over to my son John Davis, Junior, and my two sisters hereinbefore named; and in case of the death of either my son or my two sisters prior to such time, my trustees shall divide equally between and pay over to the survivors or survivor of my son and my two sisters hereinbefore named, the principal of such estate upon the expiration of such time.

"Fourth. Subject to the foregoing provisions, I give, devise and bequeath the rest, residue and remainder of my estate to my trustees hereinafter named, and their successors in trust, to hold and conserve the principal of my estate for the use and benefit of my son John Davis, Junior, and my two sisters, Mrs. Abner Brown and Mrs. Jennie Quiner, for the period of fifteen years from my death, and upon the expiration of such period to divide, and pay over and deliver to my son and my two sisters, or to the survivor or survivors of the three, the principal of my estate, absolutely and forever, it being my intention that in case of the death of any one of the three prior to the expiration of such fifteen years, such principal shall be divided between the survivors or survivor of them who shall be living at the expiration of such period, and that no descendant of either one of the three shall be entitled, under this will, to the share of the parent.

"Fifth. I hereby appoint as trustees under this will, my wife, Margaret Smith Davis, Abner Brown, William E. Best, Langdon C. Henry and James B. Howe, all of Seattle, giving and granting unto a majority of such trustees, and their successors, the right and authority, by an instrument in writing signed by such majority and filed in the office of the clerk of

the superior court of the state of Washington for King county, to appoint a successor to any one of the trustees herein named who shall not qualify, or who, qualifying, shall thereafter resign or die.

"Sixth. I also authorize and empower my wife, Margaret Smith Davis, with the consent of three of the other trustees, to sell and dispose of any portion of the principal of my estate, upon such terms and conditions and for such price as she and such three trustees may deem advisable, and without obtaining authority from any court or judge so to do, and in such case the purchaser, after paying the purchase price, shall not be bound to see to the application of the proceeds of such sale.

"Seventh. I appoint my wife, Margaret Smith Davis, guardian of the person and estate of my son John Davis, Junior.

"Eighth. I hereby nominate, constitute and appoint my wife, Margaret Smith Davis, executrix, and Abner Brown, William E. Best, Langdon C. Henry and James B. Howe, executors of this my last will and testament. In case any one or more of them shall not qualify, or, if after qualifying, shall die or resign, those qualifying or surviving, as the case may be, shall have all the powers which all of them would have had if all had qualified, and shall settle my estate and deliver the same to my trustees hereinbefore named. I will and direct that my estate be settled in the manner provided in this my last will and testament; that no bond or bonds shall be required of my trustees or any of them, or any successor of any one of them, nor shall any bond or bonds be required of my executrix or of my executors, or either of them; that neither letters testamentary nor of administration shall be required of my executrix or of my executors, or either of them, and it shall not be necessary for them or either of them to take out letters testamentary or of administration, but they shall have this my last will and testament duly probated and shall file a true inventory of all of my property in the manner required by existing laws, and after the probate of this will and the filing of such inventory, and the obtaining of a decree of solvency, my estate shall be managed by my said executrix and executors until my debts be paid, if any shall exist at the time of my death, and upon such payment, or upon the expiration of the time for the presentation of claims against my estate, my executrix and executors shall deliver my estate to my trustees hereinbefore named and until the time of such delivery my executrix and executors shall settle my estate without the intervention of any court, and thereafter my trustees shall settle my estate in the manner hereinbefore provided for, and without the intervention of any court or courts.

"In witness whereof, I have hereunto set my hand and seal to this my last will and testament, this tenth day of November, A. D. one thousand nine hundred and seventeen."

Under this will there passed into the possession of appellants, as executors, an estate consisting of personal property valued at \$169,309.19, and real estate valued at \$188,285. The total indebtedness of the estate, aside from the mortgages hereinafter re-

ferred to, amounted to not more than \$15,000, all of which was paid by appellants in due course of administration, and before they settled their accounts as executors and proceeded to handle the estate as trustees.

Among other real estate belonging to the estate is an undivided one-half interest in lots 2 and 3, block 22, of A. A. Denny's addition to Seattle, purchased by the testator in his lifetime, and then and now subject to mortgages aggregating \$160,000 on the whole, no part of which were assumed in the purchase. So that, while the testator was not personally liable for any part of the debts secured by these mortgages, and claims based thereon were not and could not have been proven as debts against his estate, yet the undivided one-half interest in the property now held by appellants as trustees is subject to such indebtedness in the principal sum of \$80,000, and may be taken in payment thereof by foreclosure, if default in payment be made, though the estate cannot be held for any deficiency.

Appellants by their complaint ask that the will be construed, and they be directed in the following particulars:

"(a) Can plaintiffs pay income of the estate to those named as beneficiaries of the income while there is mortgage indebtedness on the real estate?

"(b) Can plaintiffs use any or all of the income of the estate in reducing and paying the mortgage indebtedness above described?

"(c) Is such mortgage indebtedness a 'debt' of the estate as described in paragraph 'eighth' of the will?

"(d) Can any of the income of the estate be used in placing improvements upon property of the estate in order to make same productive of an income?

"(e) Are those named as beneficiaries of the income entitled to the whole net income of the estate irrespective of the mortgage indebtedness above described?"

The decree of the trial court answered these questions by construing the will as follows:

"(1) That the entire income of the estate, less only running and management expenses thereof, and the specific bequests to Mary Ryan, Mrs. Blanche Smith, and Miss Marjorie Thomas, be paid to the defendants John Davis, Jr., Mrs. Abner Brown, and Mrs. Jennie Quiner, all as provided in the third paragraph of said will.

"(2) That no part of said income shall be used in reducing, paying off, or discharging the mortgage indebtedness of the estate or any part thereof, except only to pay interest.

"(3) That no part of said income shall be used in placing permanent improvements upon any property of the estate.

"(4) That the payment in whole or in part of the principal of said mortgage indebtedness can only be made by the plaintiffs out of the capital of the estate or proceeds derived from the liquidation thereof."

From which result, by appeal, the case is brought here for review.

[1, 2] In construing a will certain fundamental rules must be always borne in mind:

"The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will, as viewed, in the case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was executed, although technical words are not used; or, as is sometimes said, the testator's intention must be ascertained from the four corners of the will. Hence a will cannot be construed by a mere conjecture as to the intention of the testator; but it is the intention which the testator expresses in his will that controls, and not that which he may have had in his mind, or which is manifested by some other paper not a part of the will, or by previous declarations." 40 Cyc. 1388.

"In determining the testator's intention the court should place itself as near as possible in his position, and hence, where the language of the will is ambiguous or doubtful, should take into consideration the situation of the testator and the facts and circumstances surrounding him at the time the will was executed, such as the fact that the will was written by the testator, who was not a professional man, the condition of the family, and the amount and character of his property, the state of the property devised, the testator's relation to the beneficiaries, and the mode of life in which his family has been reared, and the means provided by him in his lifetime for their culture and happiness." 40 Cyc. 1392.

These principles were early recognized in this state. *Newport v. Newport*, 5 Wash. 114, 31 Pac. 428.

[3] So, taking this will by its four corners, the intention of the testator in some respects becomes self-evident. The opening clause of paragraph 3, which disposes of the income, is, "For a period of fifteen years from and after my death." It is generally held that, where a bequest is made of income, it is payable from the time of the testator's death. *Newport v. Newport*, supra; *Stahl v. Schwartz*, 81 Wash. 293, 142 Pac. 651; *Jesseph v. Westerberg*, 94 Wash. 602, 162 Pac. 1004; *In re Harden*, 177 App. Div. 831, 164 N. Y. Supp. 1014; *Lovering v. Minot*, 9 Cush. (Mass.) 151, and *In re Jacoby's Estate*, 204 Pa. 188, 53 Atl. 768. The testator here, although presumed to know the law, seems to have taken special pains to make his intention clear that the income should immediately pass, by adding the words, "from and after my death." Moreover, the dominant note of the will shows clearly that the testator was especially concerned with the income of his estate, and took great pains to provide for its disposition with such exactness, and in such detail, that his intention cannot be doubted.

[4] This being so, did he intend that the



mortgage indebtedness should be regarded as indebtedness of his estate in the full and unrestricted sense, and be paid in the course of administration as and with the general indebtedness? The will bears date but a few days before the testator's death, and it must be presumed, until the contrary clearly appears, that he had in mind the then condition of his affairs, and of course knew of the existence of the mortgages. These were for large amounts not then due, had been carried by him since the purchase of the property, with, so far as here appears, no effort to retire or reduce them, if, indeed, they could have been paid or reduced before maturity. And if he contemplated their payment within the six months allowed by law for the presentation of claims, it would seem that he would have made some specific reference to them, or provision for their payment.

Again, as has been said, the testator is presumed to have known the law, and it seems unlikely that a man of his experience and business ability, who had long been engaged actively in the real estate business, could have failed to appreciate the fact that he did not owe these mortgage debts, had not, in fact, executed the notes or mortgages, did not assume them in the purchase of the property, and, though the property was subject to them, he and the remainder of his estate were immune from any liability thereon, or deficiency which might arise upon foreclosure. With this in mind, the language of the last paragraph of the will (the only language therein contained which refers to indebtedness of any kind) is significant:

"My estate shall be managed by my said executrix and executors until my debts be paid, if any shall exist at the time of my death, and upon such payment, or upon the expiration of the time for the presentation of claims against my estate, my executrix and executors shall deliver my estate to my trustees hereinbefore named."

It is also significant that, though the testator knew that the time for the presentation of claims was but six months, and six months' income on an estate of this size, however well invested, could not begin to pay \$80,000 represented by the mortgages, yet he gave to the executors no power to sell real estate, and no specific power to sell any property to pay debts.

Moreover, after having made careful disposition of the income of his estate in the three subdivisions of paragraph 3 of the will, it is provided in paragraph 4, "subject to the foregoing provisions, I give, devise and bequeath all the rest, residue and remainder of my estate to my trustees hereinafter named, and their successors in trust,

to hold and conserve the principal of my estate for the use and benefit," etc., thus showing the dominant purpose of the testator was the disposition of the income, expressly subjecting the principal of his estate to that purpose, and empowering and directing the trustees to conserve the principal, with the income already segregated by the direct reference to the preceding paragraph, from the body of the estate, and otherwise disposed of. The direction to conserve the principal under these conditions must mean the payment of the mortgages when they became due, if payment then be considered wise, by applying some part of the principal of the estate to that purpose, and, indeed, the personal estate seems ample to us, and probably seemed ample to the testator, for that purpose, especially so with the power to sell, which follows in the sixth paragraph of the will, thus enabling the trustees to dispose of such property, either real or personal, as in their judgment might best be sold. No doubt the testator considered his estate, without the income, abundantly sufficient to retire these mortgages, if that should be considered wise, and felt safe in applying the income to the support and comfort of those whom he considered entitled to his bounty.

The judgment of the trial court correctly construes the will, and is therefore affirmed.

HOLCOMB, C. J., and MOUNT and BRIDGES, JJ., concur.

(112 Wash. 117)

MARTON et ux. v. PICKRELL et ux.  
(No. 15867.)

(Supreme Court of Washington. Aug. 9, 1920.)

1. Highways  $\S$  175(1)—Rule of the road as to keeping to the right held not to apply to pedestrians.

The statutory rule of the road, requiring users of the highway to keep to the right, has reference to vehicles and those riding or driving animals on the public highway, and does not either expressly or by implication refer to pedestrians.

2. Highways  $\S$  172(1)—Keeping to right required only when passing or meeting other traffic.

The statutory rule of the road does not require any user of the highway to keep to the right in traveling along it, but covers only the meeting and passing of traffic.

3. Highways  $\S$  184(3)—Contributory negligence of pedestrian on left side of road held question for jury.

Whether a pedestrian was contributorily negligent in walking along the left-hand side of the road so as to be barred from recovering

for injuries inflicted by an automobile is a question for the jury; it being common knowledge that a pedestrian can better protect himself when walking toward traffic than when going in the same direction with it.

4. Appeal and error  $\S$ 1033(5) — Appellant cannot complain of conflicting instructions, where erroneous one was favorable to him.

Appellant cannot complain of a conflict between an instruction which applied the rule of the road to pedestrian and an instruction requiring him to prove contributory negligence of a pedestrian on the left-hand side of the road, since the former instruction was erroneous and was favorable to appellant.

5. Trial  $\S$ 235(6) — Instruction to consider admissions of fault by plaintiff in light of circumstances held proper.

In an action for injuries to a pedestrian struck by an automobile, where there was evidence that plaintiff had admitted fault, an instruction that such admission must be considered in the light of the surrounding circumstances, and would bind him only if he was then fully advised as to all the facts, was proper.

6. Trial  $\S$ 234(7)—Reference in instruction to knowledge of law at time of admissions held not misleading.

Since it is a common adage, known and repeated everywhere, that every man is presumed to know the law, the Supreme Court cannot hold that a reference, in an instruction as to the binding effects of admission of fault, to plaintiffs' knowledge of the law when the admission was made, misled the jury.

Department 2.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Frank Marton and wife against W. B. Pickrell and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lee & Kimball, of Spokane, for appellants.  
John L. Dirks, of Spokane, for respondents.

TOLMAN, J. A public highway, with a paved roadway 20 feet wide, known as the "Apple Way," runs east from the city of Spokane, and is extensively traveled, during the usual hours, both by vehicles and pedestrians. About 6 o'clock in the evening of January 23, 1919, respondent, with a companion, was walking eastward along this highway towards his home at Opportunity, and at that time of the year it was then quite dark. For a time they traveled along the right side or southerly edge of the pavement, but at that hour the travel was mostly from Spokane towards the east, and many automobiles approached and passed them from behind, while but few machines were traveling in the opposite direction. Observing this condition respondent and his companion passed to the north or left side of the paved roadway, and pursued their course along the northerly side of the pavement, the companion walking near the edge, and respondent

beside him, some 8 feet from the edge of the pavement. While so proceeding they observed the headlights of appellant's automobile approaching from the east, when, as they estimate the distance, it was about 90 feet from them, and appellant testified that he saw them clearly in the light of an automobile coming from the west when they were about 125 feet from him. Upon seeing the approaching car, respondent's companion stepped off the pavement to the north, while respondent stepped to the south toward the center of the roadway, intending, as they had done immediately before when meeting another automobile, to let appellant's car pass between them. As respondent stepped toward the center of the roadway, he continually watched the approaching headlights, and observed that appellant's car also turned toward the center of the roadway as it approached. He then took two quick jumps, as he expresses it, toward the south, to avoid the approaching car, but it also turned still more in the same direction, and he was struck by the right front end of the machine, the collision occurring at a point about midway between the center and south edge of the pavement, and respondent receiving the injuries complained of. From a verdict and judgment against him, appellant brings the case here on appeal.

A challenge to the sufficiency of the evidence was interposed at the close of plaintiff's case, and overruled, and at the close of the entire case the motion was renewed, and again denied. The same question was raised by a motion for judgment non obstante verdicto.

[1] Appellant bases his argument in support of this point upon the assumption that respondent was prima facie guilty of negligence in being upon the left side of the paved roadway. In this we think he overlooks the fact that our statutes, generally referred to as "the law of travel" and "the rule of the road," have reference to vehicles, and those riding or driving animals upon a public highway, and nowhere in express terms, or by necessary implication, we think, do they refer to pedestrians. It is a matter of common knowledge that a pedestrian on a highway, or on a double-track line of railway, is far better able to look out for his own safety and protection by so traveling as to face all oncoming vehicles than he would be if keeping to the same side of the roadway as vehicular traffic, and, being thus at all times obliged to keep watch to the rear.

[2] Nor does the statute require any user of the highway to keep to the right in traveling, but covers only the meeting and passing of traffic.

[3] At any rate, in the absence of a clear statutory rule applying to pedestrians, the question is one for the jury. Under the facts shown by the record it was for the jury

to say whether or not appellant used the necessary degree of care to avoid the accident, and whether or not respondent was guilty of contributory negligence.

[4] What has just been said clearly indicates that if there was a seeming conflict between the instruction which applied the rule of the road to pedestrians and the instruction which placed the burden of proving contributory negligence upon the defendant, upon the giving of which error is assigned, the latter instruction was clearly right, and the appellant has no cause to complain of the former.

[5, 6] An instruction was given which advised the jury, in effect, that if the plaintiff had made any admissions indicating that the collision was due to his own fault, such admissions must be considered in the light of all the circumstances surrounding him when made, and would be binding upon him only in case he was then fully advised as to all of the facts, and as to the law applicable thereto. The evidence which called forth this instruction was introduced by appellant and denied by respondent, and as we read it, the statements, if made, and if admissible at all, amounted to no more than an expression of opinion that both parties were to blame, or, in one instance, that it was his own fault, in either case a conclusion and not a fact, and as such not apt to be very convincing with a jury, and easily susceptible of excuse or explanation. We have no doubt since the evidence was before the jury, that the instruction was a proper one in all except the reference to knowledge of the law applicable thereto, but since it is a common adage, known and repeated everywhere, that every man is presumed to know the law, we cannot, in the absence of anything in the record to so indicate, hold that the jury was misled thereby.

An additional error is assigned, but not argued, relating to still another instruction. We have examined the instruction referred to, and are unable, unaided, to find anything therein approaching reversible error.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., and FULLERTON, MOUNT, and BRIDGES, JJ., concur.

(112 Wash. 279)

MOLITOR v. BLACKWELL MOTOR CO.  
et al. (No. 15838.)

(Supreme Court of Washington. Aug. 23,  
1920.)

1. New trial  $\S$  104(3) — Cumulative evidence no ground for new trial.

Where one of the principal questions in issue was whether the headlight on plaintiff's bicycle was burning, and there was considera-

ble testimony pro and con, a new trial will not be granted on account of newly discovered evidence on the matter; it being solely of a cumulative nature.

2. Appeal and error  $\S$  981—New trial  $\S$  99—Grant of new trial rests peculiarly in discretion of trial court.

The granting of a new trial for newly discovered evidence rests peculiarly in the discretion of the trial court, which discretion will not be disturbed, except in cases of manifest abuse.

3. Trial  $\S$  194(16)—Instruction that motorist's cutting corner was proximate cause invasion of province of jury.

In an action by a cyclist, who was struck by a motorcar, the refusal of a requested instruction that, if the driver of the motorcar cut a corner at the point where the accident occurred, in violation of an ordinance, that was the proximate cause of the injury, notwithstanding the cyclist's headlight was not burning as required, was properly refused, because it would invade the province of the jury; the court instructing the jury that the cutting of a corner in violation of ordinance was negligence.

Department 1.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by Edward Molitor against the Blackwell Motor Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Robertson, Miller & Robertson, of Spokane, for appellant.

McCarthy & Edge, of Spokane, for respondents.

TOLMAN, J. This action was brought to recover for personal injuries sustained by the appellant, plaintiff below, in a collision between a bicycle ridden by him and an automobile belonging to the defendant, who is respondent here. The case was tried to a jury, which rendered a verdict for the defendant, and this appeal is from a judgment thereon.

The errors assigned and relied upon, are: (1) Denial of a motion for a new trial; and (2) the giving and refusing of instructions to the jury.

[1, 2] The motion for a new trial, among other grounds, is based upon newly discovered evidence, which is the only ground urged here, and supported by an affidavit, showing that such evidence relates solely to the question of whether or not the appellant had a headlight burning on his bicycle, such as was required by the ordinance of the city of Spokane, at the time of the accident. This question was made a direct issue by the pleadings and was one of the principal issues at the trial. Appellant testified that he had such a headlight, properly equipped and burning; his wife testified that the bicycle was so equipped, and that the light was burning when appellant left his home

on the bicycle a few minutes before the accident occurred; the bicycle dealer, from whom the bicycle had been purchased some two or three months before, testified that, when he sold it, it was fully equipped with a regulation bicycle headlight; and a witness who worked with appellant testified that on the night preceding the accident he had observed the headlight on the bicycle, and as a matter of curiosity had turned it on and off several times, and found it then to be in perfect order. Other witnesses on both sides saw no light on the bicycle, and there was testimony on the part of the defense that an examination immediately after the accident showed no batteries or wires attached to the bicycle, or about the place where the accident occurred. The affidavits in support of the motion for a new trial show that one Eder, who was well acquainted with appellant, met him just before the time of, and but a few blocks distant from, the place of the accident, and then observed that the headlight on his bicycle was burning; that he knew of the accident the next morning after it occurred, but did not disclose to appellant his knowledge regarding the headlight, until after the trial below.

It has been repeatedly and consistently held in this state that it is not error to refuse to grant a new trial when the newly discovered evidence is merely cumulative and corroborative, and that the granting of a new trial upon the ground of newly discovered evidence, whether cumulative or not, is, from its nature, peculiarly within the discretion of the trial court, and the exercise of that discretion will not be disturbed, except in cases of manifest abuse. *Roe v. Snyder*, 100 Wash. 311, 170 Pac. 1027; *Deitchler v. Ball*, 99 Wash. 483, 170 Pac. 123; *Ronald v. Pacific Traction Co.*, 65 Wash. 430, 118 Pac. 311. We are satisfied that there was no abuse of discretion here, and therefore cannot interfere.

[3] Appellant complains of the refusal of an instruction to the effect that, if the driver of the automobile violated the city ordinance in making the turn from one street into the other, at the point where the accident occurred, such violation of the ordinance was the proximate cause of the injury, notwithstanding there was no headlight burning on the bicycle at the time. The court did instruct to the effect that, if respondent's driver cut the corner in violation of the ordinance, he was guilty of negligence, and that it was for the jury to determine whether such negligence was the proximate cause of the injury. This was as far as the court could go without invading the province of the jury, and to have instructed as requested would have been to withdraw from the jury the right to find that the failure to carry a light on the bi-

cycle, if there was such, was the proximate cause of the accident. This applies, also, to several other assignments of error, made for the purpose of raising the same question. We have examined the instructions given and refused, and are satisfied that appellant's requested instructions, so far as proper, were in substance given by the court. Finding no error, the judgment is affirmed.

HOLCOMB, C. J., and BRIDGES, MOUNT, and FULLERTON, JJ., concur.

(112 Wash. 240)

**FISHER v. SCHWABACHER HARDWARE CO. et al.** (No. 15768.)

(Supreme Court of Washington. Aug. 18, 1920.)

**Subrogation**  $\Leftarrow$  27.—**Creditor held bound by subrogation agreement with estate of guarantor, notwithstanding prior conflicting agreement with another guarantor.**

Where a corporation's accounts were guaranteed for one year by two officers and for the next year by one officer, the other having died, and thereafter the creditor received payment from the estate of the deceased guarantor for the amount of the guaranty, less the dividends from the corporation's trustee in bankruptcy, and agreed that the estate should be subrogated to his rights against the other guarantor, the creditor is bound by that agreement in proceedings against the property of the other guarantor, and cannot rely upon an agreement with that guarantor to apply the bankruptcy dividends to the account for the second year, guaranteed by him alone.

**Department 2.**

**Appeal from Superior Court, King County;** Calvin S. Hall, Judge.

Action by W. H. Fisher against the Schwabacher Hardware Company and another. Judgment for the plaintiff, and the named defendant appeals. Affirmed.

See, also, 186 Pac. 649.

Trefethen & Findley, of Seattle, for appellant.

Wright Kelleher, Allen & Hilen, of Seattle, for respondent.

**TOLMAN, J.** For several years prior to 1914, the Seldovia Salmon Company had been operating a canning plant in Alaska, and selling its product in the city of Seattle. Though a corporation, its affairs were carried on like a partnership, by Julius Redelsheimer and Benjamin Moyses, each owning an equal number of shares of its capital stock, and they two owning all of its stock except two shares held by a third person merely to qualify him to act as trustee of the corporation.

The Schwabacher Hardware Company, appellant here, had been extending large credits to the salmon company on open and run-

(191 P.)

ning account, and in 1914 Redelsheimer and Moyses, each gave a separate and personal guaranty of such open account in the sum of \$5,000. Redelsheimer died soon after the close of the 1914 fish packing season, and the salmon company was managed and operated by Moyses during the season of 1915, he then giving an additional personal guaranty covering the 1915 account of the Schwabacher Hardware Company, in which guaranty the estate of Julius Redelsheimer did not join. In the fall of 1915 the Schwabacher Hardware Company began an action against the Seldovia Salmon Company, the estate of Julius Redelsheimer, deceased, and Benjamin Moyses, to collect the 1914 account guaranteed by the two officers of the salmon company, which resulted in a judgment entered December 2, 1915, against the salmon company, Moyses, and the estate of Julius Redelsheimer, in the principal sum of \$5,000, but for some reason which does not clearly appear the judgment was made to draw interest for a greater length of time as against the salmon company and Moyses, so that the Redelsheimer estate was, in fact, liable on that judgment for about \$250 less than was the salmon company and Moyses.

Thereafter, on December 15, 1915, the salmon company was adjudged a bankrupt, and the Schwabacher Hardware Company presented and proved two claims against the bankrupt estate, one on the judgment for \$5,647.50, and a further claim for \$4,428.34, representing the 1915 book account, which had been guaranteed by Moyses, and not by Redelsheimer or his estate. Thereafter there were two dividends declared, and paid, in the bankruptcy proceedings, aggregating a little more than 26 per cent. of the face of the claims, as filed and allowed. By an agreement between Moyses and the Schwabacher Hardware Company the latter applied the whole of these dividends upon both claims, when received, toward the payment of the 1915 account, and no part of either dividend was credited upon the judgment against the Redelsheimer estate. It appears also that at the time Moyses agreed that the dividends upon both claims in bankruptcy should be so applied, there was also an understanding between himself and the hardware company that Moyses should turn over to the hardware company certain stock of the Columbia Salmon Company, a corporation, as part payment, and that thereafter the hardware company, so far as Moyses was concerned, would look to certain real estate belonging to Moyses, upon which this and other judgments against him were liens, for the satisfaction of the balance of its claim represented by the judgment.

Later the hardware company began proceedings in the matter of the estate of Julius Redelsheimer, looking to the removal of the executrix on the ground that she was not

adequately performing her duties, and by stipulation and a decree thereafter entered by the court thereon, the claim against the Redelsheimer estate was settled by the payment by the executrix to the hardware company of the sum of \$4,199.17, that being the amount due on the judgment against the Redelsheimer estate after crediting the dividends declared upon the judgment claim in the bankruptcy proceedings, and in and by the stipulation and the decree it was provided, in effect, that to the extent of the payment so made, the Redelsheimer estate should be subrogated pro rata to any and all liens and rights existing in favor of the hardware company against the estate and property of any other judgment debtor in said judgment, and particularly Benjamin Moyses, then deceased, and his estate.

Benjamin Moyses having died, it was found advisable that the lands theretofore belonging to him, upon which the judgment was a lien, should be exchanged for other lands, and it was agreed that the title to the lands thus acquired should be taken in the name of the Seattle Trust Company, as trustee, to sell and dispose of the proceeds according to the priority of the several judgment liens against the Moyses lands so exchanged.

Respondent, Fisher, having succeeded to the interest of the Redelsheimer estate, brought this action against the trust company, the hardware company, and the executors, and all those beneficially interested in the Moyses estate, to establish the right of the trust company to sell such real estate, require it to do so, determine the amount due the hardware company on its judgment against Moyses, and to direct the proper disbursement of the funds to be realized from such sale. The trial court made an interlocutory decree, directing the sale of the lands, and, that being done, supplemental issues were framed in which respondent claimed all of the fund realized by the trustee from the sale of the land, except a very small amount which it was conceded should be paid to the hardware company.

The trial court found that, under the stipulation and decree entered in the proceedings instituted by the hardware company in the probate of the Redelsheimer estate, the Redelsheimer estate had paid to the hardware company \$4,199.17, in full of the judgment against it, and in consideration of such payment the hardware company had assigned to the Redelsheimer estate a proportionate interest in the judgment against Moyses, this finding following the provisions of the stipulation and decree in the probate proceedings hereinbefore referred to, and the court further found that the respondent, as successor in interest of the Redelsheimer estate, was the owner of a pro rata interest in the judgment of 4199.17/4555.77 thereof, and

that the hardware company was the owner of the remaining \$56.60/\$55.77 of the judgment, and directed that the portion of the funds applicable to the payment of this judgment should be distributed, \$1,856.09 to respondent, and \$157.62 to the hardware company. From a decree based on that finding, this appeal is taken.

It seems to be appellant's contention that, notwithstanding the stipulation and decree in the probate proceedings, it may now enforce the oral agreement between itself and Moyses, and credit all of the dividends, paid through the bankruptcy court on the claim represented by the judgment, on the 1915 account, upon which the Redelsheimer estate was not liable, leaving the original judgment unaffected thereby. We think this contention untenable, because, while the original debt was that of the salmon company, both Redelsheimer and Moyses were guarantors thereof, and as between themselves either one, paying the whole debt, or any proportion thereof greater than one-half, might enforce contribution from the other; consequently any agreement, applying the dividends on the claim represented by the judgment to the payment of the open account, would be effective only as against the parties to such agreement. The Redelsheimer estate, not being a party thereto, was not bound thereby, and, although by the judgment made liable for the debt, it might, if called upon to pay such judgment in whole or in part, look to the salmon company, so far as it had assets, to be made whole, and after such assets had been exhausted it might claim contribution from Moyses, its coguarantor, to an extent which would equalize the liability between them. This situation was recognized by the decree in the probate proceedings; and, no appeal having been taken from that decree, it became final and binding upon the parties thereto, both the hardware company and the Redelsheimer estate, and respondent, as the successor in interest on the Redelsheimer estate, may claim the benefit thereof.

The judgment of the trial court is affirmed.

HOLCOMB, C. J., and BRIDGES, FULLERTON, and MAIN, JJ., concur.

(183 Cal. 586)

HARDIMAN et al. v. CHURCH, Judge.  
(S. F. 9394.)

(Supreme Court of California. Aug. 20, 1920.)

1. Wills § 225, 249—Objection to jurisdiction not ground for contest, but for opposition to probate.

Want of jurisdiction in the superior court because deceased was not a resident of the

county is not a proper ground for contesting the will (Code Civ. Proc. § 1312), but contestants may object to the court's jurisdiction to entertain the application for probate on that ground.

2. Wills § 384—Review of conclusions on jurisdictional question of residence allowable.

On appeal from a judgment or order admitting a will to probate, contestants are entitled to have reviewed the conclusions of the court on the residence of deceased, which is essential to jurisdiction, and such rulings receiving or excluding evidence on that issue as may be complained of.

3. Exceptions, bill of § 36(3)—Wills § 364—Attempted appeal in will contest and service of bill of exceptions held made within time.

In a will contest neither the objection that the attempted appeal was not taken within the time allowed, or that the proposed bill was not served in time, was well grounded, where there was a proceeding on motion for new trial allowed by Code Civ. Proc. § 1714, and decision thereon and bill and appeal were served and taken, respectively, within proper time thereafter, under sections 630, 939, regardless of the merits of the motion.

4. Exceptions, bills of § 55(4)—Mandate to compel settlement not to be taken as intimating Supreme Court's view on merits.

A decision, granting a peremptory writ of mandate to compel settlement of bill of exceptions, is not to be taken as intimating any view as to the merits of the appeal in the light afforded by the proposed bill.

In Bank.

Application by Mary Hardiman and others for writ of mandate, directed to the Superior Court of Alameda County, and Hon. Lincoln S. Church, judge thereof, to compel a settlement of a bill of exceptions for appeal from a judgment admitting to probate the will of Jane O'Neill. Writ granted.

W. F. Stafford and Wm. M. Stafford, both of San Francisco, for petitioners.

Dixon L. Phillips, of Oakland, for respondent.

ANGELLOTTI, C. J. This is a proceeding in mandate to compel the settlement of a bill of exceptions for use on an appeal from a judgment or order of the superior court of Alameda county, admitting to probate the will of one Jane O'Neill. The will was contested, petitioners here, who were heirs of deceased, being the contestants, the grounds of contest stated in the written opposition to probate filed being: First, want of jurisdiction of the superior court of Alameda county, for the reason that deceased was not a resident of that county at the time of her death; second, incompetency of deceased to make a will; third, want of proper execution, and, fourth, undue influence.

[1] The first ground stated was not a

proper ground of contest of the will (section 1312, Code Civ. Proc.), but the contestants did have the right to object to the jurisdiction of the court to entertain the application for probate on that ground, and the statement in the opposition to probate filed of the alleged facts in this regard constituted such an objection. Answer to the opposition was filed by the proponent of the will, and, a trial having been had, judgment was given, admitting the will to probate. Within the time prescribed by law therefor the contestants duly initiated a proceeding on motion for a new trial of the contest, the grounds therefor specified therein being limited, however, to the issue of the residence of the deceased at the time of her death, and the matter of the jurisdiction of the superior court of Alameda county, dependent on the residence of deceased in said county at such time, to admit said will to probate, or to hear said contest. The motion for a new trial was denied on November 15, 1919, the order of denial being entered that day, and the appeal of contestants from the judgment was taken within 30 days thereafter, viz. on November 24, 1919, but not within 60 days after the entry of the judgment or order admitting the will to probate. Within the time allowed by law, assuming the time commenced to run upon notice of the order denying a new trial, and the further time granted by the court, contestants served their proposed bill of exceptions, this proposed bill containing only matters relative to the residence of deceased at the time of her death, including the rulings of the trial court in regard to evidence offered on this question and its determination on the evidence that the deceased was a resident of Alameda county.

[2] It cannot be disputed that upon an appeal from the judgment or order admitting the will to probate the contestants are entitled to have reviewed the conclusion of the trial court on the question of the residence of the deceased, a matter essential to the jurisdiction of the court to try the contest, and such rulings in the matter of receiving or excluding evidence on that issue as may be complained of. See *Estate of Latour*, 140 Cal. 414, 425, 73 Pac. 1070, 74 Pac. 441.

[3] The learned judge of the trial court refused to settle the bill solely on the ground that the attempted appeal was not taken within the time allowed by law, and the further ground that the proposed bill was not served in time. Neither of these objections

was well grounded if there was a proceeding on motion for a new trial, for the appeal, while taken more than 60 days after the entry of judgment, was taken within 30 days after the order denying a new trial was entered (section 939, Code Civ. Proc.), and the proposed bill of exceptions was served within the time allowed by law as extended by the court after the entry of such order. Section 650, Code Civ. Proc. We have seen that a proceeding for a new trial was duly instituted, and terminated by an order denying the motion. The law allows such a proceeding in the case of "contests of will." Section 1714, Code Civ. Proc.

The claim in this connection is, in the last analysis, that in view of the fact that no ground upon which a new trial of the contest could properly be granted was stated in the notice of intention to move for a new trial, there was in fact no proceeding on motion for a new trial within the meaning of our statutory provisions relative to the time of taking appeals, with the result that the appeal should have been taken within 60 days after the entry of the judgment or order. We are satisfied that it cannot fairly be so held. There was in fact a proceeding on motion for a new trial in a case where the statute expressly allows such a proceeding. The motion was more obviously devoid of merit perhaps than such motions usually are, but the objection was one going to the merits of the motion and not to the jurisdiction of the court to entertain it. See in this connection *Estate of Nutt*, 57 Cal. Dec. 512, and cases there cited. As a matter of right the petitioners were entitled to have the bill of exceptions settled for use on their appeal from the judgment or order.

[4] We see no ground upon which it may fairly be held that petitioners are not entitled to a writ of mandate as prayed. Of course, our decision is not to be taken as intimating any view as to the merits of the appeal in the light afforded by the proposed bill. So far as this application for mandate is concerned, that is a matter that may properly be decided only upon the hearing of the appeal, or upon a motion to affirm for obvious want of merit in the appeal.

Let a peremptory writ of mandamus issue in accord with the prayer of the petition.

We concur: SHAW, J.; LAWLOR, J.; LENNON, J.; WILBUR, J.; OLNEY, J.

(183 Cal. 537)

**McNUTT v. HANNON. (L. A. 5337.)**

(Supreme Court of California. Aug. 12, 1920,  
as Modified by Order of Sept. 10,  
1920, Denying Hearing.)

1. Partnership  $\Leftrightarrow$  258(8)—Evidence held to show that fees and services by a surviving law partner were firm assets.

In an action for an accounting against the surviving partner of a law firm, evidence held to sustain finding that the fees for which an accounting was asked for the foreclosure of mortgages due an estate for which the partners were attorneys and for final settlement of the estate, were firm assets, though the services were rendered by the surviving partner after the death of the other.

2. Partnership  $\Leftrightarrow$  255(4)—Final settlement is included in employment as attorneys for administrator.

An employment of a firm of lawyers for the administrator of an estate includes their employment to procure the final settlement of the estate, so that the fees for such settlement are firm assets, though one of the partners died before the services were rendered.

3. Partnership  $\Leftrightarrow$  255(4)—Surviving partner bound to apply part payment of fee to partnership claim.

Where a firm of lawyers was employed in a case at an agreed fee, and after death of a member the survivor prosecuted an appeal, and received less than the agreed fee for all services, he was bound to apply the entire amount received to the payment of the agreed fee due the partnership, though the appeal was not included in the employment of the firm, so that the fee therefor would not be firm assets.

Department 2.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Finlay A. McNutt, executor of the last will and testament of Cyrus F. McNutt, deceased, against Joseph E. Hannon. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Vincent Hannon, of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for respondent.

WILBUR, J. Cyrus F. McNutt and J. E. Hannon, the defendant, were law partners from 1897 until the death of the former, May 31, 1912. The plaintiff, as executor of the will of the deceased partner, brought this action against the surviving partner for an accounting and recovered judgment for \$9,292.70, being one-third of the fees that the trial court found resulted from the partnership. Defendant appeals from the judgment on a bill of exceptions, and the plaintiff, while

claiming that there should have been an equal division of the \$27,878.10 fees received by the surviving partner, does not appeal. The court found that the plaintiff is "equitably entitled to receive one-third" thereof.

[1] The defendant claims that the evidence is insufficient to sustain the finding that the partnership existed at the time of the death of plaintiff's testator and the finding that the fees defendant was required to account for were received for the partnership, and, even if they were for partnership business, that the decision of the trial court was inequitable, inasmuch as most of the work for which the fees were paid was done by defendant after the death of his partner. The first claim of the defendant is that the partnership was dissolved about 30 days before the death of McNutt. It is sufficient upon this point to say that the evidence abundantly supports the conclusion of the trial court that the partnership continued until his death. The partners continued to occupy the partnership office and transact partnership business until McNutt became too ill to continue in an important trial then in progress. The fees divided by the decree were largely for services rendered in the estate of Andrew Glassell, which had been in probate from 1901 until finally distributed after the death of plaintiff's testator. The estate was appraised at about \$1,000,000. The fees were partly from mortgage foreclosures begun for the administration of said estate after the death of McNutt. One foreclosure proceeding, No. 94486, in the superior court, was begun September 18, 1912; and the attorney fee collected therein was \$8,000. In another, No. 94487, begun the same day, the fee received was \$4,833, and in action No. 97715, begun January 11, 1913, the fee was \$4,000, and in action No. B6406, begun November, 1913, the fee allowed was \$500. The defendant claims that each foreclosure resulted from a separate and distinct employment after the death of his partner.

We will only state the evidence that tends to support the findings. The partnership represented Hugh Glassell and Andrew Glassell, executors of the last will and testament of Andrew Glassell, deceased, from February 16, 1901, to January 10, 1912, when, upon their resignation, the Southern Trust Company was appointed as their successor at the instance of the partnership acting for the heirs, and thereafter the partnership continued to act for the successor in all matters pertaining to the estate, but without any express contract so to do. The foreclosure of the above-mentioned mortgages, as well as other work for which fees were claimed by the defendant, was an essential part of the work of preparing the estate of Andrew Glassell for distribution, and the fees therefor were properly allowable to the adminis-



trator in its account as such, and not otherwise. There is other evidence supporting the conclusion that the foreclosures were partnership business. On January 20, 1912, the defendant wrote to the newly appointed administrator as follows:

"Replying to yours of January 18, in re mortgages of Lawrence, Hamilton, Cary, Pixley, Rankin, and Brown. \* \* \* We may also observe in this connection that, before the resignation of Hugh and Andrew Glassell as executors, the other heirs of the estate insisted most strenuously that the mortgages should be foreclosed for the failure of the mortgagees to make the payments as they became due. We have not been advised of any change of attitude of the heirs, and understand that they still insist on that course being pursued. Referring to your request for the address of the parties whose notes you hold, we have some of them and are endeavoring to obtain the others, and will send them as soon as possible."

On February 2, 1912, an order of the superior court was made on the application of the administrator, presented by the partnership, permitting the administrator to obtain a correct certificate from the Title Insurance & Trust Company showing a correct description of the real property belonging to the estate of decedent, with plats, etc. On February 5, 1912, the defendant, by written order, instructed the Title Insurance & Trust Company to make "foreclosure search for mortgages as below, in your usual form to property in Los Angeles county, Cal." Then follows book and page of records of 12 mortgages, including all those for which foreclosure fees are claimed by the plaintiff. The certificates of each mortgage search were separate, and shortly after each was delivered a foreclosure was begun to foreclose the mortgage covered by the certificate, and the cost of the certificate was claimed and recovered with interest in the foreclosure.

As the fees allowed in the foreclosure cases were found by the trial court to belong to the partnership, we may note at this point that defendant claims that the fees in three of these cases were made unusually large by stipulation to cover work done for the defendants therein, and for a corporation organized by the heirs to purchase the property at foreclosure sale and that the proportion thereof resulting from such other work does not belong to the partnership, even if the foreclosure fee was a partnership asset. It is sufficient in that regard to say that the fact that such fees were allowed to and paid by the administrator as a fee for such foreclosure is sufficient to sustain the finding of the trial court, if it did not compel its conclusion. It will be necessary to more fully state the additional evidence concerning the foreclosure cases, as the facts vary somewhat in each case.

On May 28, 1912, the administrator mailed

the defendant the notes and mortgage of D. W. Lawrence, with interest computed to May 28, 1912, amounting to \$148,406.27, in accordance with its practice when foreclosures were contemplated. The search of the records was completed April 30, 1912, and the expense thereof was claimed and recovered in the foreclosure. The complaint was filed September 18, 1912, and numbered 94486. The fee allowed, \$8,000. In case No. 94487, filed the same day, the mortgage of Lawrence was delivered to the defendant May 18, 1912. Interest was figured to that date. Total amount of principal and interest was \$124,712.84. Certificate of search was completed April 25, 1912. Attorney fee recovered, \$4,833. In the foreclosure against Carey the fee recovered was \$500. Suit was filed November 16, 1913. The certificate of search for which the cost was recovered was one covered by the general order of February 5, 1912. In the suit against Rankin (foreclosure No. 97715) the complaint was filed January 11, 1913. The original order of search included this mortgage, but the certificate upon which the foreclosure was based was covered by a subsequent order.

While these complaints were all filed along after the death of McNutt, the relationship of the parties, the delivery of the mortgages, the computation of interest, and the order of a foreclosure search as early as February, 1912, all point to the conclusion adopted by the trial court and sufficiently sustain its finding that such business was partnership business, as was the three foreclosures begun before his death, all indicating the general plan of closing up the business of the estate by such foreclosures. There are other facts and circumstances which tend to support the conclusion of the trial court, but in view of our conclusion it is unnecessary to set them forth.

The appellant attacks a finding that a fee of \$1,750, allowed in the settlement of the final account of the administrator for the settlement of the executors' final accounts, was a partnership asset. The statement of the defendant, on which the fees were paid, that this work "extended over practically the whole time, from the resignation of the former executors until the settlement of their accounts, and took most of my time," is alone sufficient to sustain the finding that it was partnership business.

[2] The partnership also acted as attorneys for the estate of Phillip Glassell, one of the heirs of Andrew Glassell. The defendant claims that there is no evidence of any employment to complete the administration, and therefore that the fee for such work does not belong to the partnership. This estate had been in probate from April 22, 1907. The partnership had acted as attorneys for the executors, and after the substitution of the

Southern Trust Company in both estates acted for such administrator. After the death of McNutt a decree of partial distribution was procured, the final account was settled, and final distribution had. These proceedings were necessarily contemplated at the time of the employment of the partnership, and the relationship of the parties was such as to justify the conclusion of the trial court that this was partnership business. To uphold the contention of the defendant would be to override the almost universal custom relating to such employment, a custom by which probate courts have for years fixed the fees of the attorneys for executors, and which is now recognized by the statute, which fixes the attorney fees to be allowed to executors and administrators.

[3] The appellant claims that the finding in favor of the plaintiff that a \$600 fee received in the case of Provident Gold Mining Co. v. Haines was partnership property is not supported by the evidence. The partnership was employed at an agreed fee of \$1,000. Appellant conducted an appeal after the death of his partner, and, having collected \$600, claims the right to apply \$400 only to the partnership fee, and the balance to his service on appeal. Waiving the question as to whether such appeal was partnership business, the defendant was bound to apply the payment of \$600, made without designation, to the partnership fee then due and owing. Appellant claims that the trial court made no finding with reference to a claim that the decedent had received medical services valued at \$572 from a client, who owed the partnership a fee exceeding that amount, and had thus, in effect, collected that part of the fee. The client filed a claim against the estate of the decedent, which had not been disposed of. The client could not properly set off this individual debt against the partnership claim, and if there was any error it was in a failure in the accounting to dispose of the fee due the partnership, but this is not assigned by appellant as an error.

Appellant complains that the court only allowed him two-thirds of the fees earned by the partnership and by him in his capacity as surviving partner. Assuming, for the purposes of the decision, that he was entitled to more than one-half of such fees (see *Little v. Caldwell*, 101 Cal. 553, 36 Pac. 107, 40 Am. St. Rep. 89), we think the record is such that the conclusion of the trial court in the matter of apportionment of fees is sufficiently supported by evidence.

As to the points made concerning the admissibility of evidence, the foregoing sufficiently shows its pertinence.

Judgment affirmed.

We concur: LENNON, J.; SLOANE, J.

(183 Cal. 519)

**COHEN et al. v. CITY OF ALAMEDA et al.**  
(S. F. 8340.)

(Supreme Court of California. Aug. 12, 1920,  
Rehearing Denied Sept. 10, 1920.)

1. Municipal corporations  $\S$  453(2)—Appointing city officers to assess benefits for opening street held not to invalidate assessments.

The appointment of three city officers as commissioners to assess damages and benefits for a street opening, who were to be paid, under St. 1889, pp. 71, 72, §§ 6, 8, from the assessments levied by them, does not invalidate the assessments.

2. Municipal corporations  $\S$  474—Failure to assess lot within district does not make assessment void.

In the assessment of benefits and damages for the opening of a street, the mere failure to assess a lot of land within the assessment district does not make the assessment void; the remedy being by appeal to the city council, under St. 1889, p. 73, § 14.

3. Municipal corporations  $\S$  474—Exclusion from improvement district of public property does not invalidate assessment.

Under St. 1889, p. 72, § 9, as amended by St. 1909, p. 1034, § 1, which authorized the commissioners to assess benefits for public improvements against public lands the exclusion by the city council from an improvement district for the opening of streets of all public lands within the exterior boundaries of the district was a mere exercise of their power to determine the extent of the district and the liability of public property to assessment, and did not invalidate the assessment.

4. Municipal corporations  $\S$  484(2)—Decision of council as to extent of assessment district conclusive except on appeal.

The decision of the city council, determining the extent of the district benefited by an improvement, is conclusive except on appeal to that body; the commission having no power to assess benefits on public lands excluded by the council from the district.

5. Eminent domain  $\S$  169—General exception of public ways from land to be taken does not invalidate description in resolution and notice.

The resolution and notice for a public work sufficiently described the property to be taken where, after describing in detail the strip of land which was to constitute the street, it excepted therefrom all lands held by the city or the people as open ways.

In Bank.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Emilie G. Cohen and others against the City of Alameda and another, to enjoin the sale of real property for assessments for street work. Judgment for defendants, and plaintiffs appeal. Affirmed.

R. M. F. Soto, of San Francisco, for appellants.

Wm. J. Locke, of San Francisco, for respondents.

**WILBUR, J.** This action was brought to enjoin the sale of the plaintiffs' respective pieces of property for the nonpayment of assessments for the widening and extension of Encinal avenue in Alameda. The application for an injunction pendente lite having been denied, the plaintiffs paid the assessments under protest, and thereupon filed a supplemental complaint for the recovery of the amounts paid. Judgment was rendered for the defendants on demurrer, and plaintiffs appeal. The assessments were made by authority of the street opening act of March 6, 1889, as amended in 1909 and 1913. St. 1889, p. 70; St. 1909, p. 1034; St. 1913, p. 376.

[1] Appellants claim that the proceedings are void for the reason that three city officers appointed by the city council as commissioners for the assessment of the damages and benefits, to wit, the city clerk, the city auditor, and the city attorney, were disqualified because they were to be paid, as provided by the statute (St. 1889, pp. 71, 72, §§ 6, 8), from the assessments levied by them. There is no merit in this contention. If appellants' position is sound it would invalidate every assessment for the purpose of state and county taxes, and render impossible the performance of such services except by volunteer officers. It is contended that this disqualification also results from the vesting in these commissioners of an uncontrolled discretion, if the law be so construed, to exclude or include public property in the assessment of benefits. But there was no public land within the assessment district, as will be shown in the discussion of the next point.

[2.] Appellants claim that the assessment is void for the reason that 14 pieces of property, belonging to the city of Alameda, within the exterior boundaries of the assessment district, were not assessed for benefits. There are two answers to this proposition: First. In a district assessment the mere failure to assess a lot of land within the assessment district does not make the assessment void. The remedy for such an erroneous assessment is by objection to the city council. St. 1889, p. 73, § 14; *Larsen v. City and County of San Francisco*, 186 Pac. 757. Second. The city council expressly excluded such lands from the district to be assessed by the following proviso in said description:

"Saving, excepting and excluding from said district all public streets, avenues, roads, places and parks, and any and all public property within the exterior boundaries of said district of lands hereinbefore specified and described."

Previous to the enactment of section 9 of the statute, which authorized the commissioners to assess benefits against public lands, the liability of such lands for assessments for benefits accruing thereto by reason of local improvements depended upon the nature and character of the public ownership and the use to which it was applied. *Witter v. Mission School District*, 121 Cal. 350, 53 Pac. 905, 68 Am. St. Rep. 83; *City Street Imp. Co. v. Regents of the University of Cal.*, 153 Cal. 776, 96 Pac. 801, 18 L. R. A. (N. S.) 451; *Tularé Irrigation Dist. v. Collins*, 154 Cal. 440, 443, 97 Pac. 1124; 28 Cyc. 1117, 1118. The effect of the statute was to authorize the local authorities to assess public property where, in their judgment, such property would be benefited by the improvement. If, however, in the judgment of the city authorities such property was not benefited, they might so determine and thus exclude such property from assessment. This, is, in effect, what was done by the city council.

The statute provides that before ordering the opening or extension of any street the city council shall pass a resolution of intention to do so describing the opening or extension to be made and the land to be taken, "and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, cost, and expenses thereof." Stats. 1889, p. 70, § 2. It also provides for notice and a hearing at which any person interested may object to the extent of "the district of lands to be affected or benefited." Sections 3, 4, and 5. If the objections are sustained, the proceeding terminates. If they are overruled, it goes forward. While the statute requires only the "exterior boundaries" of the district to be specified, it is reasonable to hold that if the council finds that any convenient delimitation of such boundaries would include parcels of land that in its opinion would not be benefited or affected by the proposed opening or extension, it could properly qualify the description by excepting such parcels, so that they would not form a part of the district. The council is empowered to determine the extent of the district benefited. It should be permitted to describe it accurately by making a proper exception of the land that may be within the fixed outer boundaries, but which are not benefited, in order that the resolution may not be inaccurate or misleading. Such a description would not make the proceeding void. The exception herein shown is obviously nothing more than a part of the description of the district, and if the council was of the opinion above referred to, the exception was necessary to make the description accurate. It must be presumed that it so decided and framed the description accordingly.

[4] The decision of the city council, determining the extent of the district benefited by the improvement, is conclusive except on appeal to that body. *United Real Estate & Trust Co. v. Barnes*, 159 Cal. 242, 113 Pac. 187. The commission had no power to assess any portion of the benefits upon the public lands thus included within the assessment district.

[5] It is contended that the city council never acquired jurisdiction because of the insufficient description in the resolution and notice of public work of the land to be taken. This contention is based upon the fact that after describing in great detail a strip of land 80 feet wide which was to constitute the street as widened and opened, the following exception is stated in the resolution and notice:

"Excepting therefrom all lands now held by said city or the people of said state as open ways."

Proceedings instituted under the same statute here involved were under consideration in *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377. The description of the land taken in that case was modified by the following words:

"Excepting therefrom all land now held by said city or the people of said state as open ways."

It was held that the sufficiency of the description was not impaired by the exception. It was there said:

"If, as a matter of fact, a portion of the land within these boundaries has already been appropriated to public use, or is held by the city or state 'as open ways,' the land deemed necessary to be taken is sufficiently described by designating in the resolution the outer lines of the proposed improvement, without any mention of such open ways, or by excepting the same, without describing the exceptions. In either case the parties to be affected by the proposed improvement are fully notified of every fact necessary for the protection of their interests."

Although the language of the exception here involved is somewhat different, the principle is the same, and upon the authority of *Cohen v. City of Alameda*, supra, it must be held that the description of the land to be taken, contained in the resolution and notice, is sufficient. The same reasoning would apply with equal force to the sufficiency of the description of the district to be assessed, with its exceptions. These exceptions are equally definite.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; LENNON, J.

OLNEY, J. (concurring). I concur in the decision and in opinion of Justice WILBUR, except as to the conclusion that the public

lands within the exterior limits of the assessment district were not a part of the district. The assessment district was described by its exterior boundaries followed by an exception reading, "excluding \* \* \* any and all public property within the exterior boundaries of the district." It is plain that the fact that lands are public lands, a park for example, does not affect the matter of their being benefited by the contemplated improvement. The improvement may well benefit the land, although it is public. The statute requires that all lands which will be benefited shall be included within the district, and it necessarily follows, in my judgment, that the city council cannot exclude from the assessment district all lands of a certain character such as lands owned by the public, when such lands are within the exterior limits of the district benefited, and the character or attribute because of which they are attempted to be excluded is one which does not affect the matter of their being benefited or not.

It does not follow, however, that the attempt to exclude such lands from the assessment district invalidates the assessment. The plaintiff was in no wise prejudiced thereby. Under section 9 of the act, it was discretionary with the city council to assess, or not to assess, public lands within the district. The attempt of the city council to exclude the lands from the district is but an attempt to exercise this discretion at the wrong point in the proceedings. The result, however, is the same as if it had been exercised when it should have been, at the time of making the assessment.

(48 Cal. App. 254)

**VIGNAUT v. SUPERIOR COURT OF SACRAMENTO COUNTY et al. (Civ. 2204.)**

(District Court of Appeal, Third District, California. June 29, 1920.)

**Certiorari**  $\Rightarrow$  60—Where orders had been vacated, writ will be dismissed.

Where the certificate of the clerk of the inferior court showed that the orders sought to be reviewed had been vacated, and petitioner consented, the proceeding for writ of review will be dismissed.

Application by August Vignaut for writ of review to be directed to the Superior Court of Sacramento County and Charles O. Busick, Judge thereof, to review certain orders. Petition dismissed.

R. Platnauer, of Sacramento, for petitioner.  
H. N. Mitchell, of Sacramento, for respondents.

PREWETT, Presiding Judge pro tem. The petitioner applies for a writ of review to

review the action of above-named respondents in making certain orders in the civil action in said superior court pending wherein one Mary W. Vignaut is plaintiff and the petitioner herein is defendant.

It appears from the certificate of the clerk of said superior court on file herein that the orders complained of have been vacated, and, in consequence, the petitioner consents that this proceeding be dismissed.

The proceeding is accordingly dismissed.

We concur: HART, J.; BURNETT, J.

### PEOPLE v. MALONE. (Cr. 529.)

(District Court of Appeal, Third District, California. July 1, 1920.)

1. Criminal law  $\S$  1144(13)—In absence of evidence, appellate court must assume it supported verdict.

Where the appellate court is not furnished with a copy of the testimony on appeal from a conviction of robbery, it must assume that the evidence was sufficient to justify the verdict.

2. Criminal law  $\S$  916, 1144(18)—New trial not granted because substituted attorney not prepared, where no continuance asked; it being presumed defendant's rights were protected.

It was not error to deny a motion for a new trial, after conviction for robbery, on the ground that defendant's attorney was substituted for another, who was taken ill on the day of the trial, and was unprepared to conduct the defense, where no application was made for a continuance of the trial, and the record does not contain the proceedings, as it must be presumed defendant's rights were protected.

Appeal from Superior Court, Stanislaus County; J. O. Needham, Judge.

Sam Malone was convicted of robbery, and he appeals from the judgment of conviction and order denying motion for new trial. Affirmed.

T. M. Anaya, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was convicted of robbery in the superior court of the county of Stanislaus in having taken by means of force and violence from the person of one L. R. Williams certain personal property. The appeal is from the judgment and order denying defendant's motion for a new trial. The appeal has apparently been abandoned, as no appearance has been made for appellant in this court.

[1] We have not been furnished with a copy of the testimony in the case, and we must therefore assume that the evidence was

amply sufficient to justify the verdict. The clerk's transcript, which we have examined, discloses no error. The information is sufficient, the instructions were fair and fully covered the law of the case, and there is apparently no error in the ruling of the court in denying the motion for a new trial.

[2] That motion was based upon the fact that the attorney who was employed by the defendant was taken suddenly ill, and another attorney was substituted by the court on the day of the trial. The latter filed an affidavit on the motion for a new trial, in which he stated that he was unfamiliar with the facts in the case at the time he was appointed by the court, and was utterly unprepared to make a proper defense. It is sufficient to say, however, that no application was made for a continuance of the trial, and, in the absence of the record, we must assume that all of the rights of the defendant were safeguarded; that he was efficiently represented; that he had a fair and impartial trial; and that the verdict is just and legal. The judgment and order are affirmed.

### BRIDGFORD v. McADOO, Director General of Railroads. (Civ. 3281.)

(District Court of Appeal, First District, Division 2, California. June 24, 1920.)

1. Trusts  $\S$  104—Facts held to show an involuntary trustee.

One who had a contract with the United States assigned to plaintiff all checks that might be issued under the contract. Thereafter the Director General of Railroads, with notice of the assignment, issued a check to the contractor, and then received it back from him for application on some other claim. Held that, under Civ. Code,  $\S$  2223, the Director General was an involuntary trustee for plaintiff, irrespective of proof of the contractor's unwillingness to repay plaintiff the advances to secure which the assignment was made.

2. Assignments  $\S$  101—Director General of Railroads cannot satisfy prior claim for freight from proceeds of subsequent shipment assigned for advances.

One who had a contract with the United States assigned to plaintiff all checks that might be issued under the contract. Thereafter the Director General of Railroads, with notice of the assignment, issued a check to the contractor, and then received it back from him to satisfy a claim against the contractor for freight charges in connection with other matters. Held that the Director General could not so withhold the amount due from the assignee.

3. Costs  $\S$  260(6½)—Penalty for frivolous appeal not imposed against Director General of Railroads, who was not responsible therefor.

Though an appeal from a judgment against the Director General was palpably frivolous,

a penalty will not be imposed against him, where it was apparent he was not responsible for the delay.

Appeal from Superior Court, Alameda County; Stanley A. Smith, Judge.

Action by E. A. Bridgford against William G. McAdoo, Director General of Railroads. Judgment for plaintiff, and defendant appeals. Affirmed.

Stanley Moore, of San Francisco, for appellant.

E. A. Bridgford and Herrington & Clausen, all of San Francisco, for respondent.

NOURSE, J. Defendant, as Director General of Railroads, appeals from a judgment rendered against him and in favor of plaintiff for \$1,078.32, the proceeds of a check belonging to plaintiff and issued by the paymaster of the Quartermaster's Department of the War Department. The facts of the case found to be true by the trial court are: On September 18, 1917, one Lawrence entered into a contract with the United States, acting through its War Department, for the delivery of 2,500 cords of wood to the department at Camp Fremont, in San Mateo county. On January 16, 1918, Lawrence entered into a contract with respondent whereby respondent agreed to advance money to Lawrence from time to time to assist him in the performance of his contract with the government, and Lawrence assigned to respondent all moneys, vouchers, and checks issued under said contract, and authorized respondent to collect and receive the same. Subsequent to said assignment Lawrence delivered at Camp Fremont wood of the agreed price of more than \$2,200, and fully prepaid all freight thereon with moneys advanced to him by respondent for that purpose, and there is still due and owing to respondent from Lawrence on account of said advances a sum in excess of \$2,200. On the 2d day of August, 1918, an officer of the Northwestern Pacific Railroad Company (then operating under the appellant as Director General of Railroads), with full knowledge of respondent's right and claim to the money due under said contract, accompanied Lawrence to the office of the paymaster of the War Department, and, over the protests of respondent, aided Lawrence in procuring from the paymaster a check for \$1,078.32, a portion of the amount due under said contract, and at the same time received the check from Lawrence, which was then delivered to appellant, who ever since has retained the check or its proceeds in his said capacity as Director General of Railroads.

[1] The only point raised by appellant is that it does not appear but that Lawrence was at all times willing to repay respondent all the money advanced to him, and that it does not appear that respondent ever made

demand therefor upon Lawrence. Neither fact is essential to recovery in this action. The check and its proceeds were the property of respondent by reason of the assignment. The appellant and his agents, with full knowledge of the title and claim of respondent, having wrongfully secured the check, wrongfully detained possession thereof. The appellant thereby became an involuntary trustee under section 2223, Civil Code, which provides:

"One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

Respondent was entitled to recover his own property from the trustee who thus wrongfully held it for his benefit, irrespective of the willingness of Lawrence to recompense him for the loss, and without demand upon Lawrence for that purpose.

[2] It cannot be ascertained from the record what, if any, claim appellant had against Lawrence. None is set up in the pleadings, the answer consisting entirely of denials of the allegations of the complaint. From the briefs it would appear that the claim is for freight charges of some nature. But as the trial court found that all freight on wood delivered by Lawrence to Camp Fremont pursuant to the contract and subsequent to the assignment was fully paid by moneys advanced for that purpose by respondent, and that the same had not been repaid to respondent, it is apparent that if appellant had any claim against Lawrence for freight charges it must have accrued prior to the assignment. Such being the case, Lawrence could not satisfy this indebtedness out of moneys which he had previously assigned to respondent.

[3] Furthermore, the answer filed by defendant consists solely of denials of the allegations of the complaint, including a denial of the delivery of the check to appellant as above outlined, and a denial that the check or its proceeds were ever received by appellant or his officers or agents or retained by them. The evidence offered at the trial, including the admissions of an agent of appellant who was a witness in his behalf, amply supports the conclusion of the trial court that these allegations of the answer were not true. From the record it is apparent that the check and its proceeds are the property of respondent, and that appellant is wrongfully withholding the same without any claim or title.

The appeal from the judgment is frivolous, and was palpably taken either to delay or harass the respondent, but no penalty is imposed, because it is apparent that the appellant is not the party responsible for the delay.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

## PEOPLE v. PRINCE. (Cr. 514.)

(District Court of Appeal, Third District, California. July 13, 1920.)

**Criminal law** §1130(4)—Conviction affirmed, in absence of brief, no error appearing on face of record.

On appeal from conviction of receiving stolen goods and denial of new trial, defendant filing no brief and not being represented by counsel, record examined for error, none found, and consequent affirmance.

Appeal from Superior Court, Sacramento County; Malcolm O. Glenn, Judge.

Cuban Prince was convicted of receiving stolen goods, denied a new trial, and appeals. Affirmed.

Richard P. Talbot, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

**PER CURIAM.** The defendant was convicted by a jury in the superior court of the county of Sacramento under an information charging him with the crime of buying and receiving for his own gain certain stolen property, knowing the same to have been stolen. He appeals from the judgment of conviction and the order denying his motion for a new trial.

The appeal was placed on the calendar of the late (June, 1920) term of this court, and the attorney appearing of record for the defendant regularly and duly notified of the day on which the cause would be called for hearing and argument. No brief was filed in support of the appeal on behalf of the defendant within the time required by the rules of this court, or at all, and none has, since the cause was called for hearing, been filed herein. Nor was the defendant represented by counsel before this court when the case was called, and consequently no oral argument was presented in support of the appeal. There was therefore left to the Attorney General no other alternative but to submit the case upon the record, which, on the motion of that officer, was ordered done.

We have, nevertheless, examined the evidence and the rulings of the court upon objections made to certain questions put to certain witnesses, and, without entering into a detailed or even general statement of the facts, which, under the circumstances, is not required, or referring specifically to the exceptions to the rulings referred to, we state our conclusion to be that the verdict rests upon evidence sufficiently substantial to sustain it, and that none of the rulings upon the evidence to which objections were interposed by the accused is justly subject to the criti-

cism implied from the said objections. We have also carefully examined the court's charge to the jury, and so have been fully convinced that thus the court correctly enlightened the jury upon the principles and rules of law pertinent to the charge and the facts as developed by the evidence.

The judgment and the order are accordingly affirmed.

## PACIFIC FINANCE &amp; INVESTMENT CO. v. PIERCE et al. (Civ. 3429.)

(District Court of Appeal, First District, Division 1, California. July 21, 1920.)

**1. Sales** §477(6)—Acceptance of past-due installments not waiver of time as essence.

Where an agent of an automobile company sells under an installment contract a car owned by him to a purchaser, who in fact has purchased for another, whom he is merely financing, and the contract makes time of the essence, and expressly provides that acceptance by the owner of any payment after the same is due shall not constitute a waiver of such provision, the automobile company, which has taken over the contract from its agent by assignment, does not by accepting past-due installments, waive its right to retake the car upon further default.

**2. Sales** §481—Failure to find as to rights of third person held immaterial.

Where purchaser of automobile in fact purchased for a third person, whom he was merely financing, and default was made in the payment of installments, in claim and delivery by the purchaser against the former owner of the automobile, who had retaken it, it was not necessary to find the amount owing to the purchaser by the third person.

**3. Sales** §481—Failure to find as to rights under assignment held immaterial in claim and delivery.

Where an owner of an automobile sold it under an installment contract, and thereafter assigned the contract to a company, which after retaking the car on default of payments sold it to another, in an action of claim and delivery by the first purchaser against the assignee, it was not necessary to find as to the rights existing between such assignee and its later vendee.

**4. Sales** §481 — Evidence held to sustain finding that purchaser made agreement with third person without consent of seller's assignee.

A finding in such action that the ostensible purchaser and such third party entered into an agreement for the protection of the former, without the knowledge or consent of the seller's assignee, held supported by evidence.

**5. Sales** §481 — Award of interest during wrongful detention held erroneous.

In claim and delivery by purchaser for an automobile, it was error, in awarding the pos-

session of the car to defendant, to allow a certain sum as interest on the money invested in the automobile during the time plaintiff was wrongfully in possession thereof, where such award was not supported by allegations, finding, or conclusion of law.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Claim and delivery by the Pacific Finance & Investment Company, a corporation, against Harley Pierce and others. There was a judgment for defendants, confirming the right of possession in defendant Greer-Robbins Company, and plaintiff appeals. Modified and affirmed.

J. De La Motte, of San Diego, for appellant.

R. Lee Bagby, of San Diego, for respondent.

Albert J. Lee, of San Diego, for defendants.

WASTE, P. J. The plaintiff, claiming the right to do so, under the provisions of a contract of purchase and sale, took possession of a certain automobile, and brought this action against the defendants, seeking to be subrogated to the right of the defendant Pierce to perform a contract, entered into between the Greer-Robbins Company and Pierce, to purchase the car. Judgment was for the defendants, and confirmed the right of possession of the automobile to the Greer-Robbins Company. Plaintiff appealed.

The plaintiff is a corporation engaged in the business of financing contracts for automobiles and other commodities sold on the installment plan. The defendant Greer-Robbins Company, engaged in the business of selling automobiles, had sold the automobile in question to Frank H. Wells, one of its salesmen. Wells, as owner, then entered into a contract with the plaintiff, under the terms of which he sold the car to it upon the installment plan for the sum of \$1,100. As a matter of fact, the real purchaser from Wells was the defendant Harley Pierce, the plaintiff merely financing the purchase for him. Wells then assigned the contract to the defendant Greer-Robbins Company. Defendant Pierce, in order to secure the plaintiff, entered into a side agreement with it, in which he agreed to buy the automobile from it, on installments, and specified terms. Payments, as per the Wells contract not being made, the Greer-Robbins Company took forcible possession of the car, and declared the contract cancelled. Plaintiff thereupon offered to pay the amount past due on the contract and the entire balance due on the car. The Greer-Robbins Company refused the offer, and sold the car to the defendant National Motors Company, under an installment contract for the amount due it as assignee of the Wells contract. The plaintiff took the possession of the car from the National Motors Company. That concern had in the meantime

defaulted in its payments, and the Greer-Robbins Company had instituted an action to cancel all its rights under its contract.

The plaintiff in its amended complaint alleged the whole transaction to have been conceived and carried out for the purpose of cheating and defrauding it out of the money paid by it upon its contract with Wells, and other sums expended for the benefit of Pierce under its contract with him. It offered to pay into court the balance due the Greer-Robbins Company, and sought to be subrogated to the right of Pierce, and to be allowed to redeem and perform the contract for the purchase of the car. The trial court found there was no fraud in the premises. It confirmed in every particular the rights of the defendant Greer-Robbins Company in the transaction, and held that it was entitled to the possession of the automobile.

[1] Much of the appellant's argument upon this appeal is disposed of by the findings of the lower court. By its terms time is the essence of the Wells contract, and it is expressly covenanted that acceptance by the owner of any payment after the same is due shall not constitute a waiver of that provision. Pierce was in default, and plaintiff was in no better position than was Pierce when the Greer-Robbins Company took possession of the car and canceled the contract for its purchase. That company looked to plaintiff for the installments under the contract. The record indicates that it, in turn, relied upon Pierce, and he upon it. Plaintiff knew and warned Pierce of the danger he and it were in from "standing off" the payments, all, or the most of which, were made after they became due, and after notification and demand by the Greer-Robbins Company. By accepting the installments when they were past due that company did not, as contended for by the appellant, waive its right to retake the automobile upon further default. *Benedict v. Greer-Robbins Co.*, 26 Cal. App. 468, 470, 147 Pac. 486. The condition of the contract was the payment of the purchase price in installments at given times. The failure to make them entitled the vendor by the express terms of the agreement, at its option, without previous demand or notice, to retake possession of the car. *Hegler v. Eddy*, 53 Cal. 597, 598. The appellant and Pierce were one in the transaction, and the Greer-Robbins Company was not estopped to assert the contract against the claim and offer of appellant, no fraud or oppression being proved or found. *Van Allen v. Francis*, 123 Cal. 474, 481, 56 Pac. 339. The trial court correctly concluded and held that the acceptance of the payments after they became due did not constitute a waiver of the strict performance of the clause in the agreement making time of the essence of the contract and providing for retaking possession of the car on default in the payments. The cases relied upon by appellant to support its contention expressly lay down the rule that they



are not applicable when, as here, time is expressly made the essence of the contract. *Liver v. Mills*, 155 Cal. 459, 462, 101 Pac. 299, citing *Miller v. Steen*, 30 Cal. 407, 89 Am. Dec. 124.

[2, 3] The appellant contends that the court omitted to find on material issues. The side agreement entered into by the appellant and Pierce, for the purpose of protecting appellant in its advances for Pierce's benefit, was collateral to the transaction involved here, and immaterial to the real issues of the case. It was unnecessary for the lower court to find the amount, if any, owed to appellant by Pierce under its terms. It does appear from the findings, however, that but two payments were made by the appellant on the contract, and an additional amount of one hundred and sixty-three dollars for advances. Whatever may have been the amount due to Greer-Robbins Company from Pierce, or the National Motors Company, under the contract, was also immaterial. Appellant's contention that there is no finding upon the issue as to the forfeiture of its rights under the Wells contract is not supported by the record. The court expressly found that such a forfeiture was declared, and the finding is supported by the testimony and the written notice of cancellation, dated June 2, 1917. We are unable to see how the appellant is materially injured by the failure to expressly find that the contract between the Greer-Robbins Company and the National Motors Company was canceled or forfeited. The evidence is to the effect that the payments were not made under its provisions. No rights of the appellant rest upon the existence or nonexistence of that contract. It was in default under its own contract before that transaction arose. For the same reason it matters little to appellant who comprised the copartnership National Motors Company, although the finding that Fairbairn and Davis were the partners appears sufficiently supported by the evidence.

[4] The lower court found that after the contract between Wells and plaintiff was made, the plaintiff, without the consent, knowledge, or acquiescence of Greer-Robbins Company, entered into the side agreement with Pierce. While there is evidence tending to show that this finding does not entirely accord with the facts, it finds support in the testimony of the secretary of the Greer-Robbins Company to the effect that, while it was

well understood that the plaintiff was financing Pierce in the deal, the company had no knowledge of their real relations, or that there was any contract or agreement between them. Finding 6, relative to the transaction between the Greer-Robbins Company and the National Motors Company, and the interest of Pierce in that concern, after the rights of plaintiff in the Wells contract had been forfeited, finds ample support in all its essential details in testimony, the truth or falsity of which, and the weight to be given it, were matters for the determination of the trial court.

[5] When the appellant commenced this action it had the automobile in its possession. The respondent Greer-Robbins Company, by way of a cross-complaint, on the facts already stated, sought its return and at some stage of the proceedings got possession, which it had at the time of the trial. The finding of the court was that none of the other parties had any interest in the automobile, and that the Greer-Robbins Company was the rightful owner. In addition to awarding the possession of the car, the court included in the judgment "the sum of \$17.50 as interest upon the money invested in said automobile during the time plaintiff was wrongfully in possession thereof." Respondent did not suggest, or pray for, damages of that character. We are at a loss to appreciate upon what theory the item was included in the judgment. There is neither allegation, finding nor conclusion of law, to which it responds. We have been unable to bring the amount into agreement with any of the figures of the various contracts, or unpaid balances, entering into the transaction. The findings are not models of legal sufficiency, but on the whole record fairly support a proper judgment, except as just noted. The judgment should be affirmed, except as to the item of interest included therein.

The cause is remanded to the lower court, with instructions to modify the judgment by striking out therefrom "the sum of \$17.50 as interest upon the money invested in said automobile during the time plaintiff was wrongfully in possession thereof." When so modified, the judgment shall stand affirmed, the respondent to recover the costs of appeal.

We concur: RICHARDS, J.; WELCH, Judge pro tem.

## MEMORANDUM DECISIONS

**PEOPLE v. MOSLEY.** (Cr. 505.) (District Court of Appeal, Third District, California. July 1, 1920.) Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge. Frank Mosley was convicted of grand larceny, and he appeals. Affirmed. Wm. P. Toscano, of San Francisco, and Frank E. Murphy, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

**PER CURIAM.** Defendant was convicted in the superior court of the county of San Joaquin of the crime of grand larceny in having stolen two head of cattle, the property of one Chris Wencelburger. No appearance has been made for appellant in this court, and our attention has not been called to any reason why the judgment should be reversed. We have, however, examined the record, and find abundant evidence of the guilt of defendant, and are satisfied that no prejudicial error was committed, and that defendant had a fair and impartial trial. The judgment is therefore affirmed.

**JOYCE-PRUIT CO. v. GEORGE.** (No. 2371.) (Supreme Court of New Mexico. April 27, 1920.) Appeal from District Court, Roosevelt County; McClure, Judge. Proceeding between the Joyce-Pruit Company and Cleve George. Judgment for the latter, and the former appeals. Affirmed. G. L. Reese, of Portales, for appellant. T. E. Mears, of Portales, for appellee.

**RAYNOLDS, J.** This cause is identical with, and governed by, cause No. 2370, First National Bank of Elida, Appellee, v. Cleve George et al., Appellants, 189 Pac. 240, decided at this term of court. Therefore the judgment of the district court will be affirmed; and it is so ordered.

**PARKER, C. J., and ROBERTS, J., concur.**

**Ex parte COX.** (No. A-2860.) (Criminal Court of Appeals of Oklahoma. Aug. 30, 1920.) Petition by Fred Cox for writ of habeas corpus. Petition withdrawn, and cause dismissed. West & Hagan, of Oklahoma City, for petitioner.

**PER CURIAM.** Petition withdrawn, and cause dismissed.

**Ex parte JOHNSON et al.** (No. A-3650.) (Criminal Court of Appeals of Oklahoma. Aug. 30, 1920.) Petition of Dick Johnson and others for writ of habeas corpus. Cause dismissed, on motion of counsel for petitioners. John R. Lesch, of Leach, Hunt & Beauchamp, of Grove, and Jas. S. Davenport and Preston S. Davis, all of Vinita, for petitioners. W. C. Hall, Asst. Atty. Gen., and O. F. Mason, of Miami, for respondent.

**PER CURIAM.** On behalf of Dick Johnson, Forrest Johnson, Raymond Scaggs, and Dan Scaggs a duly verified petition for writ of habeas corpus was filed in this court on Novem-

ber 10, 1919, alleging that petitioners were illegally restrained of their liberty and unlawfully imprisoned in the county jail of Delaware county, at Jay, the county seat, by George W. Hogan, sheriff of said county, upon commitments issued by the court clerk of said county, upon judgments of conviction for rape, as jointly charged in an information, and alleging that notices of said appeal from said judgment had been duly given, and that the court, in fixing the amount of supersedeas bond, fixed the same in excessive amounts, and asking that the alleged excessive bail be reduced. A demurrer was interposed, and thereupon the cause was dismissed, on the motion of counsel for petitioners.

**Ex parte KELLY.** (No. A-2642.) (Criminal Court of Appeals of Oklahoma. Aug. 30, 1920.) Petition of Kid Kelly for writ of habeas corpus. Dismissed.

**PER CURIAM.** Proceedings dismissed.

**KING v. STATE.** (No. A-3153.) (Criminal Court of Appeals of Oklahoma. Aug. 14, 1920.) Appeal from County Court, Oklahoma County; Wm. H. Zwick, Judge. Jack King was convicted of a violation of the prohibitory law, and he appeals. Affirmed. S. A. Byers, of Oklahoma City, for plaintiff in error. The Attorney General, and W. C. Hall, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, Jack King, was convicted on a charge of selling one-half pint of whisky and two quarts of beer to one H. L. Griffin, and in accordance with the verdict of the jury he was on the 2d day of June, 1917, sentenced to be confined in the county jail for 90 days and to pay a fine of \$100. From the judgment he appeals. No brief has been filed. The record shows that the testimony of the four witnesses for the state is undisputed. An examination of the record discloses that plaintiff in error had a fair and impartial trial, and that the appeal is without merit. The judgment is therefore affirmed.

**In re LAWLER.** (No. A-3450.) (Criminal Court of Appeals of Oklahoma. Aug. 31, 1920.) Petition for writ of habeas corpus by Andrew Lawler against A. K. Gossom, Superintendent of the State Training School at Pauls Valley, to which petitioner had been committed by order of the judge of the juvenile court. Petitioner discharged, and committed to the custody of his father, by agreement, subject to the further order of the court. George S. March, of Madill, for petitioner. S. P. Freeling, Atty. Gen., R. McMillan, Asst. Atty. Gen., and Geo. L. Sneed, Co. Atty., of Madill, for respondent.

**PER CURIAM.** This was a petition for writ of habeas corpus, filed for setting at liberty Andrew Lawler. The writ was granted returnable before this court September 1, 1918. It is averred in the petition that Andrew Lawler

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is a minor of the age of 15 years; that C. W. Lawler, of Kingston, Marshall county, Okl., is his father; that petitioner is unlawfully restrained of his liberty in the State Training School at Pauls Valley, by A. K. Gossom, superintendent; that J. I. Hensaw, judge of the juvenile court of Marshall county, made an order that petitioner be committed to the care of his father, C. W. Lawler, if it should be proven that his father was of good character and a worthy citizen; that proof was made that petitioner's father was a man of excellent character and a suitable person for the care and custody of petitioner, which proof was undisputed, and the father of petitioner in open court pledged his word to the court that he would faithfully keep and provide and conform to all orders made by the court, and require said petitioner to obey all orders of the court with fidelity. It was further averred that said juvenile court was without jurisdiction to make said order of commitment to the State Training School, because no evidence was received tending to prove that the petitioner was a delinquent child. Return was duly made to the rule to show cause why the writ should not be allowed, at which time it was agreed that petitioner be discharged and committed to the custody of his father, subject to the further order of the juvenile court of Marshall county; and it was so adjudged and ordered.

Ex parte McGLAUGHLIN. (No. A-3582.) (Criminal Court of Appeals of Oklahoma. Aug. 30, 1920.) Petition by Patrick McGlaugh-

lin for writ of habeas corpus. Demurrer to petition sustained, and cause dismissed. F. W. Jacobs, of Sapulpa, for petitioner.

PER CURIAM. Petition for writ of habeas corpus filed July 3, 1919. Demurrer to the petition sustained, and cause dismissed.

MILLER v. STATE. (No. A-2725.) (Criminal Court of Appeals of Oklahoma. Aug. 23, 1920.) Appeal from County Court, Garfield County; E. L. Swigert, Judge. Sam Miller was convicted of violating an ordinance of the city of Enid, and he appeals. Reversed. Adam S. Garis, of Enid, for plaintiff in error.

PER CURIAM. The plaintiff in error, Sam Miller, was convicted in the police court of the city of Enid of violating a city ordinance, and he appealed to the county court of Garfield county, where upon his trial he was again convicted, and in accordance with the verdict of the jury was sentenced to pay a fine of \$5 and the costs. From this latter judgment he appealed to this court. The penalty for the violation of the ordinance in question is a fine of not less than \$5 nor more than \$50. For the reasons stated in the opinions of the court in the cases of Ex parte Johnson, 13 Okl. Cr. 30, 161 Pac. 1097, and Ex parte Monroe, 13 Okl. Cr. 62, 162 Pac. 233, we are of opinion that the proceedings had upon the trial and conviction of the plaintiff in error were illegal and void. The judgment is therefore reversed, and the cause remanded.

END OF CASES IN VOL. 191.









